THE CROWN AS FIDUCIARY AND THE CONFLICT OF INTEREST INHERENT IN ITS USE OF INDIAN LANDS FOR PUBLIC PURPOSES

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Thesis submitted to
the School of Graduate Studies and Research
in partial fulfilment of the requirements
for the LL.M. degree in Law

Université d'Ottawa/University of Ottawa

December 13, 1994

ISBN 0-612-11600-X

UNIVERSITÉ D'OTTAWA
UNIVERSITY OF OTTAWA

ABSTRACT

The Crown as Fiduciary and the Conflict of Interest
Inherent in its Use of Indian Lands for Public Purposes

This thesis examines the fiduciary relationship between the federal Crown and Indian bands arising under the *Indian Act*, and more particularly the obligations adhering to the Crown when it accepts surrenders of reserve lands for its own purposes.

It begins with an analysis of the theoretical basis of the fiduciary relationship in private law, concluding that such a relationship arises whenever a person acquires a power or property subject to the condition that the power will be exercised, or the property used, to further the interests of another. The thesis then examines the source of the Crown/Indian fiduciary relationship, and concludes that the *Indian Act* requirement that a band contemplating an alienation of its lands must first transfer those lands to the Crown, and the corresponding discretion vested in the Crown in disposing of those lands on the band's behalf, supply the requisite conditions, in accordance with private law fiduciary principles, for establishment of an ongoing fiduciary relationship in respect of the alienation of Indian lands.

The thesis then provides a detailed review of the rules applicable to conflict of interest by a fiduciary in private law, and concludes that the more stringent requirements applicable to conflict of interest by a fiduciary in private law should also be extended to the Crown where the Crown accepts surrenders of land, or deals with Indian assets, in a manner that ultimately benefits the Crown.

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CHAPTER I
INTRODUCTION

Since their rejection of the federal government's 1969 White Paper on Indian Policy,[1] Canada's aboriginal peoples have been seeking to redefine their legal and political status in Canadian society. No longer content to remain on the periphery, they have sought and, as recent headlines will attest, continue to seek to establish a new relationship with the Canadian government. Inherent in any stable and productive relationship, however, is a clear understanding of mutual rights and obligations, and both parties to the Crown/Indian[2] relationship have been struggling to define these. One objective of this paper is to clarify some of the legal rights and obligations of both those parties, in an effort to pave the way to a better and more productive relationship.

In 1984, the Supreme Court of Canada for the first time recognized that certain of the obligations inhering in the Crown/Indian relationship are legally enforceable. In *Guerin et al v. The Queen*,[3] the Court declared that a fiduciary duty regulates certain governmental dealings with Indian peoples in Canada, for the first time applying a fiduciary concept developed at common law to the public law Crown/Indian relationship. The *Guerin* judgment did not, however, fully explain the scope and content of the fiduciary duty that it imposed. As a result, subsequent judicial decisions attempting to apply the fiduciary

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[1] *Statement by the Government of Canada on Indian Policy*, 1st Session, 28th Parliament, Queen's Printer, Ottawa: 1969.

[2] Although Canadian aboriginal people and societies are referred to by a number of different expressions, including "first peoples" and "first Nations", in this paper the expressions "Indian" or "band members" will be used in discussions relating to the *Indian Act* (with the limited meanings defined in that Act) and "aboriginal peoples" in discussions that are not limited to the that Act. As per accepted practice, the law involving aboriginal peoples is referred to as native law.

[3] [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, [1985] 1 C.N.L.R. 120 (S.C.C.). Future references to D.L.R.

concept to the Crown/Indian relationship have met with mixed success, particularly in dealing with allegations of conflicts of interest by the government in transactions involving Indian land. Although these decisions endeavoured to give some substance to the government's fiduciary duty, they failed to establish clear and coherent parameters.[4] The results have been at best uncertain and at worst inconsistent, and have consequently contributed little to clarification of the Crown/Indian relationship. This deficiency is particularly evident when one attempts to divine the implications of the Crown's possible conflict of interest in the numerous situations in which it deals with Indian lands or other assets for public purposes.

It is the thesis of this paper that the continuing imprecision in applying the fiduciary concept to the Crown/Indian relationship is attributable to a tendency exhibited by the courts to import the label "fiduciary" from the common law regulating private transactions and personal relationships while failing to import from that body of law all of the corresponding legal principles. Contrary to some expressed views,[5] it is submitted that the attributes of the Crown/Indian relationship are not sufficiently different from those of private law fiduciary relationships to warrant the abandonment of private law principles when applying fiduciary law in the public law context.[6] It is further submitted that the

[4] As James Reynolds and Lew Harvey point out in "The Fiduciary Obligation of the United States and Canadian Governments towards Indian Peoples", (1985) *Indians and the Law II* 1 (Vancouver: Continuing Legal Education Society of British Columbia), at p. 28:

> Until recently, the law relating to fiduciary obligations had received little attention in legal works and the courts have largely failed to set out or apply the underlying principles in a consistent fashion.

[5] E.g., Michael J. Bryant, "Crown Aboriginal Relationships in Canada: The Phantom of Fiduciary Law", (1993) 27 *U.B.C.L. Rev.* 19, who expresses the view (at p. 34) that "the spirit guiding [the Crown/aboriginal relationship] cannot properly be exported to [traditional fiduciary law]".

[6] "Private law" is used in this paper to denote the common law governing the rights and obligations of parties of whom neither is the government. The same terminology is used by Dickson J. in *Guerin*, *supra*, n. 3, at p. 341. D. Waters uses the expression in the same manner in "New Directions in the Employment of Equitable Doctrines: The Canadian Experience", in *Equity, Fiduciaries and Trusts*, ed.

only means by which coherence and comprehensibility can be brought to the Crown/Indian relationship in the public law forum is through the proper application of private law fiduciary principles to that relationship. While this exercise may give cause for reconsideration of some earlier native law decisions involving fiduciary issues, it is submitted that it will offer a more coherent basis for the application of fiduciary concepts to future cases.

In this paper I will present an analysis of the Crown/Indian relationship incorporating fiduciary principles that are capable of general and prospective application. I will further demonstrate that the courts have failed to apply accepted private law principles governing conflict of interest to public law fact situations that are sufficiently analogous to warrant the application of those principles. I will focus particularly on the potential for conflict of interest, and for corresponding breaches of fiduciary duty, where the government deals with Indian lands for its own purposes — by purchasing those lands for public works, for example, a situation described as "one of the most problematic aspects of government trusteeship".[7]

This paper will examine in detail the government's dealings with Indian land in *Guerin v. The Queen* and in *Apsassin v. The Queen*[8], the latter of which is currently under appeal to the Supreme Court of Canada. It will assess the judgments in those cases against the private law fiduciary model and against accepted private law conflict of interest rules.

T.G. Youdan, (Toronto: Carswell, 1989) p. 411, at p. 418. "Public law", on the other hand, is used to denote law applicable to the government or to relations or transactions with the government.

[7] Darlene Johnston, "Guerin v. R.: A Theory of Crown Trust towards Aboriginal Peoples" (1986) 18 *Ottawa L. Rev.* (No. 2) 307, at p. 325.

[8] [1988] 1 C.N.L.R. 73, [1988] 3 F.C. 20 (abridged), 14 F.T.R. 161, 17 C.P.C. (2d) 187 (F.C.T.D.); (1993) 100 D.L.R. (4th) 504, 151 N.R. 241, [1993] 2 C.N.L.R. 20 (F.C.A.); leave to appeal to S.C.C. granted October 14, 1993.

The effect of the Supreme Court's decision in *R. v. Sparrow*[9] will also be reviewed to assess whether that case represents an expansion of the scope of the Crown's fiduciary duties.

Prior to the *Guerin* decision, the Canadian government had assumed that its relationship with the Indian people was governed by a "political trust" — a politically mandated, but legally unenforceable, obligation to attend to the welfare of the Indian people over whom it exercised legislative jurisdiction.[10] This assumption was challenged in *Guerin*. In that case, the federal government was found to have obtained a surrender of Indian lands for leasing on certain terms, and then to have leased those lands on different and less advantageous terms.[11] The trial court[12] held that the Crown held the surrendered lands in trust and that under the circumstances it had breached that trust. The Federal Court of Appeal rejected the trust argument in favour of the political trust status quo.[13] That decision was reversed on appeal to the Supreme Court of Canada, where the majority view, delivered by Mr. Justice Dickson, was that the Crown had a legally enforceable equitable obligation to deal with the surrendered lands for the benefit of the Indians, and that it had failed to do so. Dickson J. described this obligation as follows:

> This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty.[14]

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[9] [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, [1990] 4 W.W.R. 410 (S.C.C.). Future references to D.L.R.

[10] Pursuant to s. 91(24) of the *Constitution Act, 1867*, which gives the federal government jurisdiction over "Indians, and lands reserved for the Indians".

[11] The fact situation in *Guerin* is examined in detail, *infra*, at p. 38.

[12] [1982] 2 F.C. 385, 10 E.T.R. 61. Future citations to F.C.

[13] [1983] 2 F.C. 656, [1983] 2 W.W.R. 686, 143 D.L.R. (3d) 416, [1983] 1 C.N.L.R. 20 (F.C.A.). Future citations to D.L.R.

[14] *Supra*, n. 3, at p. 334.

With this single stroke, the Court wrested the Crown/Indian relationship from a murky history of political trust and introduced a concept of governmental legal accountability based on private law fiduciary principles. It might have been expected that the introduction of such venerable judicial precepts would have ushered in an era of legal certainty and stability. It would appear, however, that that era is not yet upon us. Subsequent judicial decisions have failed to provide a clear and coherent framework for the enforcement of a Crown fiduciary duty and, as a result, a wide diversity of opinion on the subject persists among native law practitioners and government representatives.[15]

One of the more recent decisions involving the fiduciary obligations of the Crown, and potentially the most important since *Guerin*, is *Apsassin v. The Queen*.[16] That case, concerning a surrender obtained by the Crown for the purpose of providing land to returning World War II veterans, tests the scope of the Crown/Indian fiduciary relationship and raises important questions of conflict of interest on the part of the Crown. To date, the trial and appeal courts have held that there was no breach of fiduciary duty with respect to mineral rights alienated with the land, and that the band's claim with respect to other substantiated breaches is statute-barred, with a dissenting opinion on appeal demurring in respect of both breach of fiduciary duty and limitation periods. That decision has been appealed to the Supreme Court of Canada.[17]

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[15] As per William McMurtry and Alan Pratt in "Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective", [1986] 3 *C.N.L.R.* 19:

> The [*Guerin* decision] has generated ... an uncertainty in all quarters with regard to the sources, extent and implications of the fiduciary concept as it applies to the relationship between the Crown and the Indian people of Canada."

The Federal Court of Appeal has very recently described the subject of Crown/Indian fiduciary obligations as "an area of law which could not be said to be settled with certainty" (*Cardinal v. The Queen*, [1994] 3 C.N.L.R. 41 (F.C.A.), at p. 43).

[16] *Supra*, n. 8.

[17] Leave to appeal to that Court was granted on October 14, 1993.

It will be argued that the courts in *Apsassin* did not give adequate consideration to the common law governing fiduciary relationships in the private sector before attempting to apply those principles to the public sector circumstances before them. Had they done so, the courts would have provided a much clearer analysis of the facts and would possibly have reached different conclusions. In this paper, I will endeavour to present an analysis of *Apsassin* that is consistent with the fiduciary principles adopted and applied in *Guerin*. While the limitation defence may ultimately determine the outcome of the case, it is submitted that an appropriate application of fiduciary principles will both cast the circumstances of *Apsassin* in a different light and assist in the future development of the law governing the Crown/Indian relationship.

This paper will proceed by way of a two-step process, first examining the Crown/Indian fiduciary relationship in Part I and then proceeding in Part II to a detailed examination of fiduciary conflict of interest. As a first step in analysing the fiduciary component of the Crown/Indian relationship in Part I, it is necessary to establish a theoretical framework for the relationship. In Chapter II, I will therefore review competing theories of fiduciary obligation and will identify a single theory capable of guiding the application of fiduciary principles in both the private law and in the Crown/Indian context. Chapter III will examine the application of that fiduciary theory to the Crown/Indian relationship, and will conclude with a brief examination of the implications the Crown's relationship to Indians might have in areas other than transactions involving surrendered reserve lands. In Chapter IV, the implications of the imposition of fiduciary obligations on the Crown will be examined, including a general discussion of breach of fiduciary duty and the available remedies. Part II commences with an introduction, in Chapter V, to the conceptual framework for the rule against conflict of interest developed in the private law and the evidentiary presumptions utilized by the courts in applying that rule. Chapter VI examines the implications of applying the conflict of interest rule to the Crown in its relationship with Indian peoples, including the implications for third parties involved in impugned transactions. Chapter VII will set out my concluding remarks.

PART I — THE FIDUCIARY RELATIONSHIP

CHAPTER II

THEORETICAL BASIS OF THE FIDUCIARY RELATIONSHIP

In order to clarify and give substance to the characterization of the Crown's relationship as fiduciary, it is necessary to understand the import of the term "fiduciary" as it has been used in the common law regulating private transactions and personal relationships and to identify the principles governing its application. Moreover, in order for those principles to have predictive value, it is necessary to derive from the body of fiduciary law a set of objective criteria that are capable of general application.[18] In the pages that follow, I will outline competing theories of fiduciary law, identify appropriate criteria and propose a single theory of fiduciary relationships.

While the fiduciary concept has for centuries[19] existed as a "fundamental and unstated assumption" underlying the law of agency, trusts, corporations and succession,[20] its synthesis as an effective analytical tool has proved to be a vexatious task for legal

[18] As Sopinka and McLachlin JJ. state in discussing a related element in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 465, "An objective criterion must be found to identify this measure if the law is to permit people to conduct their affairs with some degree of certainty."

[19] Referred to as early as 1717 in *Bishop of Winchester v. Knight*, (1717) 1 P. Wms. 406, at p. 407.

[20] J.C. Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1981), at p. 12.

scholars and the judiciary alike. As E. Weinrib points out, "the jurisprudence in this area is littered with dissents, reversals on appeal, and inconsistent holdings."[21] Mr. Justice La Forest described the state of fiduciary law in *International Corona Resources Ltd. v. Lac Minerals Ltd.* in the following terms:

> There are few concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship. In specific circumstances and in specific relationships, courts have no difficulty in imposing fiduciary obligations, but at a more fundamental level, the principle on which the obligation is based is unclear.[22]

This chapter will analyse the jurisprudence and scholarship on fiduciary theory in an effort to demonstrate that a single theory, based on a concept of a conditional transfer of power, is capable of capturing the disparate aspects of fiduciary obligation identified by the courts. This theory will be distinguished from a number of competing but arguably incomplete theories propounded to explain the fiduciary relationship.

The concept of fiduciary duty originated in Equity, which granted relief in cases of abuse by one person of the trust and confidence of another where the Common Law courts provided no remedy.[23] Professor D. Waters explains the origins of fiduciary duty in the context of the trust relationship as follows:

> It was in Equity that the notion of the fiduciary was first conceived, and it originated to explain the position of one who at law held title and had no right of personal enjoyment.... Equity could not deny the doctrines of the common law, and at law the trustee was title holder and possessor. The only way around that obstacle was for Equity to impose obligations upon this person with title and

[21] Ernest Weinrib, "The Fiduciary Obligation", (1975) 25 *U.T.L.J.* 1, at p. 16.

[22] [1989] 2 S.C.R. 574, at p. 643. Although in the Supreme Court's most recent judgement in this area, *Hodgkinson v. Simms*, (*supra*, n. 18, at p. 407), La Forest J. states that "*until recently* the fiduciary duty could be described as a legal obligation in search of a principle", the fact that the Court split 3-1-3 on the decision, with Iacobucci J. concurring only as to result, may call into question La Forest J.'s confidence on this point. (Emphasis added.)

[23] Deborah A. DeMott, "Beyond Metaphor: An Analysis of Fiduciary Obligation" (1988) *Duke L.J.* 879, at p. 880.

> possession, and the nature and scope of these obligations were spelt out in the concept of fiduciary relationship.[24]

Although it has been argued that the concept of fiduciary duty pre-dates the development of the trust as a legal institution,[25] much of the early law of fiduciaries developed as an attempt to regulate the actions of trustees.

Since its introduction, the courts have expanded the scope of fiduciary law to encompass a myriad of relationships[26], and may continue to do so.[27] This expansion has, however, been criticized as being merely an exercise in taxonomy, rather than the product of the application of general legal principles;[28] it is argued that the courts have merely employed threads of factual commonality to justify the categorization of certain relationships as fiduciary, often simply in order to justify the application of equitable remedies and presumptions. The result has been dismissed as "nothing but a series of unrelated rules bound together by semantic error".[29] The scholarly consensus appears to be that fiduciary jurisprudence is in need of a valid analytical basis. As Weinrib puts it, "even the vague protean standard embodied in the fiduciary obligation should not exist in an analytic

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[24] Donovan Waters, *The Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at pp. 31-32.

[25] Shepherd, *supra*, n. 20, at p. 17.

[26] See partial listing, *infra*, at p. 13. Mark Vincent Ellis notes, in "A Discussion Paper: Fiduciary Duties and Beyond", presentation to *1990 L.S.U.C. Special Lectures*, Toronto, at p. 21, that the number of reported decisions involving fiduciary duties increased by a factor of three between 1988 and 1990.

[27] Dickson J. comments in *Guerin* that "the categories of fiduciary, like those of negligence, should not be considered closed", *supra*, n. 3, at p. 341, citing *Laskin v. Bache* (1971), 23 D.L.R. (3d) 385 (Ont. C.A.), at p. 392. Laskin J. earlier referred to fiduciary duty as a principle that may be "reformulated ... to maintain its vigour" in new fact situations, in *Canadian Aero Service Ltd. v. O'Malley*, 40 D.L.R. (3d) 371, at p. 383.

[28] Shepherd, *supra*, n. 20, at p. 5; DeMott, *supra*, n. 23, at p. 879.

[29] Shepherd, *ibid.*, at p. 4, summarizing the position taken by certain scholars.

vacuum".[30] The following discussion seeks to provide an analytically structured principle as a means of accurately identifying a relationship as fiduciary.

In proposing an analytical theoretical structure, one must meet two requirements. The first is that the theory's essential elements must consist of objectively ascertainable factors.[31] By this I mean that the component elements of the theory must be independently ascertainable, and not dependent upon the subjective opinion of the adjudicator. As R. Slaght observes,

> The introduction of an objective test will move the analysis away from the court's own determination of what conduct or activity in society will attract sanctions to one founded upon a review of applicable standards against which prospective advice could be given.[32]

An objectivity requirement therefore precludes acceptance of any theory that is based on whatever individual perceptions of fairness and equity the adjudicator may bring to a particular case. The incorporation of objective factors allows a theory to be applied generally and predictively, to distinguish fiduciary from non-fiduciary situations by identification of the relevant factor. The second requirement, related to the first, is that the theory must be sufficiently generic to have practical value; it must be capable of application to a broad spectrum of relationships and capable of identifying fiduciary characteristics in novel circumstances. McLachlin J. appears to recognize these requirements in the following observation from *Norberg v. Wynrib*:

> The principles alluded to by Wilson J. in *Frame v. Smith* and applied by this Court in its earlier decision in *Guerin v. The Queen* are principles of general application, translatable to different situations and the protection of different

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[30] *Supra*, n. 21, at p. 22.

[31] See also Tamar Frankel, "Fiduciary Law" (1983), 71 *Calif. L. Rev.* 795, at p. 833.

[32] "Proving a Breach of Fiduciary Duty", *Fiduciary Duties, 1990 L.S.U.C. Special Lectures* 37 (Toronto: De Boo, 1991), at p. 44.

interests than those hitherto recognized.[33]

Since we are not operating in a jurisprudential vacuum, however, it is not sufficient for our purposes that a fiduciary theory merely be objective and capable of application to new circumstances. In order to be valid, any proposed theory must generally accord with the body of accepted fiduciary law and must offer a consistent, or at least a plausible, rationale for decided cases in which fiduciary obligations were found to exist (or to be absent), to the extent that those decisions are generally accepted as accurate.[34]

In essence then, a valid analytical theory of fiduciary duty must

(1) embody general objective criteria,

(2) provide a reliable guide to the determination of new fact situations, and

(3) offer an adequate explanation of existing jurisprudence.

In seeking or applying a fiduciary principle it is also important to distinguish between legal principles, legal rules and the legislative policy underlying the law. Shepherd provides a concise explanation of the distinction as follows:

> Legal rules are the specific generalisations used to decide the majority of cases. They usually take the form of propositions that, if facts X, Y and Z are proved, a specific result follows. Legal principles are conceptual constructs used mainly to create new rules, and in unusual situations, or cases of first impression, to decide cases. The principles represent an understanding of human activity in terms susceptible to logical analysis. In essence they represent the framework of the legal system.... While principles are based on policies, ... those policies are reasons or justifications, and not explanations.[35]

[33] [1992] 2 S.C.R. 226, at p. 289.

[34] No analytical theory can ever explain *all* past decisions for the simple reason that there will always be erroneous decisions, which will result in non-conforming data. Megarry V.C., describing the difficulty in reconciling all authorities and dicta, alluded to such decisions as "judgments that have been given without all the relevant authorities having been put before the judges" (*Re Montagu's Settlement Trusts*, [1987] 2 W.L.R. 1192 (Ch. D.) at p. 1211). For a discussion of the difficulties posed in reconciling poorly reasoned cases with a theory that attempts to structure such reasoning, see J.C. Shepherd, "Towards a Unified Concept of Fiduciary Relationships" (1981), 97 *L.Q.R.* 51, at p. 53.

[35] *Ibid.*, at p. 57.

While, in the context of the fiduciary relationship, the rules of fiduciary conduct embody the specific legal consequence of a finding that a fiduciary relationship exists, the fiduciary principle itself must provide a consistent rationale for determining whether it is appropriate to apply the rules in the first place. Policy considerations, on the other hand — considerations as to whether the perceived consequences of imposition of the rule are socially expedient — dictate when it is *desirable* to have rules of conduct. While in searching for a principle to guide the rational formulation and application of rules one must remain cognizant of the policy underlying their perceived necessity, one must also be mindful not to confuse the desired legal consequences or the social expediency of the objective with the unifying rationale that an underlying principle must provide. As Seavey and Scott state, "a statement of principle is not a description of what it produces".[36]

Since the objective of this paper is to examine the *principle* by which a fiduciary relationship is identified and to apply that principle to the Crown/Indian relationship, its focus will be on presenting and applying the appropriate conceptual constructs of fiduciary law in terms susceptible to logical analysis. The examination of fiduciary *rules* of conduct will be limited to assessing their impact on the actions of the Crown in the context of its fiduciary relationship with Indian people. Because the focus of this paper is not reform of the law, however, no attempt will be made to question whether the imposition of fiduciary constraints is appropriate or desirable to the Crown/Indian relationship, aside from determining whether that relationship satisfies the criteria for a fiduciary relationship embodied in fiduciary theory.

A number of different theories have been put forward in an attempt to identify one or more principles with which to order the body of fiduciary case law, many of which

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[36] "Restitution", (1938) 54 *L.Q. Rev.* 29, at p. 37.

are arguably incomplete. These include the descriptive theory, various recursive and subjective theories, the commercial utility theory, the reliance theory and the undertaking theory. The following section will briefly describe these theories and will attempt to shed light on some of their perceived deficiencies. Following that examination, a theory of conditional transfer of property or power will be advanced as a theory that is consistent with accepted fiduciary law and is also sufficiently generic and analytical to be capable of application with some degree of certainty to novel circumstances, including those of the Crown/Indian relationship.

Incomplete Theories

The complexity of interpersonal relationships in modern society has led to the judicial extension of fiduciary principles to a multitude of circumstances, as a result of which a wide variety of relationships have been found to be fiduciary in nature. These include the more commonly recognized categories of agents, trustees, partners, corporate directors and solicitors, as well as other less commonly recognized categories such as religious advisers, doctors,[37] relatives such as parents,[38] siblings, nephews, fiancé(e)s and spouses, guardians, servant/companions, marriage counsellors,[39] spies,[40] Indian chiefs,[41]

[37] *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *Norberg v. Wynrib*, *supra*, n. 33. The English courts have, however, held otherwise: *Sideway v. Board of Governors of Bethlem Royal Hospital* [1985] A.C. 871 rejecting the Supreme Court of Canada decision in *Reibl v. Hughes* (1980), 114 D.L.R. (3d) 1. Fiduciary obligations have not, however, been extended to dentists (Shepherd, *supra*, n. 20, at p. 28).

[38] *K.M. v. H.M.* (1992), 42 N.R. 321 (S.C.C.)

[39] Deborah A. DeMott, *Fiduciary Obligation under Intellectual Siege: Contemporary Attacks on the Duty to be Loyal* Osgoode Hall Law School, 1993, at p. 1.

[40] *Ibid.* See also *Snepp v. United States* (1980), 444 U.S. 507.

[41] *Westbank Indian Band v. Derrickson* (June 16, 1993, B.C.S.C.) File No. C900612.

public officials and, in the business sector, stockbrokers,[42] appraisers, bankers,[43] stock promoters,[44] controlling shareholders,[45] employees,[46] partners,[47] bankruptcy inspectors, property managers and bailees.[48]

A class of theories, dubbed "descriptive theories" by DeMott, seeks to describe the fiduciary relationship in terms of the common traits of these relationships. Wilson J. subscribed to such an approach in *Lac Minerals*:

> It is, in other words, my view of the law that there are certain relationships which are *per se* fiduciary such as trustee and beneficiary, guardian and ward, principal and agent, and that where such relationships subsist they give rise to fiduciary duties.[49]

Sealy also concludes that fiduciary relationships must be defined class by class.[50]

Any theory that relies on such a taxonomic approach, however, is self-limiting

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[42] *Glennie v. McD C. Holdings Ltd.*, [1935] S.C.R. 257; *Maghun v. Richardson Securities of Canada Ltd.* (1986), 34 D.L.R. (4th) 524 (Ont. C.A.).

[43] *Lloyd's Bank v. Bundy*, [1975] 1 Q.B. 326.

[44] Peter D. Maddaugh, "Definition of Fiduciary Duty", *1990 L.S.U.C. Special Lectures* 15 (Toronto: De Boo, 1991) at p. 17.

[45] *Lavigne v. Robern* (1984), 18 D.L.R. (4th) 759 (Ont. C.A.).

[46] But not "mere" or "ordinary" employees: *Hudson's Bay Co. v. McClocklin*, [1986] 5 W.W.R. 29, at p. 33.

[47] *Davis v. Ouelette* (1981), 27 B.C.L.R. 167 (B.C.S.C.).

[48] See generally Shepherd, *supra*, n. 20, at pp. 22-32; Waters, *supra*, n. 24, at p. 404; Austin W. Scott, "The Fiduciary Principle", (1949) 37 Calif. L. Rev. 539, at p. 541; and Mark Vincent Ellis, *Fiduciary Duties in Canada* (Toronto: DeBoo, 1988) at pp. 1.7 to 1.8.

[49] *Supra*, n. 22, at p. 631. See also Margaret Ross, "Conflicting Interests: The Fiduciary Duties of Agents", *1990 L.S.U.C. Special Lectures* 175 (Toronto: De Boo, 1991), at p. 176.

[50] L.S. Sealy, "Fiduciary Relationships", [1963] *Camb. L.J.* 69, at p. 73. He proposes four categories of fiduciary: 1) where one party controls the property of another; 2) where one party undertakes to act on behalf or for the benefit of another; 3) in circumstances of accretions to fiduciary property, such as life tenants; and 4) where undue influence is presumed (pp. 74-79). While Sealy's first and second categories contain elements of generalized principle, the third is probably best characterized as simply descriptive of circumstances in which it is felt that fiduciary obligations should apply. His fourth category appears to proceed from a presumption to a finding that a fiduciary relationship exists, rather than vice versa (see discussion, *infra*, pp. 17-18).

and fails to offer guidance in novel and divergent circumstances.[51] As T. Frankel explains,

> analogies are not helpful in solving specific problems that new situations pose, because the rules that apply to the old prototypes do not necessarily respond to the problems posed by the new ones.[52]

Moreover, the law may impose fiduciary obligations in relationships not normally considered to be fiduciary. As La Forest J. stated in *Lac Minerals*,

> [A] fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship. As such it can arise between parties in a relationship in which fiduciary obligations would not normally be expected.[53]

By the same token, even among the categories set out above, there are no identifiable categories of relationship that are always fiduciary in nature; in certain circumstances, fiduciary obligations may be lacking in even the more traditional relationships.[54] Although a relationship may be identified as fiduciary for some purposes, other aspects of the relationship may not attract fiduciary obligations.[55] As La Forest J. stated in *McInerney v. MacDonald*, "A relationship may properly be described as fiduciary for some purposes, but not for others."[56]

The inadequacy of the approach taken by the descriptive theories is that they constitute a compendium of described characteristics, rather than a synthesis that provides a

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[51] Shepherd, *supra*, n. 34, at p. 72.

[52] *Supra*, n. 31, at p. 804.

[53] *Supra*, n. 22, at p. 648.

[54] Shepherd, *supra*, n. 20, at p. 21. See also J.R. Maurice Gautreau, "Demystifying the Fiduciary Mystique", (1989) 68 *Can. Bar Rev.* 1 at p. 8.

[55] Per Sopinka and McLachlin JJ. in *Hodgkinson v. Simms*, *supra*, n. 18, at p. 463.

[56] [1992] 2 S.C.R. 138, at p. 149.

rationale for those characteristics.[57] By way of illustration, consider as a class a set consisting of ten numbers corresponding to the first ten prime numbers.[58] One can easily confirm that a given number belongs to the set if it matches a number in the set. However, unless one knows the unifying principle of the class — that all numbers in the set are divisible only by themselves and by 1 — one cannot state with certainty why a non-matching number does not belong to the set, nor does one have any means of identifying whether a previously unexamined number, such as 29, should be added to the set. A mere description of the class does not provide a rationale sufficient to test new data.

The goal, as DeMott puts it, is to identify a theory of fiduciary duty "that is more than merely descriptive and is sufficiently analytic to permit its application to a variety of diverse relationships and factual circumstances".[59] While in certain cases reference to established categories of fiduciary relationship may facilitate exposition[60] or expedite analysis, it is submitted that the descriptive theory does not afford an adequate basis for the fiduciary principle. As DeMott concludes,

> Used to resolve difficult questions, argument-by-taxonomy seems an example of legal formelius at its worst ... in that the result follows inexorably from the initial categorization.... Taxonomy, in short, furnishes starting points but not answers.[61]

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[57] Shepherd, *supra*, n. 20, at p. 94. Sealy, a proponent of the taxonomic approach, in fact despaired of finding any such rationale (*supra*, n. 50, at p. 73). Although English Court of Appeal, in *Lloyd's Bank v. Bundy*, *supra*, n. 43, dismissed the taxonomic approach, it too concluded that "it is neither feasible nor desirable to attempt closely to define the [fiduciary] relationship, or its characteristics, or the demarcation line showing the exact transition point where a relationship that does not entail that duty passes into one that does" (at p. 341).

[58] 1, 2, 3, 5, 7, 11, 13, 17, 19 and 23.

[59] DeMott, *supra*, n. 23, at p. 909.

[60] Paul D. Finn, "The Fiduciary Principle" in *Equity, Fiduciaries and Trusts*, ed. T.G. Youdan, (Toronto: Carswell, 1989) 1, at p. 55.

[61] *Supra*, n. 39, at pp. 34-35.

In the context of the Crown/Indian relationship, then, in rejecting the taxonomic approach, one would necessarily reject any rationale which sought to impose fiduciary duties on the Crown simply on account of having identified the Crown/Indian relationship as one of a class of prescribed fiduciary categories. To explain the relationship, and to determine the scope of the Crown's fiduciary duties, one must necessarily look further.

Another class of fiduciary theories opportunistically invokes a fiduciary relationship as the means of justifying the imposition of a particular remedy in a particular case. As stated by La Forest J. in *Lac Minerals*:

> Courts have resorted to fiduciary language because of the view that certain remedies, deemed appropriate in the circumstances, would not be available unless a fiduciary relationship was present.
>
> . . .
>
> This approach moves the characterization of a relationship as fiduciary from the reasoning which justifies a conclusion to the conclusion itself: a relationship becomes fiduciary because a legal consequence traditionally associated with that label is generated by the facts in question.[62]

He cites as examples two cases, *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.*[63] and *Goodbody v. Bank of Montreal*,[64] in which a fiduciary relationship was found to exist solely in order to ground the equitable remedy of tracing.[65]

In effect, such recursive theories attempt to define a relationship in terms of the desirability of imposing a fiduciary remedy that might not otherwise be available. As

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[62] *Supra*, n. 22, at pp. 649 and 651, the latter observation quoted from "Restitutionary damages for breach of contract: Snepp and the fusion of law and equity", [1987] *Lloyd's Mar. & Com. L.Q.* 421, at p. 436.

[63] [1981] Ch. 105.

[64] (1974) 47 D.L.R. (3d) 335 (Ont. H.C.).

[65] *Supra*, n. 22, at p. 650. A.H. Oosterhoff and E.E. Gillese, in *Text, Commentary and Cases on Trusts*, 4th ed., (Toronto: Carswell, 1992) at p. 717 refer to these cases as examples of "stretching the fiduciary concept beyond recognition". Another early example of this approach can be found in *Re West of England and South Wales District Bank, ex p. Dale & Co.* (1879), 11 Ch. D. 772, at p. 778, where a fiduciary relationship is defined as one in which a trust remedy exists.

Megarry, V.-C. pointed out in *Tito v. Waddell (No. 2)*, one cannot argue from a conclusion to a duty and then back to a conclusion.[66] Weinrib explains the difficulty inherent in this approach as follows:

> This definition in terms of the effect produced by the finding of a fiduciary relation begs the question in an obvious way: one cannot both define the relation by the remedy and use the relation as a triggering device for the remedy.[67]

La Forest J. reacted similarly, concluding in *Lac Minerals* that contriving a fiduciary relationship to justify a desired result "reads equity backwards".[68]

Waters succumbs to a similar vice in construing the fiduciary label as "an abstract one describing in general terms the duty of loyalty, as it has become known in the U.S."[69] Once again, this characterization explains the relationship in terms of a duty, but offers no principled assistance in ascertaining *when* the duty should be applied: i.e., whether a fiduciary relationship exists. Without further refinement or qualification, such a description merely indicates that a fiduciary relationship is a relationship in which one person owes another a fiduciary duty. This is merely a circular definition, not a test.

Shepherd warns of the similar pitfall of mistaking procedural devices (such as

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[66] [1977] 3 All E.R. 129, at p. 232. See also D.S.K. Ong, "Fiduciaries: Identification and Remedies" (1986) 8 *U. of Tasm. L. Rev.* 311 at p. 314. Although Finn makes this point as well (*supra*, n. 60, at p. 10), in his earlier text *Fiduciary Obligations* (Sydney: Law Book Company, 1977) at p. 2 he falls into the same trap, maintaining that

> It is not because a person is a "fiduciary" or a "confidant" that a rule applies to him. It is because a particular rule applies to him that he is a fiduciary ...

[67] *Supra*, n. 21, at p. 5.

[68] *Supra*, n. 22, at p. 652. Similar arguments would also apply in respect of Shepherd's "unjust enrichment theory", described by him as determining whether "in fairness and equity, the defendant should disgorge his profits" and, if so, finding that the defendant stands in a fiduciary relationship to the plaintiff (*supra*, n. 20, at p. 71). Since the time of his writing, however, the concept of unjust enrichment has evolved considerably as a restitutionary remedy, which should be considered independently of the sense, analogous to Finn's fairness test, in which Shepherd uses the expression.

[69] *Supra*, n. 24, at p. 33. Slaght, too, describes a fiduciary relationship as one in which a person has a duty to act in another's interest, *supra*, n. 32, at p. 45.

presumptions and reverse onuses) that might be employed once a fiduciary relationship is found for criteria indicating that such a relationship exists:

> Somewhat surprisingly, the major hurdle has been distinguishing between the substantive theory of fiduciary relationships, and the evidentiary and procedural superstructure which has developed around it. As long as we continue to see the various procedural rules as substantive, and vice versa, the theoretical basis of the fiduciary relationship must remain out of our conceptual grasp.[70]

Other fiduciary theories are impracticable as legal tools because they rely on a subjective element, which cannot reliably be transposed to other fact situations. DeMott's descriptive theory describes the fiduciary relationship as "a device that enables the law to respond to a range of situations in which, for a variety of reasons, one person's discretion *ought to be controlled*" because of the nature of that person's relationship with another.[71] Although the theory identifies an objectively ascertainable element (discretion), the triggering element (a circumstance in which, in the view of the judge, a person's discretion ought to be controlled) is subjective and to that extent the theory is analytically unsatisfying. It tells us nothing about the circumstances in which discretion should be controlled, and therefore offers no guidance in determining whether a relationship is fiduciary. It is not sufficient for this purpose to hope, as was suggested in *Lefebvre v. Gardiner*,[72] that "the court will recognize a fiduciary relationship when it sees one although it may not be able to say why". As a practical guide DeMott offers little more than a description of fiduciary duty (a device for controlling discretion) as a legal tool that should be employed in relationships in which, from a policy point of view, there ought to be fiduciary constraints.

Other definitions of fiduciary suffer from similar weaknesses. Finn subscribes to

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[70] *Supra*, n. 20, at p. 6.

[71] *Supra*, n. 23, at p. 915. Emphasis added.

[72] (1988) 22 B.C.L.R. 294 at 299.

an "unfairness" test, applicable in circumstances where "one party's decision or action may bear so directly upon the interests of the other that basic fairness may require that in some circumstances he should have regard to those interests in addition to his own".[73] This definition is also undermined by its subjective nature. As Sopinka J. noted in *Lac Minerals*,

> the presence of conduct that incurs the censure of a court of equity in the context of a fiduciary duty cannot itself create the duty.[74]

J.D. McCamus suggests that a subjective definition of principle serves only to legitimate the dispensing of "palm-tree justice":

> Because of its vague character, the principle would, if taken seriously, confer a broad discretion upon judges to do justice in the individual case with a resulting lack of stability and predictability in legal doctrine.[75]

Slaght, too, cautions that

> [Advocates' invocations of fiduciary rhetoric] in an attempt to move the court to do what is "fair" ... often are bold attempts to bypass traditional analysis. They implore the court to impose liability because of the inherent right and justice of the plaintiff's case.[76]

The principal deficiency of the subjective approaches is that they fail to inform the involved parties as to whether a present or contemplated relationship will be considered to be fiduciary in nature, and from this point of view they are of limited value as a unifying

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[73] *Supra*, n. 60, at p. 13. On the other hand, Finn has also recognized the difficulties posed by a test of this nature (*supra*, n. 66, at p. 15):

> It is one thing to oblige a fiduciary to act honestly in what he believes to be the interests of his beneficiaries. It is quite another to attempt to use that formula alone as the criterion on which to base judicial review.

[74] *Supra*, n. 22, at p. 600. See also his reference to "the presence of conduct which attracts judicial sanction" as a false indicator of a fiduciary relationship in *Hodgkinson v. Simms*, *supra*, n. 18, at p. 463.

[75] J.D. McCamus, "The Recent Expansion of Fiduciary Obligations: Common Themes and Future Developments", (1987) 23 *E.T.R.* 301, at p. 141.

[76] *Supra*, n. 32, at p. 37.

fiduciary principle.

Somewhat similar to the fairness theory is Weinrib's "commercial utility" theory which proposes that, because a certain amount of trust and confidence is necessary in commercial relationships, the courts should impose fiduciary relationships to protect those relationships and maintain the integrity of the marketplace.[77] As a description of legal policy, this is fine. Without further refinement, however, the theory lacks substance. It proceeds from the premise that because a certain result is desirable, and because the imposition of fiduciary duties would achieve that result, the relationships in question should be considered to be fiduciary in nature. As in Waters' "duty of loyalty" description referred to above, the commercial utility theory seeks to justify the imposition of a fiduciary relationship in terms of the desirability of its policy objectives — the attainment of economic efficiency. As Shepherd points out, the commercial utility theory substitutes a commendable economic policy objective — the ensuring of trust and confidence in commercial relations — for a legal principle that serves to identify *which* relationships should entail duties that would ensure the maintenance of trust and confidence. In this respect, the commercial utility theory, like other policy-oriented theories, is of little practical assistance.

The "reliance" theory of fiduciary relationships holds, in its simplest form, that a fiduciary relationship should be found wherever one person relies on, or reposes trust and confidence in, the actions of another, normally to the detriment of the former.[78] In a more

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[77] Weinrib, *supra*, n. 21, at pp. 15 and 22; Shepherd, *supra*, n. 20, at p. 78.

[78] *Lloyd's Bank v. Bundy, supra*, n. 43, at p. 341; Oosterhoff and Gillese, *supra*, n. 65, at p. 53, citing *Zadorozny v. Picken* (1991), 4 O.R. (3d) 385 at 392 (Ont. C.A.). See also Ross, *supra*, n. 49, at p. 176, and Ong, *supra*, n. 66, who describes his theory as one of "implicit dependency". Bryant relies to a certain extent on aboriginal dependence and reliance on the Crown to support his theory of Crown fiduciary obligation (*supra*, n. 5, at p. 31), as do Robert Reiter in *The Fundamental Principles of Indian Law*, (Edmonton: First Nations Resource Council, 1990) at p. 1, and David P. Owen in "Fiduciary

elaborate formulation, the reliance theory is embellished by the addition of a requirement that the person being relied upon act with knowledge of the reliance.[79] The reliance theory is based on the moral consideration that a person who relies upon, and hence is vulnerable to, the actions of another should not be taken advantage of. While Finn and Shepherd criticize the reliance theory as being merely descriptive,[80] it may be argued that it contains an element of generalized principle, in that the result is triggered by an objectively ascertainable factor — reliance — that is especially prevalent in advisory relationships but that can also be found across a broad spectrum of otherwise dissimilar relationships. The difficulty with the theory, especially in its simplest form, is that it is both unworkably broad and inconsistent with jurisprudence in other areas of law. Contracts, for example, the terms of which both parties necessarily rely upon the other to fulfil, are often breached on the basis of economic efficiency. The courts have nevertheless resisted awarding equitable restitutionary remedies in such cases and instead have limited the plaintiffs to compensatory damages at common law.[81] Although the reliance theory has had limited acceptance as a basis for tort liability in the context of certain advisory relationships, the courts have consistently rejected the contention that reliance on advice should be actionable in every relationship.[82] That rejection militates against the imposition of a general liability in

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Obligations and Aboriginal Peoples: Devolution in Action", [1994] 3 *C.N.L.R.* 1 at p. 2.

[79] Finn, for example, postulates that reliance can generate a fiduciary relationship if the stronger party fails to disavow responsibility in a timely fashion (*supra*, n. 60, at p. 8). See also Ellis, *supra*, n. 26, at p. 6.

[80] Finn, *supra*, n. 60, at p. 33; Shepherd, *supra*, n. 20, at p. 57.

[81] Shepherd, *ibid.*, at p. 86.

[82] For a general description of relationships in which no liability is incurred for reliance on advice, see A.M. Linden, *Canadian Tort Law* (Toronto: Butterworths, 1977) at pp. 393-394. See also *Welbridge Holdings Ltd. v. Greater Winnipeg* (1970), 22 D.L.R. (3d) 470 (S.C.C.) and *Beebe v. Robb* (1977), 81 D.L.R. (3d) 349 (B.C.S.C.).

equity under the guise of fiduciary duty.[83] Although Finn advocates a theory of "justifiable" reliance, leading to "legitimate" expectations,[84] such a theory begs the question: in order to ascertain what constitutes legal justification or what legitimizes an expectation, one must look to further principles embodied in some external theory.

Another theory, the "voluntary assumption" or "undertaking" theory, states that a fiduciary relationship is created whenever one person undertakes to act in the interest of another at the expense of his or her own interest.[85] While, as an objectively ascertainable criterion, the existence of an undertaking has some analytical appeal, the theory has some apparent shortcomings. DeMott points to the difficulty in identifying a dispositive undertaking in many situations, such as those involving majority shareholders and prospective partners, that are accepted as giving rise to fiduciary obligations.[86] Although in circumstances such as those in *Lac Minerals*, fiduciary duties would have been imposed on the basis of an implicit understanding, as opposed to an express undertaking,[87] it is not always possible to imply one. Shepherd notes that, in many situations recognized as fiduciary in nature,

> the proposed fiduciary, if asked whether he was intending to act in the best interests of the other party, at the time that those actions were only contemplated,

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[83] See La Forest's comments in *Canson v. Boughton*, ([1991] 3 S.C.R. 534, at p. 581.

[84] *Supra*, n. 60, at p. 14.

[85] DeMott, *supra*, n. 23, at p. 910; Scott, *supra*, n. 48, at p. 540; Finn, *supra*, n. 66, at p. 201; Sealy, "Some Principles on Fiduciary Obligation", [1963] *Camb. L.J.* 119, at p. 122; and Maddaugh, *supra*, n. 44, at p. 21. This was also relied on by the Court of Appeal in *Hospital Products Ltd. v. U.S. Surgical Corp.*, [1983] 2 N.S.W.L.R. 157, and is also referred to by Reiter, *supra*, n. 78, at p. 2.

[86] DeMott, *ibid.*, at pp. 910-911.

[87] The applicable obligation in *Lac Minerals* was based on an industry practice, not an express undertaking (*supra*, n. 22, at p. 658). See also Shepherd's comments, *supra*, n. 34, at p. 66, regarding the theory's inapplicability to undue influence cases.

would reply decisively in the negative, if he were willing to tell the truth.[88] Where no undertaking can be identified, one is left with only the reliance by the purported beneficiary that the assumed fiduciary will act in his or her best interests, and the undertaking theory resolves into the reliance theory discussed above.[89]

In another sense, the voluntary assumption theory is too broad. It would impose fiduciary obligations in any situation in which one person undertakes to act exclusively for the benefit of another. In discussing the role of a professional advisor in *Hodgkinson v. Simms*, La Forest J. stated that

> there must be something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be enforced as fiduciary ....[90]

What appears to be lacking is some element of resulting vulnerability, which might serve to provide legal justification for exposing the undertaker to legal liability.[91]

Consider the example of an undertaker "A", an experienced auction-goer, who offers to bid on an item at an auction for the less-experienced "B". B accompanies A to the auction. Just before the item comes up for auction, A is called away for business reasons and he leaves the auction, neglecting his undertaking to B. Although it is obvious to B that A cannot bid for him as promised, B suffers no disability as a result of A's failure to live up to his undertaking because B is still able to bid on the item himself. Can B simply

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[88] *Supra*, n. 34, at p. 67. See also Slaght, *supra*, n. 32, at p. 39, who notes that

> By and large, however, fiduciary law is concerned not with the identification of circumstances where one party has agreed to do something in the interests of the other but rather with when the court will decide that one party had an obligation to do so, often in the face of a strident protest to the contrary.

[89] *Ibid.*, at p. 67.

[90] *Supra*, n. 18, at p. 410.

[91] For reasons which differ somewhat from those that follow, Ong also refers to a unilateral undertaking as only "the first hurdle to the existence of a fiduciary relationship" (*supra*, n. 66, at p. 317).

choose not to bid and instead sue A for compensation for any losses incurred or profits lost? B cannot found his claim in contract law, because he gave no consideration for A's undertaking. There seems to be no logical reason why he should be able to fall back on an undertaking theory of fiduciary duty to succeed instead in equity. Among other things, this would undermine the efficacy of the contract law requirement of consideration.[92]

What is needed to attract the attention of Equity is a transfer of power or property to the fiduciary, such as would have happened in the above example if B had given A all of his money to make the purchase, thereby rendering him incapable of acting in A's absence. Such a theory is discussed in the following section on analytically structured theories.

Analytically Structured Theories

A more analytically attractive theory is the "proprietary theory", which is probably the most widely accepted of the fiduciary theories,[93] perhaps on account of its relative straightforwardness. It holds simply that a fiduciary relationship exists wherever one person holds property that is to be used for the benefit of another. Describing the fiduciary relationship in terms of property concepts has the attraction of appearing to reduce a broad concept to "manageable legal proportions"[94] and, as Weinrib puts it, "has the

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[92] See, for example, the discussion of unenforceability of charitable subscriptions by S.M. Waddams in *The Law of Contract* (Toronto: Canada Law Book Limited, 1977), at pp. 81-82.

[93] Shepherd, *supra*, n. 20, at p. 52. Frankel's theory is also of a proprietary nature (*supra*, n. 31, at pp. 827-828). Bartlett also appears to subscribe to the proprietary theory in the context of Indian lands, as he confesses to a difficulty in rationalizing accountability absent a proprietary interest (*supra*, n. 178, at p. 308). Waters also subscribes to the propriety view (*supra*, n. 24, at p. 32):

> The fiduciary's obligations have been defined in a number of ways by the courts and commentators, but essentially it means the duty to account to another, the person with the right of enjoyment over the property in question, for all that one does with the property and in the office of trustee.

[94] Weinrib, *supra*, n. 21, at p. 10. The same view was expressed by Finn regarding the descriptive theory (*supra*, n. 60, at p. 55).

advantage of providing a familiar landmark, of stirring recollection of equity's primordial jurisdiction, and of diffusing an aura of technical precision."[95] At least one Supreme Court of Canada justice has opined that a proprietary component is integral to fiduciary theory.[96] The predominance of the theory may reflect what Finn refers to as "the primacy the law has long given to the protection of proprietary interests".[97]

From an analytical perspective, the attraction of the proprietary theory lies first in its objectivity, in that it looks to the existence of a relationship the characteristics of which — the holding of property by one for the benefit of another — are objectively ascertainable. It is also attractive in that it has predictive value, as its central element is not limited to previously identified categories of relationship. The proprietary theory appears to be particularly useful in circumstances such as those involving secret commissions, in which an agent of the owner of property secretly receives consideration from the purchaser to whom the property is sold. The proprietary theory would characterize such a secret commission as the receipt of a gain (equal in value to the commission) from the use or transfer of property of the beneficiary or as a "diversion of property en route to" the beneficiary,[98] which our notions of property ownership dictate should properly accrue to the owner of the

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[95] *Ibid.*, at p. 10.

[96] As the Honourable Beverly M. McLachlin stated in "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A Canadian Perspective", in *Equity, Fiduciaries and Trusts, 1993*, ed. Donovan W.M. Waters (Toronto: Carswell, 1993) p. 37, at p. 42:

> Not only must the first party agree to act on behalf of the other, but the arrangement must have the result of placing the property of the other in the power of the former.

[97] Finn, *supra*, n. 60, at p. 34.

[98] John D. McCamus, "Remedies for Breach of Fiduciary Duty", *1990 L.S.U.C. Special Lectures* 57 (Toronto: De Boo, 1991), at p. 73.

property.[99]

The major drawback of the proprietary theory is that, while it does not appear to be inconsistent with any accepted fiduciary jurisprudence, it is not broad enough to adequately account for entire range of circumstances accepted as fiduciary in nature. Proprietary theories run into difficulty in relationships where a property element is difficult to identify.[100] Shepherd explains this shortcoming as follows:

> The most universal criticism of the property theory is that it requires many things which are not in the traditional sense property to be considered as property in order for the rule to work. Now, the fact that assets do not fit into the traditional types of property is not of itself a particularly strong argument.... But, under the property theory, many items which have not in any sense been "acquired" by the alleged beneficiary must be treated as his property. The best example of this is in the area of opportunities, where advantages the beneficiary only hopes to gain must be considered in the fiduciary context as advantages he already owns.[101]

Shepherd cites as a further example the "impossibility" cases, in each of which the fiduciary was held liable to the beneficiary for taking advantage of a maturing opportunity notwithstanding that, for legal or practical reasons, the beneficiary could not have taken advantage of it himself.[102] As he points out,

> it is difficult to understand how a person can have a beneficial interest in a property, such as a corporate opportunity, that for some external reason he cannot

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[99] On the basis that "receipt of a bribe by a buying agent from a vendor causes the principal to lose a discount in an amount corresponding to the value of the bribe": T.G. Youdan, "The Fiduciary Principle: The Applicability of Proprietary Remedies", in *Equity, Fiduciaries and Trusts*, ed. T.G. Youdan (Toronto: Carswell, 1989), at p. 108.

[100] DeMott, *supra*, n. 23, at p. 912. She refers to the proprietary theory as an "entrusting" theory, in that property is entrusted to a fiduciary subject to fiduciary constraints. DeMott points out that such a theory works best where the fiduciary's role is that of property holder, the paradigm of which is the trust.

[101] *Supra*, n. 20, at p. 53. Oosterhoff and Gillese describe the same difficulty in ascertaining the subject matter of a trust, given that "Equity does not regard a mere expectancy as property" (*supra*, n. 65, at p. 184).

[102] *Ibid.*, at p. 54.

possibly own.[103]

A classic example of this is found in *Boardman v. Phipps*,[104] in which the defendant was held liable for the purchase of shares that could not, by reason of financial constraints, have been acquired by the trust itself.[105]

Finn also considers that cases involving partnership obligations, confidential information, product goodwill or use of another's name or business connections must have a justification disjunctive from proprietary principles.[106] Other such circumstances might include cases in which the benefit of illegal actions by a fiduciary are accorded to the beneficiary, such as the awarding to a corporation of profits made by shareholders through insider trading, notwithstanding that it would have also been illegal for the corporation to indulge in such activities itself.[107] Youdan concludes that an attempt to extend a purely proprietary theory to such circumstances "may lead to such a stretching of the concept of property that the principle becomes confused and fails to provide useful guidance."[108]

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[103] Shepherd, *supra*, n. 34, at p. 64.

[104] [1967] 2 A.C. 46 (H.L.).

[105] From time to time this paper will make reference to trust law jurisprudence to illustrate arguments applicable to fiduciary law. Scholars generally agree that rules applicable to dealings with trust property also apply to fiduciary assets (see Waters, *supra*, n. 65 at pp. 401 and 404) . This would seem to be justifiable, in that it is arguable that the trust is merely a subset of the set comprising all fiduciary relationships (see Oosterhoff and Gillese, *supra*, n. 65, at p. 12; Frankel, *supra*, n. 31, at p. 804).

[106] *Supra*, n. 60, at p. 37.

[107] Weinrib, *supra*, n. 21, at p. 15, citing *Diamond v. Oreamuno* (1969), 248 N.E. 2d 910 (N.Y.C.A.) and *Schein v. Chasen* (1973) 478 F. 2d 817 (2nd Cir.). Another example is *Reading v. A.G.*, [1951] 1 All E.R. 617 (H.L.), in which bribes accepted by an army sergeant to escort smugglers were awarded to the British government, despite the absence of any entitlement by the army to payment on its own behalf for such an illegal activity. In *Lister v. Stubbs* (1911), 44 S.C.R. 543, the court refused to order restitution of a bribe received by an agent, on the ground that the bribe had never been the property of the principal. Shepherd supports this view, *supra*, n. 20, at p. 54. Youdan, on the other hand, roundly criticizes this case on grounds of authority, policy and principle (*supra*, n. 99, at p. 98), while Oosterhoff and Gillese express doubt as to whether it reflects the law in Canada today (*supra*, n. 65, at p. 435).

[108] *Supra*, n. 99, at p. 104.

An unadorned proprietary theory is, moreover, less useful than it otherwise might appear to be in explaining fiduciary duty in the Indian/Crown context because of the conclusion reached by Dickson J. in *Guerin* that the Indian interest transferred in a surrender is not a proprietary interest.[109] Although this conclusion may be debatable,[110] unless or until the courts arrive at a contrary conclusion a purely proprietary theory will be insufficient in that context. It is submitted that the shortcomings inherent in a proprietary theory of fiduciary duty can, however, be addressed by supplementing the proprietary theory with a theory of encumbered power and discretion.

Theories generally described as "power and discretion" theories focus on the fiduciary's possession of a power or discretion affecting the interests of the beneficiary that may be exercised to the detriment of the beneficiary. Weinrib defines the fiduciary relationship in such terms, referring to it as "a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him".[111] As Wilson J.'s points out in *Frame v. Smith*, "unless such a discretion or power is present there is no need for a superadded obligation to restrict the damaging use of the discretion or power".[112]

Wilson J. described such a power and discretion theory in *Frame v. Smith*:

> Relationships in which a fiduciary obligation have [*sic*] been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to

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[109] *Supra*, n. 3, at pp. 339 and 342.

[110] See discussion, *infra*, at p. 46.

[111] *Supra*, n. 21, at p. 4, referred to by Dickson in *Guerin*, *supra*, n. 3, at p. 340.

[112] *Supra*, n. 113, at p. 99.

affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[113]

She went on to conclude that it is the ability to use this discretion against the interests of the beneficiary that makes it necessary to impose a fiduciary duty.

Two criticisms may be offered of this formulation of the power and discretion theory. The first is that it is unnecessarily complicated, since the possession of a power necessarily comprises a discretion as to whether to exercise that power.[114] The second is that the existence of a legal power also necessarily contemplates the existence of a corresponding liability or vulnerability in the person subject to the power.[115] For these reasons, once a power is found to exist, additional references to discretion and vulnerability are superfluous.

The "unilaterally exercisable" characteristic referred to by Wilson J. would also appear to be unnecessary. To the extent that unilateral is interpreted as meaning capable of exercise without the consent of the beneficiary, this would seem to be implicit in the concept of a power, since the existence of a power necessarily connotes the ability to exercise it independently of the consent of those subject to it.[116]

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[113] (1987) 42 D.L.R. (4th) 81 (S.C.C.) at p. 99. This passage was also referred to by La Forest J. in *K.M. v. H.M.*, *supra*, n. 237, at p. 136, by McLachlin J. in *Canson v. Boughton*, *supra*, n. 83, at p. 543, and in *Norberg v. Wynrib*, *supra*, n. 33, at p. 274.

[114] As Finn states, "it is the essence of a power that its exercise is not mandatory", *supra*, n. 66, at p. 34. Shepherd criticizes a similarly over-elaborate theory proposed by Wolinsky on this basis as well, *supra*, n. 20, at p. 84. Oosterhoff and Gillese also stress the point in their discussion of powers of appointment, *supra*, n. 65, at pp. 94-101.

[115] See W. N. Hohfeld's analysis of legal powers in "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1913) 23 *Yale L.J.* 16, at pp. 44-54.

[116] Robert Flannigan, in "Fiduciary Obligation in the Supreme Court", (1990) 54 *Sask. L.R.* 45 at p. 62, also considered this criterion to be superfluous, as did La Forest J. in *Hodgkinson v. Simms*, *supra*, n. 18, at p. 412.

The third characteristic referred to by Wilson J., that of vulnerability of the beneficiary, has been seized upon by a number of other judges and commentators as a key element in the fiduciary mosaic.[117] As Weinrib points out, however, not all vulnerability is of relevance. It is important to appreciate that it is only vulnerability that arises out of the relationship, not vulnerability that precedes its establishment, that is germane:

> It cannot be the *sine qua non* of a fiduciary obligation that the parties have disparate bargaining strength. An agent surely would not be heard to say that he had no fiduciary duty because his principal was a man of business experience who had created the agency relation with his eyes open. In contrast to notions of unconscionability, the fiduciary relation looks to the relative positions of the parties that *results from* the agreement, rather than the relative position that precedes the agreement.[118]

The same distinction has been pointed out by other authors. In the recent judgement in *Hodgkinson v. Simms* La Forest J. emphasizes that vulnerability is not the hallmark of the fiduciary relationship.[119] Referring to the above quote by Wilson J. in *Frame v. Smith*, Gautreau, too, observes:

> The first [matter deserving of comment] is the reference to vulnerability: it is not an element leading to a fiduciary relationship, but rather, it is a characteristic of the result of the relationship.... It is nothing more than a description of the victim's situation when the fiduciary can affect his lawful interests by exercising his position of power.[120]

McLachlin J. made this distinction in *Norberg v. Wynrib*, quoting in part from the following passage by Frankel:

> It is important to emphasize that the entrustor's vulnerability to abuse of power does not result from an initial inequality of bargaining power between the entrustor and the fiduciary.... The relation may expose the entrustor to risk even

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[117] Sopinka J. in *Lac Minerals*, *supra*, n. 22, at p. 599; Finn, *supra*, n. 60, at p. 9.

[118] *Supra*, n. 21, at p. 6. Emphasis added.

[119] *Supra*, n. 18, at p. 405. Finn, too, rejects vulnerability as the key to ascertaining fiduciary responsibility (*supra*, n. 60, at p. 32).

[120] *Supra*, n. 54, at p. 5. See also Shepherd, *supra*, n. 34, at p. 69.

> if he is sophisticated, informed, and able to bargain effectively. Rather, the entrustor's vulnerability stems from the *structure* and *nature* of the fiduciary relationship. The delegated power that enables the fiduciary to benefit the entrustor also enables him to injure the entrustor[121]

Such a distinction between pre- and post-relationship vulnerability is apparent in the following passage, cited by Wilson J. in *Frame v. Smith*, from the Australian High Court decision in *Hospital Products Ltd. v. U.S. Surgical Corp.*:

> The relationship between the parties is therefore one which gives fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is *accordingly* vulnerable to abuse by the fiduciary of the position.[122]

Shepherd criticizes any unqualified exposition of the power and discretion theory on the ground that it lacks logical limits.[123] He therefore qualifies his exposition of the power and discretion theory by requiring that the power in question must have been bestowed upon the fiduciary on the condition that it was to be used to further the interests of the beneficiary.[124] Because of the condition attaching to the exercise of the power, Shepherd characterizes this as a theory of "encumbered power".[125]

McLachlin J. relies on a similar analysis in *Norberg v. Wynrib*, combining the concept of the acceptance of a power with the condition that it be used to benefit another:

> the peculiar hallmark of the fiduciary relationship — trust, the trust of a person with inferior power that another person who has assumed superior power and responsibility will exercise that power for his or her good and only for his or her

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[121] *Supra*, n. 33, at p. 277, quoting from Frankel, *supra*, n. 31, at p. 810. Emphasis in original.

[122] (1984) 55 A.L.R. 471 at p. 454.

[123] He reasons that a contracting party may choose to breach a contract without being required in equity to disgorge any profit that might be earned as a result (*supra*, n. 20, at p. 86).

[124] *Ibid.*, at p. 96. Also postulated by Frankel, *supra*, n. 31, at p. 809. Ellis, *supra*, n. 26, at p. 22 quotes without citation from a similar definition given by Finn.

[125] *Supra*, n. 34, at p. 76.

good and in his or her best interests.[126]

Although the Supreme Court's decision in *Hodgkinson v. Simms* was couched in the rhetoric of reliance, the decision in fact turns upon the *de facto* transfer of decision-making power in that case from the client respondent to his professional advisor:

> It is important, however, to add further precision about the nature of reliance, particularly as it applies in the advisory context.... As I see it, the reality of the situation must be looked at to see if the decision is effectively that of the advisor ... Here, as I see it, the trust and reliance the appellant placed in the respondent ... was such that the respondent's advice was in substance an exercise of a power or discretion reposed in him by the appellant.[127]

Shepherd argues that an additional requirement is needed, the requirement that the recipient of the power in fact use the power, as evidence of the fact of acceptance of the power by the would-be fiduciary.[128] This embellishment is unnecessary, however, at least to a finding that a fiduciary *relationship* exists, since once the ability to use an encumbered power exists, the requisite fiduciary relationship has been established. There is no requirement that an encumbered power actually be used for a fiduciary relationship to exist.[129] For example, where a principle contracts with an agent to act in a forthcoming real estate transaction, the fiduciary relationship is established at the time the contract is entered into, not merely at the time the agent is first called upon to use his powers of agency. While it may be argued that no breach of fiduciary duty can occur until the

[126] *Supra*, n. 33, at p. 272.

[127] Per La Forest J., *supra*, n. 18, at p. 431. Although dissenting as to whether the circumstances indicated a transfer of power, Sopinka and McLachlin JJ. agreed (at p. 466) that "the distinguishing characteristic between advice *simpliciter* and advice giving rise to a fiduciary duty is the ceding by one party of effective power to the other".

[128] *Supra*, n. 20, at p. 101. Also referred to by La Forest J. in *Hodgkinson v. Simms*, *supra*, n. 18, at p. 413.

[129] Sealy, *supra*, n. 85, at p. 124. It may, on the other hand, be very important to know whether a fiduciary relationship exists, even if the encumbered power has never been used, when contemplating possible constraints on a future course of action.

fiduciary is called upon to use his or her powers, the fiduciary relationship nonetheless antedates the breach. While this point may appear to be somewhat academic, the point at which a fiduciary relationship is established in the Crown/Indian context is of some importance to the analysis of that relationship discussed in the next chapter.

The encumbered power theory satisfies the requirements of analytical validity in that the presence or absence of a conditional transfer of power is a factor that can be objectively ascertained. In addition, it is sufficiently general to be capable of application to a broad spectrum of relationships. Moreover, it is submitted that such a theory provides a reasonable, or at least plausible, rationale for accepted fiduciary case law. The theory is more appropriate than a strictly proprietary theory in providing a rationale for the imposition of fiduciary constraints in situations involving the use of what Finn describes as "close property analogues",[130] such as confidential information, goodwill, a name or a business connection, and for the "impossibility cases", in that one can readily justify the attribution of profits gained from the use of a power to the party who conferred that power.[131] As Shepherd points out,

> Just as in the case of a manager of property, who may well have more ability than the owner to get profit out of the property, so the manager of a power may have more ability to gain the profits, but this would not in any respect reduce the owner's right to those profits.[132]

An Integrated Theory

Although Shepherd proposes a theory of encumbered power, he suggests that its

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[130] *Supra*, n. 60, at p. 34.

[131] Under the power and discretion theory, any profit obtained through the utilization of the transferred power would accrue to the benefit of the beneficiary, whether or not the beneficiary was precluded, by reason of legal incapacity, financial impecuniosity or otherwise, from obtaining the benefit personally.

[132] *Supra*, n. 34, at p. 78.

adoption without further elaboration is problematic, in that a comprehensive fiduciary theory calls for some property element.[133] Such a problem may, however, be more apparent than real. In principle, an encumbered power theory is broad enough to subsume within it the proprietary theory discussed earlier; control over property denotes the power to determine the ultimate use and disposition of the property, and control over the property of a beneficiary imbues the fiduciary with a power to affect the beneficiary's interests. From an alternate point of view, the proprietary theory can be looked upon as a subset of the encumbered power theory, describing relationships in which the power transferred is a power to determine the disposition of property, always subject, of course, to the understanding that the power over that property is to be used to benefit the beneficiary.[134]

While, based on the above reasoning, one might be tempted to completely dissolve the proprietary theory into the encumbered power theory, it is submitted that, given the primacy of property concepts in legal reasoning, its total immersion would hinder, rather than assist in, the application of fiduciary theory to many of the accepted categories of fiduciary relationship. For this reason, it is recommended that for practical purposes any definition of fiduciary theory should give some prominence to the proprietary element.

It is therefore submitted that an analytically valid and workable theory of fiduciary relationships can be achieved by merging the concepts inherent in the traditional proprietary theory with those of the encumbered power theory. A working definition might be expressed in the following terms:

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[133] Shepherd, *supra*, n. 20, at pp. 75-76 and 116.

[134] It might be noted that resolving the disparate notions of fiduciary obligation into the concept of a conferral or transfer of power, including the transfer of power inherent in the transfer of control over property, suggests that policy underlying the imposition of the obligation is society's desire, reflected by the courts, to control abuse of such powers. It is therefore proposed that the essence of the somewhat vague policy objectives of fiduciary law otherwise described as the ensuring of loyalty, the honouring of trust and the upholding of reliance is, in effect, an effort to protect against the abuse of power.

> *A fiduciary relationship exists whenever a person acquires a power or property subject to the condition that the power will be exercised, or the property used, to further the interests of another.*

In one respect, the fiduciary relationship may be perceived as having a dual nature. It will always feature the transfer of power for the benefit of another but, where that power involves control over property, the proprietary aspects of the relationship will tend to assume precedence, especially in respect of the imposition of restitutionary remedies.

It is submitted that the theory proposed above, incorporating both power and proprietary elements, presents a single analytical model that is consistent with accepted fiduciary jurisprudence and capable of general prospective application. For the purposes of the exposition that follows, this model will be referred to as the "conditional transfer" theory of the fiduciary relationship.

CHAPTER III
THE CROWN/INDIAN FIDUCIARY RELATIONSHIP

How well does reasoning behind the Crown/Indian fiduciary relationship, first propounded in *Guerin*, accord with the conditional transfer theory described above? This question could be answered to a large extent without reference to the particular facts of *Guerin*, by simply applying the principle of transfer of encumbered power or property to the relationship existing between a band and the Crown in the context of any surrender, and this might indeed be a worthwhile exercise in of itself. However, because the objective of this paper is also to examine the potential for, and implications of, conflict of interest on the part of the Crown in its capacity as fiduciary, it is important to look to the specifics of the Crown's relationship with Indian bands in carrying out surrenders of reserve lands, and for this purpose the details of *Guerin* are instructive. A brief examination of the facts of the relationship in *Guerin* will therefore follow, preparatory to an analysis of the application of the conditional transfer theory to that relationship. Before doing so, however, as both the *Guerin* and *Apsassin* cases involve surrenders of Indian land, a brief description of the surrender process provided in the *Indian Act* will help to put the facts of those cases in perspective.

The Nature of the Surrender Requirement

The provisions of the *Indian Act* relating to surrenders[135] are the foundation of the protective scheme envisaged by that Act. As Dickson J. noted in *Guerin*,

> The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.[136]

Section 37 of the Act provides a blanket prohibition against the alienation of Indian reserve lands by any means other than those provided under the Act. Section 38 allows a band to surrender any right or interest in reserve land, subject to the requirements, set out in s. 39, that the surrender must be

(a) made to the Crown,

(b) effected in the presence of an Indian Affairs official,

(c) assented to by a majority of the electors of the band at a general or special meeting of the band or by referendum, and

[135] Sections 37 to 39 of the *Indian Act* applied in *Guerin* (R.S.C. 1952, c. 149) are set out in Appendix A. The R.S.C. 1985 counterparts to those sections are also set out there, as well as the text of the other provisions in the present *Indian Act* that provide for the alienation of reserve lands: ss. 18(2), 28(2), 35 and 58(1) and (3). Additional provisions relating to alienation of Indian interests are found in the *Indian Timber Regulations*, C.R.C., c. 961 and the *Indian Mining Regulations*, C.R.C., c. 956, which are made under s. 57 of the Act.

[136] *Supra*, n. 3, at p. 340.

(d) accepted by the Governor in Council.

The essential elements of these provisions are the same today as they were at the times of the surrenders in *Guerin* and *Apsassin*.

The Background to Guerin v. The Queen

It has been noted that, in any case involving fiduciary obligations, the facts relating to the relationship of the parties and the actions of the fiduciary are of particular importance.[137] An examination of the facts giving rise to the findings in *Guerin* will therefore assist in understanding the Crown/Indian relationship.

The *Guerin* case involved a surrender by the Musqueam band of certain Indian reserve lands[138] located within the limits of the City of Vancouver. The land in question was recognized at that time as "the most potentially valuable 400 acres in metropolitan Vancouver".[139] The Shaughnessy Heights Golf Club was among a number of parties who had expressed an interest in developing the property.

In 1957, the golf club wrote to Indian Affairs[140] proposing to lease 160 acres of Musqueam land

(a) for a 15-year term, with options for up to four successive 15-year terms;

(b) at an annual rent of $25,000, subject to a maximum increase of 15% for each

[137] From *Re Coomber*, [1911] 1 Ch. 723 (C.A.) at 729: "There is no class of case in which one ought more carefully to bear in mind the facts of the case ... than cases which relate to fiduciary and confidential relations". In *Geffen v. Goodman* (1991), 81 D.L.R. (4th) 211 (S.C.C.) at p. 230, Wilson J. also referred to the necessity in fiduciary cases of conducting "a meticulous examination of the facts", an observation echoed by La Forest J. in *Hodgkinson v. Simms*, *supra*, n. 18, at p. 413.

[138] In Musqueam I.R. No. 2.

[139] *Supra*, n. 3, at p. 327, and n. 12, at pp. 389-90.

[140] The present Department of Indian Affairs and Northern Development has had a number of different appellations in the years since it was formed. For the sake of consistency, it will hereinafter be referred to as "Indian Affairs".

renewal; and

(c) with the reservation to the golf club of a right to remove any improvements on termination of the lease.

Evidence established that an officer of the Vancouver office of Indian Affairs, a Mr. Anfield, conveyed the golf club's proposal to the band council only in the most general of terms and that the band council was not informed that there might be other interested developers.

In the course of preparing documentation for the required surrender, Indian Affairs headquarters in Ottawa questioned the adequacy of the proposed $25,000 rent. It was suggested that Anfield obtain an opinion from an appraiser who had previously appraised the land for unrelated purposes.[141] The earlier appraisal had recommended a 6% rate of return, which would have netted an annual rent of $53,000.[142] On the somewhat misleading facts given to him by Anfield, however,[143] the appraiser approved a 3% rate of return.[144] He later testified that he would not have approved of the 15% limitation on rental increases proposed by the golf club and that, had he known of the club's right to remove improvements, he would have recommended a substantially higher rent.[145]

At a subsequent band council meeting, attended by Anfield and representatives of

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[141] The earlier appraisal was done for the Veteran's Land Act Administration, the agency which was at that time in the course of disposing of the surrendered lands that are now in issue in the *Apsassin* case.

[142] *Supra*, n. 12, at p. 396. Based on an approximate land value of $890,000.

[143] Anfield had not advised Howell that rent increases would be limited to 15% or that the golf club would have the right to remove improvements.

[144] *Supra*, n. 12, at p. 400.

[145] *Ibid.*, at p. 400. At trial, Collier J. found that Anfield overstated to the band the extent of Howell's approval.

the golf club, the band requested that the rent be set at $44,000. In the course of ensuing discussions, and possibly at the suggestion of Anfield, the band council agreed to a reduced rent of $29,000. This rental amount was based on their mistaken belief that the initial term of the lease would be 10 years, that subsequent terms would each be of a duration of 5 years and that there would be no limitation on subsequent rental increases.[146] Collier J. found that it was on the basis of this misinformation that the band subsequently surrendered the lands to the Crown "forever in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our welfare and that of our people".[147]

Following the surrender, Indian Affairs prepared the lease to the golf club. At that time, two additional terms favourable to the golf club[148] were added to the lease without notice to, or the consent of, the band council.

The band councillors were dismayed to subsequently learn that the lease prepared by Indian Affairs was on substantially the same terms as had been originally proposed by the golf club.[149] Although the band council formally objected to some of these terms, they were informed that they were "stuck with" them.[150] The lease was signed, unchanged, by Indian Affairs some two weeks later.

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[146] *Supra*, n. 3, at p. 329. The agreement was also given without knowledge of the golf club's right to remove improvements (*supra*, n. 12, at p. 389).

[147] *Supra*, n. 12, at p. 407.

[148] The additional terms provided that rent renewals would be calculated on an unimproved basis for use only as a golf club (precluding calculation on a highest and best use basis) and that at the end of every renewal period, the golf club, but not the Crown, could terminate the lease on six months' notice (*ibid.*, at p. 407). Collier J.'s criticism of the addition of the latter term seems somewhat odd, since it would seem to be necessarily implied that an option to renew includes a right to elect not to renew.

[149] Set out, *supra*, p. 38.

[150] The council objected particularly to the 15-year renewal periods (*supra*, n. 12, at p. 412).

Based on the evidence set out above, Collier J. concluded that the band would not have assented to the surrender on the terms of the lease ultimately entered into.[151] He also found as fact that, despite repeated requests, the band was not given a copy of the lease until March of 1970, some 12 years later.[152] It was apparently the policy of Indian Affairs at the time not to provide bands with copies of such documents.[153]

The plaintiffs' argument at trial was that the Crown held the surrendered lands in trust, and that in leasing the lands on unfavourable terms it had breached that trust. The Crown in turn argued that, if there was a trust, it was a legally unenforceable "political trust"[154] or, alternatively, that if a trust equivalent to a private law trust existed, it was confined to the terms of the surrender document, which permitted the Crown to lease the land "to anyone, for any purpose, and upon any terms which the government deemed most conducive to the welfare of the Band".[155] Collier J. rejected the Crown's arguments, and found the Crown to be in breach of trust. He assessed damages at $10 million.

The Federal Court of Appeal was unconvinced by the plaintiffs' trust arguments. Le Dain J. concluded that s. 18(1) of the *Indian Act* was insufficient to create a trust in the private law sense[156] (referred to by Le Dain J. and hereinafter as a "true trust") or, if it was, that the trust was confined to the conditions contained in the surrender document,

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[151] *Ibid.*, at pp. 413 and 418.

[152] *Ibid.*, at p. 419.

[153] *Supra*, n. 3, at p. 345, and n. 12, at p. 419.

[154] This reflected earlier dicta of the Supreme Court of Canada in *St. Ann's Shooting and Fishing Club v. The King*, [1950] S.C.R. 211 at p. 219 as to the "accepted view" that Indian people were "in effect, wards of the state whose care and welfare are a political trust of the highest obligation".

[155] *Supra*, n. 12 at p. 417.

[156] *Supra*, n. 13, at p. 469.

which made no mention of the terms contemplated by the band members.[157] On this basis, the Court of Appeal allowed the appeal.

The Supreme Court's Analysis in Guerin

Although not technically a majority opinion,[158] most commentators have treated the judgment delivered by Dickson J. as the operative judgment in the *Guerin* case.[159] In holding the Crown liable, Dickson J. disagreed with the findings of the Court of Appeal without adopting the trial court's reasoning that the Crown's obligations stemmed from a true trust. Instead, he set forth the basis of the Crown's obligation as follows:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty.[160]

In reaching his conclusions regarding fiduciary duty, Dickson J. took care to point out that the "political trust" cases,[161] which were relied on in the judgment of the Court of Appeal and which negatived certain legal obligations on the part of the Crown, did not preclude the existence of a fiduciary duty in the context of the Crown/Indian relationship:

> As the "political trust" cases indicate, the Crown is not normally viewed as a

[157] *Ibid.*, at p. 455.

[158] Owing to the death of Chief Justice Laskin, the Supreme Court's decision was rendered by the eight remaining justices, who, although agreeing on the disposition of the appeal, differed in their reasons. The reasons of Dickson J. were concurred in by three justices and those of Wilson J. by two others; Estey J. delivered separate reasons.

[159] See for example, the comments of Addy J. in *Apsassin*, [1988] 3 F.C. 20 at 45.

[160] *Supra*, n. 3, at p. 334.

[161] *Kinloch v. Secretary of State for India in Council* (1882), 7 App. Cas. 619; *Hereford R. Co. v. The Queen* (1894), 24 S.C.R. 1; and *Tito v. Waddell (No. 2)*, *supra*, n. 66.

> fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle.[162]

Dickson J. founded the Crown's fiduciary duty on twin pillars: the nature of Indian title and the statutory scheme of the *Indian Act*. He reiterates this dual basis for the fiduciary relationship a number of times throughout his reasons:

> The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. *The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.*[163]
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> . . .
>
> The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.[164]
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> . . .
>
> Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie.... This discretion on the part of the Crown ... has the effect of transforming the Crown's obligation into a fiduciary one.[165]
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> . . .
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> ... the nature of Indian title *coupled with* the discretion vested in the Crown are sufficient to give rise to a fiduciary obligation ...[166]

The above comments clearly indicate that Dickson J. considered that two distinct elements combine to create the Crown's fiduciary duty:

1) the Indians' unique interest in their lands, or Indian title; and

2) the framework of the *Indian Act*, in particular its requirement that the Crown be interposed between the Indians and third parties in any transactions involving

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[162] *Supra*, n. 3, at p. 341.

[163] *Ibid.*, at p. 334. Emphasis added.

[164] *Ibid.*

[165] *Ibid.*, at p. 340.

[166] *Ibid.*, at p. 342. Emphasis added.

their lands.[167]

The Statutory Source of the Crown's Fiduciary Obligation

In analysing the statutory source of the fiduciary duty, Dickson J. focused primarily on s. 18(1) and ss. 37 to 41[168] of the *Indian Act*. He traced the surrender requirements embodied in ss. 37 to 41 of the Act to their roots in the *Royal Proclamation of 1763*[169] and concluded that "the purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited."[170]

Dickson J. then examined s. 18(1) of the Act, which provides as follows:

> 18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

From his examination of legal history he concluded that the effect of s. 18(1) was to confirm in the *Indian Act* the "historic responsibility which the Crown has undertaken, to act on behalf of Indians so as to protect their interests in transactions with third parties" and that the discretion conferred on the Crown by s. 18(1) converted what might otherwise be

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[167] See also Paul Emond, "Guerin v. The Queen" (1986), 20 *E.T.R.* 61, at p. 67.

[168] For text of these provisions, see Appendix A.

[169] R.S.C. 1985, App. II, No. 1. Among other things, the *Royal Proclamation of 1763* provided the first formal requirement for the interpositioning of the Crown in Indian land purchases within the then settled colonies. The relevant portion reads as follows:

> And whereas great Frauds and Abuses have been committed in the purchasing of the Lands of the Indians ... We do ... strictly enjoin ... that no private Person do presume to make any Purchase from the said Indians of any Lands ... [except that] the same shall be purchased only for Us, in our Name, at some publik Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies ...

[170] *Supra*, n. 3, at p. 340.

an unenforceable political obligation into a fiduciary one.[171]

Dickson J.'s explanation of the source of the Crown's fiduciary duty in *Guerin* accords with the conditional transfer theory set out above. The *Indian Act* requirement that a band wishing to alienate its reserve lands must first transfer its interest in those lands to the Crown and allow the Crown to act as an intermediary in the transaction, together with the broad discretion accorded the Crown by s. 18(1) of that Act in so acting, clearly effect a transfer of power from the band to the Crown. In addition, the s. 18(1) declaration that "reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart" was interpreted by the Court as encumbering the discretion accorded under that subsection with the requirement that it be exercised for the benefit of the band. In combination, these factors clearly characterize a surrender of reserve land under the *Indian Act* as a transfer of encumbered power consistent with the conditional transfer theory discussed above.[172]

If the conditional transfer of power provided for in the *Indian Act* is sufficient to support a Crown fiduciary obligation on its own, however, what is one to make of Dickson J.'s emphasis on the "Indian interest" element in explaining that obligation?

The Indian Interest as a Source of the Crown's Obligation

In his reasons, Dickson J. embarked upon a comprehensive survey of the history of Indian/Crown relations from the rule of discovery[173] and the *Royal Proclamation of*

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[171] *Ibid.*, at p. 340.

[172] This also accord with the approach taken by the U.S. Supreme Court in *Nevada v. United States* (1983), 103 S. Ct. 2906 at p. 2924, which characterized the relationship between the government and Indian tribes as being in many, if not all, respects one of trustee and beneficiary in private law.

[173] By the rule of discovery, eloquently described by Marshall C.J. in *Johnson v. M'Intosh* (1823), 8 Wheaton 543; 21 U.S. 240, each European nation tacitly agreed to give to the discoverer a monopoly over all dealings with the natives occupying the newly "discovered" lands. This monopoly extended not

1763 through to the present day. On reflection, he concluded that the Indians' interest in their lands was a *sui generis* legal interest, arising independently of the legislative and executive branches of government.[174] The fact that he gave no explanation of the legal attributes of this unique interest, however, left something of a black hole in the expanse of native law, a mysterious object of irresistible attraction to native law theorists and practitioners alike.

Although Dickson J. describes the Indians' interest in their lands in proprietary terms, in arguing against the existence of a true trust, he specifically negatives the existence of any property component to the post-surrender Indian interest:

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. ... their interest does not, strictly speaking, amount to beneficial ownership[175]
>
> As the *Smith* decision[176] makes clear, upon unconditional surrender the Indians' right in the land disappears. No property interest is transferred which could constitute the trust *res*.[177]

This characterization of the Indian interest as a non-proprietary interest has been the subject of much academic criticism.[178] Even if one accepts the finding in *Smith* that

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only to trading (for furs, etc.), but also to the purchase of land. While the rule of discovery acknowledged in the native inhabitants a legal right to possession of the discovered lands (albeit a right inferior to the radical title accorded to the discovering sovereign), under the monopoly created by the rule those lands could be sold only to the discovering sovereign. Thus, while the rule of discovery did not purport to directly govern the natives themselves, by creating what was in effect a cartel or exclusive dealing arrangement, it succeeded to a large extent in achieving the same end.

[174] *Supra*, n. 3, at p. 341.

[175] *Ibid.*, at p. 339.

[176] *Gilbert Smith v. The Queen*, [1983] 1 S.C.R. 554, 147 D.L.R. (3d) 237.

[177] *Supra*, n. 3, at p. 342.

[178] John Hurley, "The Crown's Fiduciary Duty and Indian Title: Guerin v. The Queen" (1985), 30 *McGill L.J.* 559, at p. 582; Richard Bartlett, "The Fiduciary Obligation of the Crown to Indians", (1989) 52 *Sask. L. Rev.* 301, at p. 319; Johnston, *supra*, n. 7, at p. 316; Reynolds and Harvey, *supra*, n. 4, at p. 25; and Emond, *supra*, n. 167, at p. 86.

the Indian interest disappears when it is unconditionally surrendered to the Crown, the surrender in *Guerin* was not an unconditional, but rather a *conditional*, surrender. And, as Johnston points out, the courts have always upheld an Indian reversionary interest in conditional surrenders.[179]

It is somewhat odd that Dickson J. would state his "non-proprietary" proposition so categorically, since prevailing legal notions of property (the "sticks in a bundle" model) do not rule out a characterization of the Indian interest as a distinct proprietary interest.[180] Moreover, as Oosterhoff and Gillese point out, all property, including equitable and legal interests in realty and personalty, is capable of forming the subject-matter of a trust.[181] Waters, too, questions whether Dickson J. was perhaps too quick to set aside the true trust model:

> Ironically enough, the trust concept was perhaps unnecessarily put aside in *Guerin*. The Chief Justice ruled it out, it will be recalled, because the Indian interest in their lands disappears in a surrender and Wilson J. would have none of it prior to surrender because the Indians do not have a fee interest. But a personal interest, less than an equitable estate, is an acceptable beneficial interest for the purposes of a trust. In *Moore v. Royal Trust Co.*,[182] a mere personal licence to live in a particular house was accepted by the Supreme Court of Canada as a valid beneficial interest.... In my view it matters not whether this interest takes the form of a personal, usufructuary right or is best described simply as a beneficial interest.[183]

Dickson J.'s statement that the Indian interest "does not, strictly speaking, amount to beneficial ownership", if interpreted to mean that those interests fall outside the category

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[179] *Supra*, n. 7, at p. 316.

[180] The British Columbia Court of Appeal in *Canson v. Boughton*, 61 D.L.R. (4th) 732, at p. 736, in fact characterized *Guerin* as involving fiduciary control over a beneficiary's property, a fact referred to without comment by McLachlin J. in the Supreme Court of Canada's decision in that case (*supra*, n. 83, at p. 569).

[181] *Supra*, n. 65, at p. 123.

[182] [1956] S.C.R. 880.

[183] *Supra*, n. 6, at p. 423.

of beneficial or legal interests in realty or personalty, raises the question as to whether it should be called an "interest" at all. Characterizing the Indian interest as neither legal nor beneficial hinders any attempt to define it as a meaningful legal interest.

Dickson J.'s sole indication of what he determined to be the nature of Indian interest is contained in the following passage:

> The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.[184]

Unfortunately, this Delphic description tells us little more about the nature of the Indian interest than that it is inalienable.[185] The fact that when it is surrendered to the Crown a fiduciary obligation takes hold tells us nothing about the interest *per se*.[186]

If the Indian interest's inalienability is ascribable to the proscriptive framework of the *Indian Act*, then its presence in Dickson's fiduciary equation would appear to be redundant. If, on the other hand, the attribute of inalienability is characterized as being inherent,[187] this raises more questions than it answers. Would this mean that even if the

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[184] *Supra*, n. 3, at p. 339.

[185] See also Reynolds and Harvey, *supra*, n. 4, at p. 33.

[186] See also Emond, *supra*, n. 167, at p. 83. One can at best speculate that Dickson J.'s purpose in particularizing the Indian interest may have been to mark a clear departure from the line of earlier cases, commencing with the decision of the Privy Council in *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), which had held, in his view incorrectly, that the Indian interest in reserve lands was a mere personal and usufructuary right (*supra*, n. 3, at p. 339). One might further speculate that the Court was leaving open its options to further define the nature of the Indian interest at its leisure, perhaps at a time when a greater consensus among the Justices of the Court could be reached (see also Richard Bartlett, "You Can't Trust the Crown: the Fiduciary Obligations of the Crown to Indians - Guerin v. The Queen", (1984/85) 49 *Sask. L.R.* 367 at p. 370).

[187] As argued by Reiter, for example, who maintains that "aboriginal title implies most of the attributes of a fee simple with the exception of free alienation" (*supra*, n. 78, at p. 21 of Appendix). Others have suggested that the Indian interest is strictly a personal right which is for that reason not unilaterally transferable to a third party (see, for example, Emond, *supra*, n. 167, at p. 66). Dickson J., however, insisted in *Guerin* that the nature of the Indian interest is not exhausted by the concept of

Indian Act were to be repealed reserve lands would continue to be inalienable? If so, what implications would this have for self-government legislation that purports to replace the *Indian Act* and allow such alienation?

In the end result, Dickson J.'s attempt to avoid misleading has created a great deal of uncertainty.[188] Although numerous courts since *Guerin* have referred to the *sui generis* nature of the Indian interest, none has offered any clue as to what this means or why the interest is unique. As I. Binnie notes,

> The [*sui generis*] description, first coined in *Guerin*, has been repeated in subsequent cases as if repetition will make it into a definition as opposed to an adamant refusal to essay a definition.[189]

What, then, does all of this tell us about how the nature of the Indian interest contributes to the Crown/Indian fiduciary relationship? If the Indian interest is a legal proprietary interest[190] or at least, as Wilson J. proposes, a beneficial interest,[191] this would justify finding a fiduciary relationship on the basis of the proprietary element of the conditional transfer theory proposed above. If, however, Dickson J.'s enigmatic characterization of the Indian interest as non-proprietary continues to found future curial analysis, this would preclude justification of the Crown/Indian fiduciary relationship on

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a personal or usufructuary right (*supra*, n. 3, at p. 339).

[188] It has led some to speculate that the Crown/Indian fiduciary relationship is a component of Indian title itself (Hurley, *supra*, n. 178, at p. 584; Reynolds and Harvey, *supra*, n. 4, at p. 30) or that the Indian interest includes the surrender requirement itself (Bryant, *supra*, n. 5, at p. 27). Emond, however, maintains that "there is nothing about either aspect of aboriginal or Indian title that necessarily gives rise to a fiduciary or trust relationship" (*supra*, n. 167, at p. 67).

[189] W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?", (1991) 15 *Queen's L.J.* 217 at p. 221.

[190] A position argued by Emond, among others, *supra*, n. 167, at p. 85.

[191] *Supra*, n. 3, at p. 356-357.

proprietary grounds.[192] Unless the Indian interest can be eventually incorporated by the courts into prevailing theories of property law, one would have to further question whether any basis can be demonstrated for its role as one of Dickson J.'s dual pillars of the Crown/Indian fiduciary relationship.

For our purposes, fortunately, it is not necessary to definitively resolve the issue of the nature of the Indian interest. As was noted in the preceding chapter, a proprietary interest is not an essential ingredient to every fiduciary relationship. The statutory framework of the *Indian Act* confers on the Crown an encumbered discretionary power, which, it is submitted, is sufficient to create a fiduciary relationship even in the absence of an Indian proprietary interest. For the purposes of analysing the fiduciary nature of the Crown/Indian relationship, the concept of a conditional transfer of power provides a completely satisfactory description of the fiduciary nature of the relationship.

Before turning to a consideration of fiduciary theory and fiduciary obligations in the context of the *Apsassin* case, I believe it is advisable to comment on the fiduciary dicta found in *R. v. Sparrow*, a case decided subsequent to *Guerin* and one which has been argued to support a broader interpretation of the fiduciary principle.[193]

The Effect of R. v. Sparrow

In its 1990 decision in *R. v. Sparrow*[194] the Supreme Court of Canada gave

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[192] See also Emond, *supra*, n. 167, at p. 67.

[193] Binnie, *supra*, n. 189, at pp. 219 and 225; Bryant, *supra*, n. 5, at p. 37; Owen, *supra*, n. 78, at p. 14; see also argument of plaintiffs in *A.G. Quebec v. Canada (National Energy Board)* (1994), 112 D.L.R. (4th) 129 (S.C.C.), at p. 147.

[194] *Supra*, n. 9.

practical application to the constitutional protection of aboriginal rights.[195] From the point of view of fiduciary law, however, the Court's use of fiduciary terminology in that decision was unfortunate, in that it arguably obscured the basis for the application of the fiduciary concepts the Court had outlined in *Guerin*.

The *Sparrow* case dealt with an alleged violation by a member of the Musqueam band[196] of the terms of a food fishing licence. The licence limited the accused to fishing for food for personal use and limited the type of gear that could be used. At issue was whether Parliament's power to regulate fishing was limited by s. 35(1) of the *Constitution Act, 1982*, which "recognized and affirmed" existing aboriginal and treaty rights.[197]

In reaching its conclusion that Parliament's regulatory powers were constitutionally constrained, the Court[198] made a number of comments relating to fiduciary obligations. After citing a passage in *R. v. Taylor and Williams* referring to "the honour of the Crown",[199] the Court made the following observation:

> In our opinion, *Guerin*, together with *R. v. Taylor and Williams*, ground a general guiding principle for s. 35(1). That is, the government has the *responsibility to act in a fiduciary capacity* with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial ...[200]

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[195] In "Understanding the Sparrow Decision", (1991) 16 *Queen's L.J.* 377 at p. 378, Thomas Isaac states that as a result of *Sparrow*, "'existing aboriginal and treaty rights' mean something in concrete terms".

[196] The successful plaintiff in *Guerin*.

[197] There would also appear to have been an arguable issue of unauthorized subdelegation of a legislative power, since s. 12(1) of the *British Columbia Fishery (General) Regulations* subdelegates to officials the power to prescribe, in the terms of licences, a variety of normative standards, including the net length standard at issue in *Sparrow*, without apparent authority.

[198] The decision was delivered by Chief Justice Dickson and Mr. Justice La Forest.

[199] (1981) 34 O.R. (2d) 360 (Ont. C.A.) at 367.

[200] *Supra*, n. 9, at p. 408. Emphasis added.

In the circumstances of *Sparrow*, the above statement has the potential to paint a confusing picture of the Crown's fiduciary obligations and one that is difficult to reconcile with the Court's dicta in *Guerin*. Although the Court's statement that the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples is somewhat vague, it seems clear that the Court was not attempting to characterize constraints on federal legislative powers as fiduciary constraints *per se*. That the Court views the Crown's s. 35 obligations as separate and distinct from its fiduciary obligations identified in *Guerin* is in keeping with Dickson J.'s express rejection of the application of fiduciary principles to the Crown's legislative function:

> As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function.[201]

To contend otherwise, moreover, would be to disregard a key element embodied in the *Guerin* decision. *Guerin* makes it clear that the Crown/Indian fiduciary relationship arises because the *Indian Act* requires that the Crown be interposed between an Indian band and a third party purchaser of reserve land. The conditional transfer of power to the Crown under these circumstances justifies characterizing the relationship as analogous to a private law fiduciary relationship and applying private law fiduciary duties accordingly. To maintain that the Crown is *always* standing in a fiduciary relationship to aboriginal peoples — i.e., even in circumstances in which this element is lacking — is inconsistent with the fiduciary rationale advanced in *Guerin*.

The real issue in *Sparrow* was the scope of s. 35 of the *Constitution Act, 1982* and not the scope of the Crown's fiduciary duties. Although it noted the finding in *Guerin*

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[201] *Supra*, n. 3, at p. 341.

that the Crown owed a fiduciary obligation with respect to surrendered Indian lands,[202] the Court did not in any way attempt to further define the scope of that obligation or to give content to it; it seems instead to have been content to rely on the minimal definition of the fiduciary obligation presented in *Guerin*.

In its approach in *Sparrow*, the Court does, however, recognize that the Crown's fiduciary relationship with Indian peoples in one context (the surrender of Indian lands) can have a bearing on the interpretation to be given to a constitutional provision governing that relationship in a different and perhaps broader context. This is reflected in its conclusion that the Crown's regulatory powers are constitutionally limited by the words of s. 35(1):

> There is no explicit language in the provision that authorizes this court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. ... federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with ... the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen*.[203]

The most plausible interpretation of the Court's statement that the expression *recognized and affirmed* "incorporates the fiduciary relationship" into s. 35 would therefore appear to be that the Court is relying on the fiduciary relationship identified in *Guerin* as just one element in justifying the restraint on the exercise of parliamentary power imposed by s. 35.[204] From this point of view, the *Sparrow* decision should not be looked upon as importing s. 35 constitutional constraints into the Crown's fiduciary obligations that arise from the conditional transfer of power effected under the *Indian Act*; if anything, the

[202] *Supra*, n. 9, at p. 408.

[203] *Ibid.*, at pp. 409-410.

[204] *Ibid.*, at pp. 409 and 413.

reverse is true. As a result of *Sparrow*, factors considered in other contexts to be elements of the Crown/Indian fiduciary relationship have been adopted as relevant considerations in determining whether constraints on federal legislative action should be imposed by virtue of s. 35 of the *Constitution Act, 1982*.

The proposition that the Court was not attempting to characterize constraints on federal legislative powers as fiduciary constraints *per se* is supported by the Court's acknowledgement that, in appropriate circumstances,[205] the Crown is free to act against the interests of aboriginal peoples.[206] This is inimical to any characterization of the *Sparrow* obligations as fiduciary obligations.[207]

On the basis of the above, it is suggested that the Court's fiduciary references in *Sparrow* were simply part of the justification it presented for imposing constitutional constraints on the Crown. The Court related this justification to the Crown's unique relationship with aboriginal peoples, which relationship includes, but is not limited to, the Crown/Indian fiduciary relationship under the *Indian Act*. Recognizing this limited purpose of the Court's discussion of fiduciary law alleviates any inconsistency that might otherwise be argued to have been injected by the Court's somewhat imprecise references to fiduciary obligations. Recognizing the Court's references to the fiduciary relationship as a justificatory device leads one to characterize the *Sparrow* decision as a constitutional, rather than a fiduciary, precedent.

I would submit that the alternative to the above analysis is unattractive. The

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[205] Where there is a valid legislative objective, such as conserving and managing a natural resource, for example.

[206] *Supra*, n. 9, at p. 412.

[207] As Finn notes, *supra*, n. 66, at p. 256:

> The courts ... will not allow the fiduciary to justify his wrong to one beneficiary by reference to a conflicting duty owed to another.

alternative calls for a conclusion that *Sparrow* introduced an entirely new type of fiduciary relationship tenuously related to, but distinct from, the relationship based on private law fiduciary principles that was incorporated in *Guerin*. However, the fact that this new relationship (*a*) lacks the element of a conditional transfer of power that is common to all other fiduciary relationships and (*b*) would permit the Crown to act against the interests of its aboriginal beneficiaries, invites the question as to why it should be labelled "fiduciary" at all. It is submitted that in the final analysis neither the Court nor any subsequent commentators have provided any real reason to affix a fiduciary label to the requirements placed on the Crown by s. 35 of the *Constitution Act, 1982*. While certain jurists[208] might prefer the limitless possibilities suggested by the application of an entirely unique set of fiduciary-like obligations to all activities coming within the scope of s. 35, the lack of any discernible basis for applying fiduciary duties derived from the private law in such circumstances and the constitutional uncertainties that doing so would introduce preclude further consideration of that possibility in this paper.

The analysis that follows will, therefore, proceed on the basis that while the Court in *Sparrow* may have discerned in s. 35 certain constitutional constraints analogous to the fiduciary obligations introduced in *Guerin*, the decision does not support the inverse proposition, namely that s. 35 obligations have now been incorporated into the Crown's fiduciary obligations arising under the *Indian Act*.

The Fiduciary Relationship in Apsassin v. The Queen

The cases decided in the aftermath of the *Guerin* decision have made it clear that, while *Guerin* introduced the fiduciary concept into the Crown/Indian relationship, it gave

[208] See, for example, Owen, *supra*, n. 78, at p. 24.

very little guidance as to the scope of the fiduciary relationship and the content of the duties inherent in that relationship. Is the fiduciary relationship limited to dealings between the Crown and Indian bands incident to a surrender of reserve lands, or does it extend to other dealings between the parties? To what extent is the Crown bound by the conflict of interest principles governing private law fiduciary relationships? What, if any, liability might third parties incur consequent to a breach of fiduciary duty on the part of the Crown? These and other questions relating to the Crown/Indian fiduciary relationship have been put squarely in issue in *Apsassin v. The Queen*, a case scheduled to be heard by the Supreme Court of Canada in June of 1995, and it is therefore proposed to address these issues in the context of that case.

Although *Apsassin* is not the only case in which it has been sought to apply the fiduciary principles introduced into the public law in *Guerin*, it is the most recent, most important and most complex case to test the fiduciary waters. While the case involves the surrender provisions of the *Indian Act*, as did *Guerin*, it also highlights the relationship between the band and the Crown leading up to the surrender, the manner in which the Crown obtains the consent of a band, the potential for conflict of interest when governmental objectives intrude into the Crown's relationship with the band and the extent to which third parties may be held liable for breaches of fiduciary duty on the part of the Crown. The first issue forms the basis for the remainder of this chapter, while the latter issues are examined in Part II of this paper.

Preparatory to examining the nature of the relationship between the Crown and the band at each of the relevant periods of time at issue in *Apsassin*, I will briefly set out the facts of the case. Judgment in *Apsassin v. The Queen* was rendered by the Federal

Court (Trial Division) in 1987[209] and by the Federal Court of Appeal in 1993.[210] At issue was a claim by the Blueberry River and Doig River Bands that the Crown had breached its fiduciary duty in relation to a 1945 surrender of certain reserve lands[211] or, alternatively, in relation to the subsequent disposition by the Crown of the mineral rights in those lands. At trial, Addy J. dismissed the bands' action. The bands' appeal of the trial decision was also dismissed.[212]

At the relevant time, the plaintiff Blueberry River and Doig River Bands were constituted as a single band, the Beaver Band, for whom the reserve lands in issue had been set apart.[213] In 1940, the Beaver Band surrendered its mineral rights in the reserve to the Crown for leasing purposes. In 1945, the band surrendered the whole of the reserve to the Crown to be leased or sold. Pursuant to the 1945 surrender, the Crown transferred the surrendered lands in 1948 to the Director of the Veterans Land Act (hereinafter referred to as the "VLA Director"), an office created by Parliament[214] for the purpose of acquiring, administering and disposing of lands for the benefit of veterans of the Second World War.[215] The lands were subsequently resold by the VLA Director, mainly to veterans. Oil was discovered on the lands in 1976. In 1978, the plaintiffs commenced their action against the Crown.

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[209] [1988] 3 F.C. 20 (abridged), 14 F.T.R. 161, [1988] 1 C.N.L.R. 73, 17 C.P.C. (2d) 187 (F.C.T.D.). Future references are to F.C.

[210] (1993) 100 D.L.R. (4th) 504, 151 N.R. 241, [1993] 2 C.N.L.R. 20 (F.C.A.). Future references to D.L.R.

[211] I.R. 172, in the Province of British Columbia.

[212] Judgment by Stone J., with Marceau J. concurring and Isaac C.J. dissenting.

[213] I.R. 172, set aside pursuant to Treaty 8, which the Beaver Band signed in 1900.

[214] Under s. 5 of the *Veterans Land Act*, R.S.C. 1970, c. V-4.

[215] *Supra*, n. 209, at p. 75.

The plaintiffs advanced a number of claims respecting these transactions, of which of principal concern were claims that

(a) the Crown breached its fiduciary duty to the band by allowing unauthorized use of the lands prior to 1945;

(b) the Crown breached its fiduciary duty to the band in securing and accepting the 1945 surrender;

(c) the Crown breached its fiduciary duty to the band in transferring the land to the VLA Director in 1948;

(d) the VLA Director was in a fiduciary relationship to the band, and was in breach of its fiduciary duty in reselling the lands; and

(e) no limitation period should be applied on account of the band's position of subordination to Indian Affairs and a continuing equitable fraud by the latter.

By way of remedy, the plaintiffs sought damages in excess of $300 million and a declaration that the 1945 surrender and subsequent transfer of the reserve to the VLA Director were void or that neither the surrender nor the subsequent transfer included mineral rights.

The 1940 Surrender in Apsassin

The 1940 surrender presents a relatively straightforward application of fiduciary principle as applied in *Guerin*. The validity of the 1940 surrender to the Crown of the minerals rights in the reserve "in trust to lease the same"[216] was not disputed by the plaintiffs at trial. Pursuant to that surrender, a one-year exploration permit had been granted in 1940. Exploration pursuant to the permit uncovered no signs of oil or gas.

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[216] *Ibid.*, at p. 53.

On appeal, Isaac C.J. observed that the Crown was subject to fiduciary obligations relating to its handling of the mineral rights under the 1940 surrender:

> there is no question that after 1940, the Crown was a fiduciary to the Indians with respect to the mineral rights. ... the Crown was under an obligation to deal with those rights for the Indians' benefit and in accordance with the terms of the surrender.[217]

This conclusion would appear to follow readily from the principles laid down in *Guerin*. As a transfer under the *Indian Act* from the band to the Crown of a power to lease the band's mineral rights for their benefit, the conclusion similarly accords with the conditional transfer theory of fiduciary relationships set out earlier.[218]

Other aspects of the Crown/Indian relationship in *Apsassin* were not as easily conceptualized, however. In particular, the plaintiffs advanced several claims relating to the decades preceding the 1940 surrender that do not lend themselves to a simple application of the *Guerin* precedent.

The Pre-surrender Relationship between Band and Crown

The *Apsassin* plaintiffs claimed that the Crown was in breach of a fiduciary duty in allowing the unauthorized use of their reserve lands during the period between 1916 and 1945. Specifically, they alleged that the Crown had a duty to take action to prevent white farmers from grazing cattle on parts of the reserve during that period[219] and to prevent the British Columbia government from exercising regulatory jurisdiction over traditional Indian

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[217] *Supra*, n. 210, at pp. 524-525.

[218] It could also be considered as a transfer of encumbered property, if the band's interest in the reserve's mineral rights is, contrary to Dickson J.'s dicta in *Guerin*, considered to be a proprietary interest.

[219] *Supra*, n. 209, at p. 46.

lands.[220]

At trial, Addy J. held that no such pre-surrender fiduciary duty existed. In considering these issues, he focused particularly on the analysis by Dickson J. in *Guerin* that the Indian interest "gives rise *upon surrender* to a distinctive fiduciary obligation on the part of the Crown" and that "the Crown is under an obligation to deal with the land on the Indians' behalf *when the interest is surrendered.*"[221] On the basis of this reasoning and that of Urie J. in *Kruger v. The Queen*,[222] Addy J. concluded that the fiduciary relationship arises only upon surrender. In consequence, he found that there was no pre-surrender fiduciary duty owed by the Crown in respect of reserve lands:

> With the exception of any special obligations which might be created by treaty, there is no special fiduciary relationship or duty owed by the Crown with regard to reserve lands previous to surrender nor, *a fortiori*, is there any remaining after the surrendered lands have been transferred and disposed of subsequently....[223]

The Court of Appeal, however, took a different approach to the pre-surrender relationship. Stone J. did not regard the language employed in *Guerin* — that the fiduciary obligation arises "upon surrender" — as precluding the existence of a fiduciary relationship prior to surrender.[224] His reasoning as regards the language used by Dickson J. in *Guerin* is in accord with that of Heald J. in *Kruger v. The Queen*, who observed as follows:

[220] In particular by requiring that Indian trap lines be registered (*ibid.*, at p. 41).

[221] *Ibid.*, at p. 45, citing *Guerin*, *supra*, n. 3, at p. 382. Emphasis added by Addy J.

[222] [1986] 1 F.C. 3, 17 D.L.R. (4th) 591 (F.C.A.). Leave to appeal to Supreme Court of Canada denied. Future references to D.L.R. See also *MacMillan Bloedel Ltd. v. Mullin*, [1985] 2 W.W.R. 722 (B.C.S.C.), at pp. 741-742, in which it was held that no fiduciary relationship existed in the absence of a surrender.

[223] *Supra*, n. 209, at p. 46.

[224] *Supra*, n. 210, at p. 565. Marceau J. was of the same opinion, for similar, albeit less detailed, reasons (*supra*, n. 210, at pp. 540-541). Because of the narrower focus of his dissent, Isaac C.J. did not address the question of an ongoing independent fiduciary relationship in the period preceding the 1945 surrender.

> I do not think, however, that what was said by Mr. Justice Dickson relative to the fiduciary relationship existing between the Crown and the Indians can be construed in such a way as to be authority for the proposition generally that the fiduciary relationship arises only where there is a surrender of Indian lands to the Crown.[225]

Instead, he distinguished between a distinctive fiduciary *obligation* that arises on surrender and a more general ongoing fiduciary *relationship* that might exist independently of a surrender,[226] and concluded that a fiduciary relationship had existed between the Beaver Band and the Crown prior to the 1945 surrender.[227]

While it is submitted that Stone J.'s conclusion is accurate, his reasoning is not as persuasive as it might be. Stone J.'s reasoning regarding the possibility of a pre-surrender fiduciary relationship derived from two different sources. Firstly, he felt that the possibility of a pre-surrender fiduciary relationship was indicated by statements made by the Supreme Court in *Mitchell v. Peguis Indian Band*[228] and *R. v. Sparrow*.[229] He referred to the statement in *Mitchell* that

> the native peoples ... agreed to cede their traditional homelands on the understanding that the Crown would thereafter protect them in the possession and use of such lands as were reserved for their use ...[230]

and to the observation in *Sparrow* that

> the government has the responsibility to act in a fiduciary capacity with respect to

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[225] *Supra*, n. 222, at p. 797. Although *Kruger* was cited by Addy J., he made no mention of Heald J.'s analysis.

[226] *Supra*, n. 210, at p. 565.

[227] *Ibid.*, at p. 567.

[228] (1990) 71 D.L.R. (4th) 193 (S.C.C.).

[229] *Supra*, n. 9.

[230] *Supra*, n. 210, at p. 564, citing *Mitchell*, *supra*, n. 228, at p. 225.

aboriginal peoples.[231]

As discussed earlier,[232] however, given that the *Sparrow* decision provided no analysis of the Crown/Indian fiduciary relationship *per se*, the case would appear to provide little support for an extension of the scope of that relationship.

Stone J.'s second line of reasoning related to the vulnerability of the band in its relationship *vis-à-vis* the Crown as a factor leading to the creation of a fiduciary relationship. This aspect was also stressed in the judgment at trial and in Isaac C.J's dissent. Both trial and appeal courts characterized the Beaver Band as a rudimentary, nomadic society.[233] In the trial judgment, Addy J., after lengthy consideration of the culture and social organization of the band, concluded that its members lacked commercial sophistication:

> There seems to be little doubt that, in the 1940's, the [band] did not possess the required skills to engage in any financial planning or budgeting or to generally manage their affairs from a financial standpoint.... the Dunne-za Cree ... still relied to a large extent on advice and guidance from the Department's staff.[234]

Isaac C.J. was of the opinion that such a disability continued until fairly recently:

> There is in my view no doubt that until at least the mid-1970's, the Appellants were simply unable to exercise the same degree of diligence with respect to their legal rights as might be expected of an ordinary member of society.[235]

Based on this characterization of the band, and especially on the lack of formal education and business sophistication of its members, both Stone J. and Isaac C.J.

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[231] *Ibid.*, at p. 565, citing *Sparrow*, *supra*, n. 9, at p. 408. Marceau J. also referred to this statement in support of the existence of a pre-surrender fiduciary relationship (*supra*, n. 210, at p. 540).

[232] *Supra*, p. 52.

[233] *Supra*, n. 209, at p. 43; *supra*, n. 210, at p. 550.

[234] *Ibid.*, at p. 43.

[235] *Supra*, n. 210, at p. 537.

concluded that the band was at the very least in a position of vulnerability with respect to the Crown, although they fell short of stating that they considered the band to be not *sui juris* and therefore in need of protection by the courts.[236]

In support of his reliance on vulnerability as a factor in creating the fiduciary relationship, Stone J. referred to the Supreme Court's decisions in *K.M. v. H.M.*[237] and *International Corona Resources Ltd. v. LAC Minerals Ltd.*[238] and, in particular, to the three-point analysis by Wilson J. in her dissent in *Frame v. Smith* quoted earlier at page 29. He also adverted to the judgment by Sopinka J. in *Lac Minerals* as testimony to the importance of vulnerability among the fiduciary characteristics cited:

> The one feature, however, which is considered to be indispensable to the existence of the relationship, and which is most relevant in this case, is that of dependency or vulnerability.... The necessity for this basic ingredient in a fiduciary relationship is underscored in Professor Weinrib's statement, quoted in *Guerin*, that:
>
> > ...the hallmark of a fiduciary relation is that the relative positions are such that one party is at the mercy of the other's discretion.[239]

In focusing on the apparent vulnerability of the band, however, neither the trial nor the appeal courts distinguished between vulnerability existing independently of the relationship between the band and the Crown and vulnerability *caused by* the relationship.

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[236] *Ibid.*, at pp. 537 and 567. Addy J. had also concluded that the band should not be considered to lack legal capacity:

> Except insofar as those specific restrictions [imposed by the *Indian Act* on the actions and rights of status Indians] might prevent them from acting freely, the Indians are not to be treated at law somehow as if they were not *sui juris* such as infants or persons incapable of managing their own affairs, which would cause some legally enforceable fiduciary duty to arise on the part of the Crown to protect them or to take action on their behalf. They are fully entitled to avail themselves of federal and provincial laws and of our judicial system as a whole to enforce their rights, as they are indeed doing in the case at bar.

[237] *Supra*, n. 38.

[238] *Supra*, n. 22.

[239] *Supra*, n. 210, at p. 566, citing *K.M. v. H.M.*, *supra*, n. 22, at pp. 599-600. The quoted passage is from "The Fiduciary Obligation" by Ernest Weinrib, *supra*, n. 21, at p. 7.

As discussed earlier, it is not the vulnerability of the beneficiary *preceding* the establishment of the fiduciary relationship that should be considered as legally relevant, but rather the vulnerability that results from the transfer of power incident to establishment of the relationship. In *Apsassin* it is arguable that the imposition of the *Indian Act* surrender requirements made the band vulnerable to abuse of the power accorded to the Crown in dealing with the band's lands. However, there was no suggestion made that the band's vulnerability, by reason of its lack of financial sophistication, was caused in any way by the imposition of the *Indian Act* or by any fiduciary relationship flowing therefrom.[240] While the band's relative lack of commercial sophistication is relevant to the Crown's exercise of its powers *within* the fiduciary relationship, as discussed later in this paper,[241] the band's prior vulnerability would appear to be irrelevant to determining the fiduciary nature of the Crown/Indian relationship. Because it is only the vulnerability that results from the fiduciary relationship that is relevant, the existence of vulnerability *preceding* it can therefore be of no assistance in determining whether a fiduciary relationship exists in the first instance.

The analysis of whether a fiduciary relationship can or does exist prior to the occurrence of a surrender should logically commence with examination of whether the *Indian Act* provides a source of a conditional transfer of power sufficient to ground a fiduciary relationship between Indian bands and the Crown that is independent of the

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[240] While some commentators might suggest that the imposition of the paternalistic regime embodied in the *Indian Act* is in fact responsible for many of the disadvantages experienced by some aboriginal groups, the complex sociological argument underlying this suggestion is not evidenced in the *Apsassin* judgments.

[241] See discussion, *infra*, p. 113

specific circumstances surrounding the surrender of reserve lands.[242] As discussed earlier, the *Indian Act* requires that a band wishing to alienate its lands must first transfer its interest in those lands to the Crown and then allow the Crown to act as an intermediary in the transaction.[243] When this is considered in conjunction with the discretion accorded by the Act[244] to the Crown in so acting and the requirement that that discretion be exercised for the benefit of the band, it can be seen that the Act effectively provides for the transfer of an encumbered power from the band to the Crown in every situation in which an alienation is contemplated. It is important to recognize that although the power in question is only actually transferred to the Crown when a band enters into a surrender, the statutory arrangement that requires such a transfer is ever-present.

An analogy might be made to an agent who by arrangement acts for a principal in all of the principal's real estate transactions. Although such transactions may only occur at irregular intervals, the agent will be considered to have an ongoing fiduciary relationship with the principal in respect of the principal's real estate dealings. It is similarly arguable that the framework of the *Indian Act* affords a sufficient basis for the existence of an ongoing fiduciary relationship between the Crown and the band that applies at least to the

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[242] While *Guerin* identifies two sources of fiduciary obligation, the framework of the *Indian Act* and the Indian interest, this examination focuses on the conditional transfer of power inherent in the former for two reasons. In addition to the uncertainty as to the theoretical basis for the Indian interest component of the Crown's fiduciary obligations, the element of the Indian interest is common to the situation in *Guerin* and to both claims in *Apsassin* in respect of the pre-surrender period (this assumes, for discussion purposes, that the band would be able to demonstrate an appropriate Indian interest in the non-reserve traditional lands involved in the claim respecting regulatory interference by the Province of British Columbia). The key difference between the two situations therefore resides in the *Indian Act* component of the relationship, and the extent to which it operates differently in the Crown/Indian relationship prior to or absent a surrender as compared with its operation post-surrender.

[243] Although for discussion purposes I am limiting my comments to alienation by surrender, as all of the *Indian Act*'s exceptions to this rule — authorizations under s. 18(2), s. 28(2) permits and leases under s. 58 — involve the exercise of a power of alienation by the Crown similar to that obtaining under a surrender, similar considerations would apply in each of those cases.

[244] Under s. 18(1).

extent of any contemplated or actual surrender of the band's reserve lands.[245] By extension, because similar surrender requirements have existed in various forms in the predecessors to the present *Indian Act*, an argument can be made for the existence of a similar fiduciary relationship dating back to the introduction of the first *Indian Act*[246] surrender requirement and even, subject to certain qualifications,[247] to the *Royal Proclamation of 1763*.[248]

It is extremely important, however, to distinguish between the existence of an ongoing fiduciary relationship between the Crown and Indian peoples with respect to *alienation* of their lands and a broader relationship with respect to Indian land, *per se*. As noted above, a fiduciary relationship can be supported in relation to the alienation of Indian lands because of the transfer of power inherent in the *Indian Act* requirement that the Crown, and not the band, dispose of the land. Absent an alienation, however, it is difficult

[245] *McMaster v. Byrne*, [1952] 1 All E.R. 1362 at p. 1367. As Finn notes (*supra*, n. 66, at p. 191), "if a person continually resorts to another for advice then, apart from the individual relationship created in respect of each engagement, a continuing relationship of confidence may be generated between them." Although some commentators have suggested that the Crown's fiduciary obligation might not extend to certain recently acquired reserve lands on account of the absence of a historically grounded Indian interest in those lands (Emond, *supra*, n. 167, at p. 73), on the reasoning applied herein, the transfer of power mandated by the *Indian Act* would create a fiduciary obligation applicable to all reserve lands without exception.

[246] *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance lands*, S.C. 1868, c. 42, s. 8 of which provided for the surrender of Indian lands.

[247] As noted earlier (*supra*, p. 44), the *Royal Proclamation of 1763* introduced the requirement that purchases of Indian land within the settled colonies were to be made only in the name of the Crown and at a public meeting called for that purpose. Since the *Royal Proclamation* did not cover all of Canada, however, its application would have necessarily been geographically limited (see McMurtry and Pratt, *supra*, n. 15, at p. 28).

[248] Waters, *supra*, n. 6, at p. 416. It should be noted, however, that while the *Royal Proclamation* may have introduced a contemporaneous fiduciary relationship between the Crown and the Indian nations of that day, contrary to what some might argue (e.g., Reynolds and Harvey, *supra*, n. 4, at p. 33) the present fiduciary relationship is grounded in the present *Indian Act*, which has superseded the *Royal Proclamation* in all pertinent respects.

to pérceive any transfer of power to the Crown, and hence to identify any discretion accorded to the Crown in exercising such a power. As Scott points out, the scope of the fiduciary's obligations is proportional to the extent of the power transferred.[249] Slaght, too, observes that

> a relationship may be fiduciary in nature for only some specific purposes or in respect of some specific property, idea or action, or concerning only one of a number of joint undertakings.[250]

As Sopinka and McLachlin JJ. point out in *Hodgkinson v. Simms*,

> not every act in a so-called fiduciary relationship is encumbered with a fiduciary obligation[251]

Without a transfer of power to the Crown and the existence of a discretion in exercising that power, there is no basis for imposing any accompanying fiduciary obligation. And these two elements exist only in relation to alienations of reserve land.

Identifying the ongoing Crown/Indian fiduciary relationship in respect of Indian lands as a relationship in respect only of *alienation* of those lands clarifies the position of the Crown, and any obligations it might have, with respect to the pre-surrender claims put forward by the band in *Apsassin*. As it will be recalled, the two claims dealt with on appeal were claims that the Crown had a duty to prevent non-Indian farmers from grazing cattle on parts of the reserve and to prevent the British Columbia government from exercising regulatory jurisdiction over traditional Indian lands. Neither of these claims involve any actual or proposed alienation of reserve land, with a consequent transfer of

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[249] *Supra*, n. 48, at p. 541.

[250] *Supra*, n. 32, at p. 40.

[251] *Supra*, n. 18, at p. 464. This accords with the House of Lords' dicta in *N.S. Netherlands Society v. Kuys*, [1973] 2 All E.R. 1222 at 1225, in which it stated that

> A person ... may be in a fiduciary position quoad a part of his activities and not quoad other parts: each transaction, or group of transactions, must be looked at.

power to the Crown, nor do they involve any similar transaction in which the band might have bequeathed power to the Crown on the understanding that it would be exercised on the band's behalf.

As Frankel states, "The law does not impose any obligation to act on the fiduciary except to the extent that he has assumed fiduciary power."[252] For this reason, because the actions complained of are outside the scope of the band's fiduciary relationship with the Crown, there is no basis for the imposition of fiduciary obligations in respect of those actions.

What then is one to make of Stone J.'s effort to distinguish between a fiduciary *obligation*, arising on surrender, and a pre-existing fiduciary *relationship*. His comments are similar to those of Iacobucci J. in *A.G. Quebec v. Canada (National Energy Board)*, who stated:

> It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. The Queen*. Nonetheless, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation.[253]

The difference between a fiduciary obligation and a fiduciary relationship is, to a large extent, more a matter of semantics than of law. In general terms, once any fiduciary relationship is formed, certain obligations, primarily those of a proscriptive nature,[254] immediately apply. These would include duties such as the duty not to usurp opportunities falling within the scope of the fiduciary relationship that might otherwise be available to the beneficiary.[255] Other fiduciary duties, however, such as the duty not to benefit another at

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[252] *Supra*, n. 31, at p. 830.

[253] *Supra*, n. 193, at p. 147.

[254] In the sense of a duty *not* to act in a certain manner.

[255] For a more detailed discussion of duties of a fiduciary, see discussion *infra*, at p. 86.

the expense of the beneficiary, are only called into play when the fiduciary actually acts in the exercise of the transferred power.[256] Therefore, while the latter duty exists from the inception of the relationship, it remains quiescent or inert until the fiduciary acts under the relationship, at which time it is either fulfilled or breached.

There is one type of fiduciary relationship, however — the true trust relationship — that usually involves affirmative, as opposed to proscriptive, obligations from the inception of the relationship.[257] For this reason it is worthwhile to compare the trust relationship to the Crown/Indian relationship to determine whether the latter can be characterized as a trust relationship capable of supporting a broad pre-surrender fiduciary obligation that would include a duty to protect the subject assets — in this case reserve lands — from depredation or depreciation. As noted earlier, Dickson J. specifically negatived the existence of a trust in relation to surrenders of Indian land. One of his main reasons for doing so followed from his finding that the Indian interest disappeared on surrender and that there was therefore nothing capable of forming the trust *corpus*.[258]

Although certain factors might point to a trust model for the pre-surrender relationship,[259] for a number of reasons the trust paradigm is inappropriate to Indian lands. Two considerations that might point to a trust model are, firstly, the argument that the Indian interest, notwithstanding Dickson J.'s characterization of it as non-proprietary, is capable of forming the subject of a trust and, secondly, the fact that, even if the Indian

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[256] Finn notes that such duties, while from time to time "cast judicially as a positive duty ... in practice often amount to little more than an exhortation to fiduciaries to be on their mettle — to be in a state of preparedness to act when action would be advantageous to their beneficiaries" (*supra*, n. 66, at p. 34).

[257] Finn, *supra*, n. 66, at p. 34.

[258] *Supra*, n. 3, at p. 342.

[259] See also comments by Waters, *supra*, n. 6, at p. 423.

interest disappears on surrender, prior to surrender the Indian interest would still be present. For several reasons, however, founding an ongoing Crown/Indian relationship on the private law trust model is inappropriate. Firstly, the trust model contemplates a transfer of both title and control to the trustee. Even if one argues that Indian title has been transferred by treaty or cession to the Crown, de facto control of unsurrendered reserve lands has stayed with Indian bands. Compare this to the circumstances of comprehensive control existing in *U.S. v. Mitchell (Mitchell II)*, where the U.S. Supreme Court held the government of the United States to be a common law trustee of Indian timber resources:

> The timber management statutes and the regulations promulgated thereunder establish the "comprehensive" responsibilities of the Federal Government in managing the harvesting of Indian timber. The Department of the Interior — through the Bureau of Indian Affairs — "exercises literally daily supervision over the harvesting and management of tribal timber". Virtually every stage of the process is under federal control.[260]

Under a trust, the trust instrument dictates the use to which the trust property is to be put. Indian bands, on the other hand, maintain possession and exercise day-to-day control of reserve lands and, by dictating the terms of surrenders, control the manner of their ultimate disposition. The trust paradigm does not therefore represent the reality of the Crown/Indian relationship in respect of reserve lands.[261] The element of control distinguishes the Crown/Indian relationship in respect of reserve lands from a true trust relationship.[262]

Recognizing that the Crown/Indian relationship in respect of reserve land is a

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[260] (1983) 463 U.S. 206, at p. 222, citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 145.

[261] Emond, *supra*, n. 167, at p. 81. That is not to say, however, that it does not represent the reality in respect of other Indian assets, such as band monies, discussed *infra* at p. 77.

[262] The argument that in particular cases treaties constitute the trust document is by its nature limited to specific factual situations that would have to be analysed on a case-by-case basis having regard to the particular terms of each treaty. Such an argument is not capable of general application to the Crown/Indian relationship.

fiduciary relationship relating only to the alienation of those lands helps to put into perspective a number of additional pre-surrender issues that were dealt with at trial but not expressly considered by the Court of Appeal.[263] At trial, Addy J. alluded to arguments by the plaintiffs that the Crown had a legally enforceable duty to protect the band and take other actions on its behalf. He rejected these arguments, observing that

> subsection 91(24) of the *Constitution Act, 1867* ... does not carry with it the legal *obligation* to legislate or to carry out programs for the benefit of Indians any more than the existence of various disadvantaged groups in society creates a general legally enforceable duty on the part of governments to care for those groups although there is of course a moral and political duty to do so in a democratic society where the welfare of the individual is regarded as paramount.[264]

These comments are somewhat suggestive of the political trust concept, rejected by the Supreme Court in relation to surrenders in *Guerin*.[265] Indeed, speaking of the pre-surrender period generally, Addy J. made the following comments:

> There might indeed exist a moral, social or political obligation to take special

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[263] In an additional argument advanced at trial but not considered by the Court of Appeal, the plaintiffs contended that certain statements made by Crown representatives and noted in a report of the Commissioners for Treaty 8 obliged the Crown to provide sufficient lands as may from time to time have been required to ensure that the band maintained in perpetuity a land base equal in acreage to that provided under Treaty 8. Although Addy J. found the plaintiffs' interpretation of those statements to be unsupportable, he made the following observations (*supra*, n. 209, at p. 52) respecting the legal effect to be accorded to them:

> Because of the special relationship existing between the Crown and the Indians, the illiteracy of the latter and their dependency on the advice of agents of the Crown, if there was in fact a special representation made to the Indians to that effect previous to signature, any such representation would be fully binding at law on the Crown, notwithstanding the fact that it might not have been incorporated in the formal terms of the Treaty.

It is not clear on what basis Addy J. considered that such representations would be legally binding. In substance, this statement is very similar to the position taken by Dickson J. in *Guerin* regarding the binding nature of oral representations made to the Crown at the time of surrender. As Addy J. had earlier concluded that the Crown's fiduciary duty arose only upon a surrender, however, it would appear that he did not interpret this "special relationship", which occurs in a non-surrender context, to be fiduciary in nature.

[264] *Supra*, n. 209, at p. 47. Emphasis present in original text.

[265] See discussion, *supra*, at p. 42.

> care of the Indians and to protect them (especially those bands who are not advanced educationally, socially or politically) from the selfishness, cupidity, cunning, stratagems and trickery of the white man. That type of political obligation, *unenforceable at law*, ... would be applicable previous to surrender.[266]

The plaintiffs' arguments regarding alleged legislative obligations on the part of the Crown highlight the importance of recognizing that the fiduciary relationship of the Crown is situation-specific, as opposed to pervasive. As a situation-specific relationship, it arises in certain circumstances, such as surrenders of reserve lands, where the *Indian Act* requires that a band relinquish its power to deal with its property to the Crown in exchange for the implicit undertaking by the Crown to act in the band's best interests. Such elements, however, exist only in distinct, relatively narrowly defined contexts such as those involving alienations of reserve lands. Attempts to invoke fiduciary obligations in pre-surrender circumstances not involving those elements are therefore ill-founded.

Notwithstanding the divergent reasoning relied on by the Court of Appeal in *Apsassin*, the above analysis would indicate that the Court was correct in its conclusion that a fiduciary relationship existed between the Crown and the band in respect of alienation of the band's lands during the period prior to the surrenders at issue in that case. The *Indian Act* requirement that a band contemplating an alienation of its lands must first transfer those lands to the Crown to dispose of on its behalf, and the corresponding discretion vested in the Crown in doing so, supply the requisite conditions for establishment of an ongoing fiduciary relationship in respect of the alienation of Indian lands, as is suggested by the conditional transfer theory discussed above. Moreover, because these conditions have existed in one form or another since the *Royal Proclamation of 1763*, it is arguable that

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[266] *Supra*, n. 209, at p. 46.

some form[267] of fiduciary relationship has in fact existed since that time.

From the above it would appear that the Crown/Indian fiduciary relationship in the context of reserve land surrenders accords well with the private law model of fiduciary relationships, and that a case can be made for an ongoing fiduciary relationship in respect of all potential alienations of reserve land under the *Indian Act*. Before proceeding to a discussion of some of the implications of fiduciary status in Chapter IV, I propose to briefly examine the extent to which the principles identified in respect of reserve lands can be applied to other facets of the Crown/Indian relationship.

The Crown/Indian Fiduciary Relationship in Areas Other than Surrenders

Having examined the Crown/Indian fiduciary relationship in the context of the surrender of reserve lands, it is interesting to consider briefly in what other areas the Crown's fiduciary obligations might take root. As has been described above, a fiduciary relationship should be recognized in any situation in which a conditional transfer of power or property takes place — in other words, in any circumstance in which discretionary power or property is transferred by an Indian or an Indian band to the Crown to be used for the former's benefit. While this could theoretically occur by a voluntary act of the Indian beneficiary, in practice it will invariably happen as a result of a statutory compulsion, of which the requirements of the *Indian Act* provide the most noteworthy examples.

The most easily identifiable provisions of the *Indian Act* requiring a transfer of discretionary power[268] are those most closely analogous to that Act's surrender provisions:

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[267] Because the actual surrender-type requirements and the political relationship between bands and the Crown have varied over that period, the nature of the fiduciary relationship, and the content of the duties inherent in that relationship, would have varied accordingly.

[268] Or, if one discounts the *Guerin* characterization of the Indian interest as non-proprietary, a transfer of property.

those dealing with non-surrender alienations of interests in reserve lands. These include

- s. 18(2), under which the Minister of Indian Affairs may authorize the use of reserve lands for certain purposes, some of which require the prior consent of the band council;
- s. 28(2), under which the Minister may authorize a person to occupy or use reserve land, or to reside or exercise other rights on a reserve for a period not exceeding one year or, with the consent of the band council, for a longer period;
- s. 58(1), under which the Minister may authorize the cultivation of unused reserve land, grant agricultural or grazing leases of unused reserve land or grant a lease "for any purpose that is for the benefit of the person in possession of the land";
- s. 58(3), under which the Minister may lease any locatee lands for the benefit of the locatee; and
- s. 58(4), under which the Minister may dispose of wild grass or dead or fallen timber or, with the consent of the band council, sand, gravel, clay and other non-metallic substances on or under reserve lands.

In each of the above instances, if an Indian beneficiary — either a band or an individual band member — wishes to enter into a transaction involving an interest in, or a right to use, reserve land or an individual allotment of reserve land, the beneficiary must request that the Minister of Indian Affairs enter into the transaction on their behalf. Because the ultimate lease or permit is entered into not between the beneficiary and the end user but instead between the Crown and the third party, power passes to the Crown to set the terms of the transaction, embodied in the final lease or permit signed by the Crown. As in the analogous situation of a surrender, the Indian beneficiary of a lease or permit under any of the above provisions must ultimately rely on the Crown to look after its best interests. The words of s. 18(1), which were cited in *Guerin* as evidence that the Crown is under an obligation to act in the Indian beneficiary's best interest, are not directed to surrendered lands in particular, but apply to all reserve lands generally.[269] Subsection 18(1) should therefore be construed to import an equivalent obligation in each of the circumstances described above. From this it is quite apparent that a fiduciary obligation, equivalent to that pertaining to a surrender of reserve lands, should also apply in each of the lease and permit situations described in ss. 18(2), 28(2) and 58(1), (3) and (4).

Certain regulations also provide for the alienation of interests in reserve land. These are the *Indian Mining Regulations*,[270] the *Indian Oil and Gas Regulations*[271] and the *Indian Timber Regulations*,[272] which provide for the alienation from reserves of minerals, hydrocarbons and forestry products, respectively. Because any alienation of minerals or oil and gas must be preceded by a surrender, the Crown/Indian relationship in respect thereof falls squarely within the parameters established in *Guerin*. Under the *Indian Timber Regulations*, timber leases may be granted without the necessity of a surrender. However, as is the case with leases entered into under s. 58 of the *Indian Act*, reserve land timber leases must be entered into between the Crown and the third party involved, and power therefore passes to the Crown respecting the final terms of the transaction. The same reasoning applying to s. 58 leases therefore applies to Indian timber leases, and the

[269] Subsection 18(1) states that "the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band".

[270] C.R.C., c. 956.

[271] C.R.C., c. 963.

[272] C.R.C., c. 961.

fiduciary relationship established in respect of the latter is therefore arguably the same.[273]

One type of transaction involving Indian land, expropriation under s. 35 of the *Indian Act*, does not fit easily within the fiduciary model. As Urie J. noted in *Kruger*, quoting from the trial judgment in that case,

> Parliament cannot have intended that the Governor in Council consider only the best interests of the band concerned in deciding whether or not to consent to an expropriation of reserve lands. It is rarely in the best interests of an occupant to be dispossessed or of an owner to be deprived of his property against his will.[274]

In deciding whether to accede to an expropriation request under s. 35(1), Parliament did not likely intend that the Governor in Council make its decision with only the best interests of the band in mind. Its decision whether to agree to an expropriation is likely guided not by fiduciary standards,[275] but by a *Sparrow*-like consideration of whether the objective sought to be accomplished by the expropriation is being attained with the least possible infringement on Indian interests. All of the judges in *Kruger* did agree, however, that the Crown's fiduciary obligations came into play in ensuring that the band in question received full compensation for the expropriation.[276] Because it is reasonable to conclude, given the context of the Crown/Indian relationship, that the reason for the *Indian Act* requirement of Governor in Council consent is to protect the interests of a band in expropriation proceedings, this conclusion would appear to be appropriate.

Certain areas of governmental activity under the *Indian Act* are noteworthy in that

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[273] Reiter also identifies these as areas of potential fiduciary obligation, *supra*, n. 78, at p. 25.

[274] *Supra*, n. 222, at p. 648, quoting from the trial judgment, (1981) 125 D.L.R. (3d) 513 (F.C.T.D.), at p. 519.

[275] Finn notes that the fiduciary conflict of interest rule "can have no application ... where the obtaining of a personal benefit is an inevitable consequence of the exercise of a particular power" (*supra*, n. 66, at p. 48).

[276] *Supra*, n. 222, at p. 647.

they present something very close to the true trust paradigm that was rejected in respect of the surrender of Indian lands. These are the areas of the administration of Indian estates, the administration of the assets of mentally incompetent Indians and the handling of Indian monies.[277]

Under s. 43(*d*) of the *Indian Act*, the Minister may carry out the terms of wills of deceased Indians and administer the property of Indians who die intestate. Similarly, under s. 51 of the Act, all jurisdiction and authority in relation to the property of mentally incompetent Indians is vested exclusively in the Minister of Indian Affairs. Except where another executor or administrator is appointed by the court,[278] the assets of deceased or mentally incompetent Indians are administered by employees of Indian Affairs. This normally includes paying debts and expenses incurred in respect of the estate and, in the case of a deceased's estate, distribution of the residue to appropriate beneficiaries. In all such instances, an Indian Affairs administrator has complete control over the assets in question and may dispose of them as he or she sees fit. There would appear to be no reason why such an administrator should not be considered to be a trustee in the same sense as would an estate administrator in private law, and therefore be subject to all of the fiduciary duties that would attach to such a trustee in the private sector.[279] These would likely include such affirmative obligations as preventing perishable assets from wasting and, in some cases, the duty to appropriately invest trust assets.

The government's handling of Indian monies presents a more complicated situation. As has been noted, all transactions involving interests in Indian lands must be

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[277] Although the *Indian Act* and regulations use the spelling "moneys", the more standard spelling "monies" will be used herein.

[278] Under s. 44 or s. 51(2)(*a*) of the Act.

[279] See also Reiter, *supra*, n. 78, at p. 31.

entered into between the third party lessee or purchaser and the Crown and all consideration paid by the third party under such transactions is payable to the Crown. This can involve substantial amounts, especially where Indian oil and gas royalties are concerned. Under s. 62 of the *Indian Act*, all monies derived from the sale of surrendered lands or the sale of capital assets of a band are considered to be capital monies, while all other monies received are considered to be revenue monies. Under s. 61(1) of that Act, the Governor in Council is accorded in respect of Indian monies very much the same discretion as that provided to it in respect of reserve lands under s. 18(1):

> 61. (1) Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held, and ... the Governor in Council may determine whether any purpose for which Indian moneys are used or are to be used is for the use and benefit of the band.

Under ss. 64(1) and 66, the Minister of Indian Affairs may, with band council consent, authorize the expenditure of capital and revenue monies for certain enumerated purposes. A considerable amount of discretion is accorded the Minister under s. 64(1)(*k*), which provides that the Minister may authorize expenditure of capital monies for "any other purpose that in the opinion of the Minister is for the benefit of the band", and under s. 66(1), under which the Minister may authorize the expenditure of revenue monies for "any purpose that in the opinion of the Minister will promote the general progress and welfare of the band or any member of the band".

The above framework exhibits what are essentially the characteristics of a true trust. The Crown receives monies for the benefit of a band, with the band in many cases never handling the funds. As in a trust, the funds are distributed to the beneficiary only for certain well-defined purposes, set out in a governing instrument — in this case, the *Indian*

Act. This accords with the finding of the Exchequer Court in *Dreaver v. The King*,[280] which held that the Crown could disburse the proceeds of the sale of treaty lands only for the purposes set out in the treaty. Such a conclusion is also in line with American case law, which holds that the U.S. government holds band funds subject to obligations equivalent to those of a private trustee, even where there is no express provision for a trust or fiduciary obligation in the underlying statute.[281]

The conclusion that Indian monies are held by the Crown subject to what is essentially a true trust has several important implications. One of the primary obligations of a trustee is to invest the trust funds in conservative investments in order to generate income for the trust.[282] Indian monies are held in the Consolidated Revenue Fund, and under s. 61(2) of the *Indian Act* interest on those monies is paid at a rate fixed from time to time by the Governor in Council. The question that this practice raises is whether the rate of interest paid on Indian monies is equivalent to, or better than, that which could be obtained through other appropriate investments. In *Manchester Band of Pomo Indians Inc. v. U.S.*,[283] the United States government was held liable for depositing Indian revenue funds in Treasury accounts that either bore no interest or that bore interest at a rate lower than that available in other authorized depositories. Given the similarity of the circumstances in which the Canadian government holds Indian monies, it would seem likely that it would be

[280] (1935) 5 C.N.L.C. 92.

[281] *Manchester Band of Pomo Indians Inc. v. U.S.* (1973), 363 F. Supp. 1238 at 1245-1248; *The Navajo Tribe of Indians v. U.S.* (1980), 62 F. 2d 981.

[282] Waters, *supra*, n. 24, at p. 765; Oosterhoff and Gillese, *supra*, n. 65, at p. 612; Johnston, *supra*, n. 7, at p. 324; and Finn, *supra*, n. 66, at p. 114.

[283] *Supra*, n. 281.

held to a similar standard.[284] At least one action has been commenced against the Crown for improper investment of Indian monies.[285]

An additional factor may predispose the courts to a strict interpretation of the Crown's obligations in respect of the investment of Indian monies. In private law, a trustee may not invest trust money in its own assets, nor may a trustee borrow money from the trust.[286] By holding Indian monies in its own Consolidated Revenue Account and using that money for other public purposes, the Crown is in effect breaching this rule. While the Crown may argue that this is a practical necessity, because in doing so it departs from the standard to which other trustees are held, the courts may give particular attention to the adequacy of the interest income paid on these monies.

Aside from a duty to properly invest Indian monies, the Crown faces additional obligations regarding the distribution of those funds. Because of its obligation to treat all beneficiaries equally, the Crown would likely incur liability if it were to distribute funds other than according to each beneficiary's entitlement, just as it would if it distributed funds to those not entitled.[287] It is also possible that the Crown's fiduciary duty extends to confirming that Indian monies turned over to a band council are spent by the council for the intended purposes.[288] Moreover, because a trustee must take into account the interests of

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[284] *Wallersteiner v. Moir (No. 2)*, [1975] Q.B. 373 at p. 388, indicates that an appropriate rate of return would be one per cent per annum above the official bank rate or minimum lending rate.

[285] *Chief Jerome Morin et al. v. The Queen* (F.C.T.D.). The case is still pending.

[286] Waters, *supra*, n. 24, at p. 726-727; and Scott, *supra*, n. 48, at p. 552.

[287] Finn, *supra*, n. 66, at p. 56. American jurisprudence has held the U.S. government liable to account for a discriminatory distribution of the proceeds of timber sales: *U.S. v. Short* (1983), 719 F. 2d 1133; *Seminole Nation v. United States* (1942), 62 S. Ct. 1049.

[288] *Deer v. Mohawk Council of Kahnawake and The Queen*, [1991] 2 F.C. 18, in which the Federal Court of Appeal refused to strike out such a claim.

future beneficiaries,[289] there is even an argument that the Crown could be held liable for acceding to a band council's request for distribution of capital funds if the effect would be to impoverish future generations of band members.

While it is clear that the Crown should be held to certain minimum standards in its handling of Indian monies, it must also not act so conservatively as to totally ignore the aspirations of Indian people and stifle the opportunities for economic development that Indian monies can generate. Until the Crown acts to transfer ownership and control of Indian capital and revenue to its Indian beneficiaries, it will have to continue to operate as best it can within what one judge recently referred to as "an area of law which could not be said to be settled with certainty".[290]

Having noted a number of areas in which it is logical that the Crown should be held subject to certain fiduciary obligations, it may be worth noting that, by the same reasoning, there are a number of areas of governmental activity in which the Crown should *not* be held to account as a fiduciary. According to the principles embodied in the conditional transfer theory, this would encompass any situation in which there is no transfer of power or property from an Indian beneficiary to the Crown that is encumbered by the condition that the power or property be used for the best interests of the beneficiary. Among the numerous possible examples, two are worth noting. The first area that should not be considered to be subject to fiduciary constraints is the disbursement of discretionary funding for Indian housing, infrastructure or economic development or to fund legal actions against the Crown.[291] Although the Crown exercises a discretion regarding benefits to

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[289] Oosterhoff and Gillese, *supra*, n. 65, at p. 615.

[290] *Cardinal v. The Queen*, [1994] 3 C.N.L.R. 41 (Fed. C.A.), at p. 43.

[291] See *Ominayak and Lubicon Lake Indian Band v. Canada* (1987), 11 F.T.R. 85.

Indian people, the power in question is not a power that has been transferred to the Crown by, or on behalf of, the intended beneficiaries, but rather a power conferred on the Crown by Parliament through various appropriation Acts. A second example of a non-fiduciary power would be the power of the Crown to enact legislation for the benefit of Indian people.[292] Once again, although the exercise of legislative power is discretionary, the power in question is not one that has been transferred to the Crown subject to any condition as to its use.[293]

One area in which the nature of the Crown/Indian fiduciary relationship has its greatest impact is in the area of aboriginal self-government. Although some writers have questioned whether the Crown/Indian fiduciary relationship may ever be terminated,[294] when one looks to the source of the Crown's fiduciary obligations it is clear that the relationship, and the obligations flowing from it, will be terminated by any self-government arrangement under which complete control over reserve land and Indian assets is granted to the Indian beneficiaries thereof.

As noted earlier, the Crown/Indian fiduciary relationship is founded on twin pillars: the Indian interest and the *Indian Act*'s surrender requirement — the requirement that the Crown be interposed between Indians and third parties in transactions involving their lands. While the former is a constant, the latter is not likely to be carried over into any self-government arrangement that excludes the operation of the *Indian Act*. Once a new statutory arrangement is put in place, the *Indian Act* interpositioning requirement will

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[292] Technically, only a regulation-making power would be considered to be a power exercisable by the Crown, although an executive at the head of a majority government would also be in a position to introduce such statutes as it pleased.

[293] *Alexander Band v. Canada*, [1991] 2 F.C. 3, (1990) 39 F.T.R. 142, [1991] 2 C.N.L.R. 22 (F.C.T.D.)

[294] Reynolds and Harvey, *supra*, n. 4, at p. 30.

no longer apply and, unless the new arrangement mimics the former requirements or otherwise provides for a conditional transfer of power to the Crown,[295] one of the two foundations of the fiduciary relationship will be missing and that relationship will cease. It would therefore appear that the fiduciary element of the Crown/Indian relationship will subsist only as long as Indian bands remain under the *Indian Act*, and will cease if that Act is amended so as to remove the Crown's power and the discretion that accompanies that power.

Considered in light of the conditional transfer theory, this makes perfect sense. Unless a new self-government arrangement provided for the transfer of power or property to the Crown on condition that it be used for the benefit of Indian beneficiaries, there would be no basis for invoking fiduciary obligations; because the Crown would have no discretionary power left, there would be no reason to call for fiduciary obligations to confine its exercise.[296]

Having examined the basis for the Crown/Indian fiduciary relationship, I will now turn briefly to an examination of the implications of that relationship for the Crown in terms of fiduciary duties and the consequences of breach of such duties. Because the

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[295] An unlikely event.

[296] Most native law scholars appear to accept this premise. Reiter puts it thus (*supra*, n. 78, at p. 22):

> Academics agree that when a particular Indian band is given discretionary power which they are entitled to hold and are competent to wield, the Crown's responsibility to oversee their actions and decisions is decreased in a manner proportionate to the band's independence and expertise. The Crown only remains a fiduciary so long as it continues to exercise discretion and control in relation to a vulnerable Indian people.

The view that the Crown's fiduciary obligations continue only so long as its discretion remains is echoed in the following passage cited by Reiter (*supra*, n. 78, at p. 23) from an unpublished paper "The Present System" by P. Lancaster (First Nations Land Ownership Conference, Vancouver, B.C., September 29, 1988) at p. 5:

> the government could terminate its fiduciary obligation if it were to give to the First Nations themselves the power to deal with their lands as they wish. In as much as it retains its discretion over the use of Indian lands, it would appear that the Crown must act as a responsible fiduciary.

Crown/Indian fiduciary relationship is attributable to the same factors that govern private fiduciary relationships in the common law, it is reasonable to look to that law and to those relationships for the parameters of the obligations that attach to the Crown as a fiduciary in its relationship with aboriginal peoples. The following chapter examines some of the obligations that have been held to govern fiduciary relationships. Part II then offers a more detailed examination of a particular fiduciary obligation, that of avoidance of conflict of interest, and its significance for the Crown in its dealings with reserve lands.

CHAPTER IV
IMPLICATIONS OF THE CROWN'S FIDUCIARY RELATIONSHIP

General Rules Applicable to Fiduciaries in Private Law

As a prelude to examination of the application of fiduciary rules to the Crown in relation to the alienation of Indian lands, it is instructive to look at the manner in which those rules are applied in the private law context. Once a fiduciary relationship has been found to exist, the law will hold the fiduciary to what Laskin J. referred as "norms of exemplary behaviour".[297] As the conditional transfer theory's description of a transfer of *encumbered* power or property signifies, the courts have required that the fiduciary's use of the transferred power or property be directed always to the best interests of the beneficiary. This is sometimes described as a requirement of *uberrimae fides* or utmost good faith[298] — an "absolute and perfect candour or openness and honesty; the absence of any

[297] *Canadian Aero Service Ltd. v. O'Malley, supra*, n. 27, at p. 384.

[298] Ellis, *supra*, n. 48, at p. 1.2; DeMott, *supra*, n. 23, at p. 882.

concealment or deception, however slight".[299] In applying this requirement to the specific circumstances before them, the courts have derived a number of rules of conduct applicable to fiduciaries.

Before considering particular rules of conduct it is important to recognize that one element, always present but not always explicit, must be read into the iteration of each rule: i.e., that the requirements of the particular rule apply unless the fiduciary obtains from the beneficiary proper consent[300] to a departure from the rule. In fiduciary relationships in which the beneficiary is a party to determination of the terms of the relationship, such as the Crown/Indian surrender relationship, by properly obtaining the consent of the beneficiary to an otherwise proscribed act or decision, the fiduciary can remove that act or decision from the scope of his or her fiduciary duties.[301] In the result, each duty

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[299] *Black's Law Dictionary*, 4th ed., (St. Paul, Minn: West Publishing Co., 1968).

[300] The requirements for such consent are discussed, *infra*, at p. 105. For future reference, consent that meets all legal requirements will be referred to as "proper" or "appropriate" consent.

[301] Shepherd, *supra*, n. 20, at p. 170. This statement, while applicable in the context of the Crown/Indian relationship, requires some qualification, because different types of fiduciary relationship differ in the extent to which the beneficiary may vary the fiduciary's obligations (Finn, *supra*, n. 66, at p. 21). In certain relationships, some scholars treat consent not as an element of the fiduciary duty *per se*, but rather as a defence to breach of the duty (see, for example, Oosterhoff and Gillese, *supra*, n. 65, at p. 760). To address this point, it is suggested that fiduciary relationships be viewed as falling into two categories: those in which the beneficiary is empowered to alter the terms of the relationship and those in which the beneficiary cannot. For purposes of this discussion, let us refer to the former as dynamic relationships and the latter as static relationships. An agency agreement would typically constitute an example of a dynamic relationship, given that the principal is free to unilaterally limit or vary the terms of the agency; an example of a static relationship would be the typical true trust, in which the parameters of the relationship are set out in the trust instrument and may not be altered by the beneficiary. Oosterhoff and Gillese describe the distinction (at p. 60) as follows:

> ... an agent acts on behalf of, and subject to the control of, the principal. In contrast, a trustee is not subject to direction or control by the beneficiaries, beyond the obligation to deal with the trust property in accordance with his or her trust duties. This distinction holds, even when all the beneficiaries are *sui juris* and unanimous in their desire to replace the current trustee with a trustee of their choosing; no beneficiary can interfere with the exercise of the trustee's fiduciary powers in the administration of the trust.

The differences between the capacities of the beneficiaries in the above two categories to alter the parameters of the fiduciary relationship will lead to differences in the manner in which consent of the beneficiary to a breach of fiduciary duty can be understood. In a static relationship, because the discussed below should be considered to be prefaced by the expression, "Unless the beneficiary otherwise appropriately consents, ...", and the descriptions set out below should be read with this caveat in mind.

Among the rules of conduct derived by the courts to constrain the actions of fiduciaries in private law are the requirements that a fiduciary must

(a) not advance the interest of another party at the expense of the beneficiary or represent two principals in the same transaction;[302]

(b) where appropriate, adhere to the beneficiary's instructions;[303]

(c) not hire himself or herself to perform work required in connection with the fiduciary relationship;[304]

(d) make available to the beneficiary all information obtained by virtue of the fiduciary relationship[305] and, where the relationship requires that the beneficiary

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beneficiary cannot alter the terms of the relationship (Finn, *supra*, n. 66, at p. 21), the consent of the beneficiary is irrelevant to the determination of whether a breach of duty has been committed — if the fiduciary acts contrary to the fixed requirements of the relationship, he or she is in breach. If the beneficiary has consented to the prohibited act, however, the fact of that consent can be raised in defense to an action by that beneficiary for breach of fiduciary duty (Oosterhoff and Gillese, *supra*, n. 65, at p. 760, citing *Re Pauling's Settlement Trusts*, [1964] Ch. 303).

In a dynamic relationship, on the other hand, lack of consent may be treated as a requisite element of breach; because the beneficiary is free to alter the parameters of the relationship, in consenting to an otherwise proscribed act, the beneficiary may be seen as removing that act from the scope of the fiduciary's duties.

[302] Scott, *supra*, n. 48, at p. 555; Finn, *supra*, n. 66, at p. 16; Paul M. Perell, "Classifying Conflicts of Interest", (1994) 28 *L.S.U.C. Gazette* 11, at p. 12; Reiter, *supra*, n. 78, at p. 7.

[303] *Deacon v. Varga* (1972), 30 D.L.R. (3d) 653 at 659, subject to the commentary set out, *supra*, n. 301.

[304] *Broughton v. Broughton* (1855), 5 De G. M. & G. 160, 43 E.R. 831 at 833. See also Sealy, *supra*, n. 85, at p. 127.

[305] *McInerney v. MacDonald*, *supra*, n. 56, at p. 150; but see *Re Londonderry's Settlement*, [1965] Ch. 918, [1964] 3 All E.R. 855(C.A.), regarding limitations on a beneficiary's right to information concerning a fiduciary's deliberations.

make decisions, all information relevant to those decisions;[306]

(e) keep confidential any information obtained in the fiduciary capacity;[307]

(f) act impartially as between beneficiaries;[308]

(g) not purchase fiduciary property;[309]

(h) address his or her mind to the administration of the fiduciary property and show the same degree of care in that administration that a person of ordinary prudence would exercise in the management of his or her own affairs;[310]

(i) make financial accounts relating to the fiduciary property available to the beneficiary within a reasonable time after receiving a request for them;[311] and

(j) not make the business of the beneficiary "an object of interest to himself."[312]

Although one can foresee circumstances in which any of these rules might apply

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[306] *Hope v. Beard* (1860), 8 Gr. 380. See also DeMott, *supra*, n. 23, at p. 900. This might not, however, include information tending only to show that the beneficiary's instructions or decisions are improvident (*Deacon v. Varga*, *supra*, n. 303, at p. 569). In *Globe Woollen Co. v. Utica Gas & Electric Co.* (1918), 224 N.Y. 483, however, the court held that a trustee does have a duty to advise the beneficiary of any reservations that the fiduciary holds. DeMott further speculates that the fiduciary, having shared his or her honest opinion with the beneficiary, may be liable for any losses incurred by the beneficiary in reliance on that opinion. It is submitted, however, that, except where the opinion is shown to be a result of a lack of due diligence and care, such a combination of duty and liability would be somewhat perverse.

[307] Ellis, *supra*, n. 48, at p. 3.21, citing *Martin v. Brown* (1910) 19 Man. R. 680 (K.B.).

[308] Waters, *supra*, n. 24, at p. 787; Oosterhoff and Gillese, *supra*, n. 65, at p. 620; Finn, *supra*, n. 66, at p. 16.

[309] The expressions "fiduciary property" and "fiduciary assets" are used herein to identify property that has been transferred to the fiduciary on the understanding that it will be used for the benefit of the beneficiary. In an express trust, the most common situation in which encumbered property is encountered in the fiduciary context, this would normally be referred to as the "trust property". Finn notes that the latter expression is also often applied to property held by other fiduciaries (*supra*, n. 66, at p. 89).

[310] *Learoyd v. Whitely* (1887), 12 App. Cas. 727 at 733.

[311] Waters, *supra*, n. 24, at p. 872.

[312] *Toronto v. Bowes* (1854), 4 Gr. 489, at p. 503.

in the context of the Crown's relationship with Indian peoples under the *Indian Act*,[313] there is a relative dearth of authoritative jurisprudence on rules of conduct specific to that relationship. In considering the jurisprudence that does exist, however, the decision in *Guerin* forms a natural starting point.

The Crown's Breach of Fiduciary Duty in Guerin

The first two rules referred to above were the focus of the Court's findings of misconduct in *Guerin*: i.e., the Crown's failure to act in accordance with the wishes expressed by the band and its obeisance to the golf club to the detriment of the band. The former rule — that the fiduciary must adhere to the beneficiary's instructions — was put in issue by the Crown's contention that, as the wording of the surrender in that case was unrestricted, the Crown's discretion to act was left totally unfettered. This was countered by the band's argument that the Crown was equally bound by the wishes of the band that were conveyed orally to Indian Affairs in the discussions leading up to the surrender. In considering the issue, Dickson J. agreed with the Court of Appeal that the band's oral expressions had not somehow become formally incorporated into the surrender as conditions expressly binding on the Crown, since to have so held would have vitiated the formal requirements of ss. 37 to 40 of the *Indian Act*. As he pointed out, however, even though the surrender was not thereby explicitly restricted, in the context of its fiduciary relationship with the band the Crown could not disregard the band's stated intentions:

> The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act.[314]

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[313] Several such circumstances were noted in the preceding chapter.

[314] *Supra*, n. 3, at p. 344.

In the context of the conditional transfer theory described earlier, the oral representations can be seen as implicit encumbrances on the exercise of the discretion conferred on the Crown by virtue of the surrender. In this respect, the circumstances are closely analogous to those of *Lac Minerals*,[315] in which the fiduciary duties identified in the relationship exceeded those set out in the formal partnership agreement. With its discretion so encumbered, the Crown was not free to sign a lease on any terms of its choosing. When it proved impossible to obtain the lease that the band wanted, Dickson J. concluded that the Indian Affairs officials should have advised the band accordingly and sought further direction from the band as to how to proceed. A change in instructions from the band would have varied the conditions of the Crown's exercise of discretion in the circumstances. The fact that those officials did not do so, but instead proceeded with the transaction in disregard of the pre-existing constraints on their discretion, formed the basis for the Court's conclusion that the Crown should be held liable:

> After the Crown's agents had induced the band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty....
>
> The Crown cannot promise the band that it will obtain a lease of the latter's land on certain stated terms, thereby inducing the band to alter its legal position by surrendering the land, and then simply ignore that promise to the band's detriment.... In obtaining without consultation a much less valuable lease than that promised, the Crown breached the fiduciary obligation it owed the band.[316]

The weight given to oral representations made by a band during the surrender

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[315] *Supra*, n. 22. In his discussion of the case, Flannigan refers to the "default nature of fiduciary regulation", namely that fiduciary obligations need not be spelled out in a contract entered into in a fiduciary relationship but will always apply unless the parties agree otherwise (*supra*, n. 116 at p. 66). The same argument would apply by extension to the formal documents prepared to evidence a surrender.

[316] *Supra*, n. 3, at p. 344.

process could have significant implications for the Crown in its conduct of surrenders. Among other things, it would appear to require that the Crown keep accurate records of all discussions pertaining to proposed surrenders, in order to ensure that it has some record of wishes expressed and representations made. In addition, it would likely be advisable for the Crown, where appropriate, to include a statement in the surrender documents to the effect that the surrender reflects the entire extent of the band's intentions and the Crown's undertakings. Although such a disclaimer will not necessarily exclude consideration of oral representations,[317] its presence would at least alert band members to the desirability of including a statement of all important undertakings in the surrender documentation.

Although not expressly noted, the first rule of conduct listed above on page 86 — that the fiduciary may not advance the interests of another party at the expense of the beneficiary — is the basis for recovery in *Guerin*. In acceding to the golf club's request for inclusion in the lease of terms favourable to it notwithstanding the objections of the band, the Crown clearly favoured the interests of the golf club over those of the band.

As is apparent, the Court's identification of unfulfilled obligations in *Guerin* accords well with the rules of conduct applied to fiduciaries in private law. However, aside from the two obligations noted — the obligation to consult with the band before departing from agreed upon terms and the implied obligation not to favour the interests of a third party — Dickson J. offered very little guidance as to what other standards of conduct should be expected of the Crown as fiduciary.[318] Having introduced the governing fiduciary principle, the Court was apparently content to leave its scope and content either to be

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[317] The Supreme Court felt free to ignore similar disclaimers in *Hodgkinson v. Simms*, *supra*, n. 18, at p. 436.

[318] See also Johnston, *supra*, n. 7, at p. 307, who considers the judgment to be "unhelpful in assessing the nature and parameters of the Crown's fiduciary duty".

derived from the body of common law from which it was extracted or to evolve according to the unique requirements of the Crown/Indian relationship.[319]

In any event, the absence of detailed guidance as to the standards of conduct to be expected from the Crown has caused uncertainty and dissent to permeate subsequent native law jurisprudence. We have seen, however, that the Crown/Indian fiduciary relationship accords closely with the relationship between the fiduciary and beneficiary described in private law jurisprudence. Moreover, nothing suggests that there is any reason to treat the Crown/Indian fiduciary relationship as being any different from the classic fiduciary model described by a conditional transfer of power or property. If it walks like a duck and talks like a duck ... If the Crown/Indian fiduciary relationship fits the conditional transfer paradigm developed in private law, there would further appear to be no reason why the duties attaching to a fiduciary in private law should not also apply in appropriate circumstances to the Crown in its functions as fiduciary in the public law context. All of the obligations applicable to private law fiduciaries set out above should therefore also be applied, where the circumstances warrant, to the Crown in the performance of its fiduciary obligations to Indian peoples.

In the circumstances of *Guerin*, the Crown was dealing as intermediary in a transaction between the band and a third party, the golf club. This is not always the case, however. Cases subsequent to *Guerin* have involved transactions in which the Crown itself was allegedly a principal. In these cases, the most recent of which is the *Apsassin* case, uncertainty as to the scope of the Crown's obligations has persisted. This has been

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[319] In respect of the latter possibility, the Court, having introduced a radical new element into Indian/government relationship, may have been content to provide only the minimum of explanation necessary to support the decision, leaving the future application of the new principles to be expanded, limited or clarified in its own future decisions.

especially so regarding allegations of conflict of interest on the part of the Crown — the subject-matter of the last of the rules of fiduciary conduct set out above. As will be argued in Part II, by the reasoning set out in the preceding paragraph, the same principles applicable to conflict of interest in private law matters should be extended and applied to the Crown in its conduct as a fiduciary.

Notwithstanding the dearth of guidance provided as to the scope of the Crown's fiduciary duties, Dickson J. was quite clear regarding the measure of damages to be awarded for their breach, stating that such damages were to be determined by reference to the principles applicable to the law of trusts. The remedies applicable to breach of trust, and to other breaches of fiduciary obligations in general, are outlined briefly in the section that follows.

Remedies for Breach of Fiduciary Duty

Once a breach of fiduciary duty has been found to exist, the courts, in the exercise of their Equitable jurisdiction, make available certain discretionary remedies not available in actions at common law. These include:

- rescission of any transaction entered into by the fiduciary in conflict of interest;[320]
- an accounting of any profits obtained by the fiduciary;[321]
- in cases of misuse of fiduciary property, forfeiture of any profit made from its use, payment of compensation for any alteration to the property and forfeiture of

[320] Ellis, *supra*, n. 48, at p. 20.2; Youdan, *supra*, n. 99, at p. 96; John D. McCamus, *supra*, n. 98, at p. 58.

[321] *Regal Hastings v. Gulliver*, *supra*, n. 424, at p. 144; *Boardman v. Phipps*, *supra*, n. 424.

any unauthorized improvements to the property;[322]

- compensation for any loss caused by the breach of fiduciary duty, including, where property should have been invested but was not, interest from the time the property should have been invested;[323]
- imposition of a constructive trust or equitable lien in respect of transferred assets;[324]
- the tracing of assets transferred to complicitous third parties;
- an injunction[325] or declaratory relief;[326] and
- punitive damages[327] or the awarding of costs on a solicitor-and-client basis, where the breach was motivated by the fiduciary's self-interest.[328]

A finding of breach of fiduciary duty can have a number of additional implications. In certain cases, a beneficiary can avoid the application of limitation periods that would bar an action for a non-fiduciary breach.[329] In addition, as Waters explains, "Equity adopts the policy that while gain resulting from a breach is the property of the

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[322] Ellis, *supra*, n. 48, at p. 2.17, citing *Boryczko v. Toronto Polish Veterans Association*, [1958] O.W.N. 118. Oosterhoff and Gillese note that where the unauthorized improvement results in an increase in the value of the property that is attributable solely to the skill of the fiduciary, the fiduciary may not be liable to forfeiture of the increase (*supra*, n. 65, at p. 366.

[323] Waters, *supra*, n. 24, at p. 1001, citing *McArthur v. Imperial Trust Co.* (1911), 17 W.L.R. 415 (B.C.).

[324] *Keech v. Sanford*, *supra*, n. 341; *Re MacCullough; Price Waterhouse Ltd. v. MacCullough*, *supra*, n. 396; *Lac Minerals*, *supra*, n. 22, at p. 678.

[325] McCamus, *supra*, n. 98, at p. 58; Ellis, *supra*, n. 48, at p. 20.5.

[326] *Montana Indian Band v. The Queen (No. 1)*, [1991] 2 F.C. 30 at 39.

[327] *Norberg v. Wynrib*, *supra*, n. 33, at p. 299; Ellis, *supra*, n. 48, at p. 20.24.

[328] Ellis, *supra*, n. 48, at p. 20.24, citing *MacMillan Bloedel Ltd. v. Binstead* (1983), 22 B.L.R. 255 (B.C.S.C.).

[329] Shepherd, *supra*, n. 20, at p. 9.

beneficiary, every loss is the trustee's own."[330] As a result, where a fiduciary has committed a number of breaches, he or she may not set off losses incurred in some against gains made in others, unless all were part of a single continuing transaction.[331] Moreover, in the case of a loss attributable to a breach of fiduciary duty, the fiduciary may be denied recourse to a defence that the beneficiary contributed to his or her own losses.[332]

In *Guerin*, the trial judge awarded compensation based on the loss of economic rent to the band from the lands in question. Although the estimates presented varied from $45 million to $71 million, the trial judge applied various contingencies to reach an award of $10 million.[333]

The last-mentioned fiduciary obligation set out above on page 87 — that the fiduciary shall not have a personal interest in dealings with a beneficiary — has been problematic for the Crown. The perception of fiduciary impropriety has been particularly troublesome in circumstances in which the Crown has sought to use Indian reserve lands for public purposes. The implications for the Crown in this regard are the subject of Part II of this paper, which follows. As a basis for examination of the application of conflict of interest principles to the Crown, it is proposed to first describe the manner in which those

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[330] Waters, *supra*, n. 24, at p. 999.

[331] *Ibid.* See also *McMahon v. Canada Permanent Trust* (1980), 6 E.T.R. 43. (B.C. C.A.).

[332] *Carl B. Potter Ltd. v. Mercantile Bank of Canada* (1980), 8 E.T.R. 219 (S.C.C.), at p. 228. The opposite course is, however, strongly indicated in the judgments of McLachlin and La Forest JJ. in *Canson v. Boughton*, *supra*, n. 83, at pp. 556 and 585, respectively. See also J. Derek Davies, "Equitable Compensation: "Causation, Foreseeability and Remoteness", in *Equity, Fiduciaries and Trusts, 1993*, ed. Donovan W.M. Waters (Toronto: Carswell, 1993) p. 297, at pp. 317-318.

[333] *Supra*, n. 3, at p. 332. Although Dickson J. stated that trust law principles govern the quantum of damages for breach of fiduciary duty, the trial judge's approach to determining the damages was not a model of precision; even he admits that he found himself "unable to set out a precise rationale or approach, mathematical or otherwise" for his award.

principles have been developed and applied in private law, which description forms the subject of the next section.

PART II — CONFLICT OF INTEREST

CHAPTER V
CONFLICT OF INTEREST BY A FIDUCIARY

The Rule against Conflict of Interest in Private Law

The rule against conflict of interest is arguably the most important rule applicable to a fiduciary, and one which is implicit in a number of other rules of fiduciary conduct discussed earlier. Weinrib refers to the conflict of interest rule as the "irreducible core of the fiduciary obligation".[334] The rule, put simply, is that a fiduciary may not allow a personal interest or a duty to another to conflict with his or her duty as a fiduciary, which includes the making of a personal profit by virtue of the fiduciary capacity.[335] Scott refers to the conflict of interest rule as a "precept, old as holy writ, that a man cannot serve two masters".[336] The general rationale for the rule was stated in *Toronto v. Bowes*:

> when a man views his duty to another through the medium of his private interests, it is *human nature* that this vision of the former should be imperfect, if not distorted.[337]

The conflict of interest rule appears in a number of formulations addressed to the

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[334] *Supra*, n. 21, at p. 16.

[335] Oosterhoff and Gillese, *supra*, n. 65, at p. 396; Perell, *supra*, n. 302, at p. 28; Finn, *supra*, n. 66, at p. 4.

[336] *Supra*, n. 48, at p. 555. See also Finn, *supra*, n. 66, at p. 252.

[337] *Supra*, n. 312, at p. 526. Emphasis in original.

specific circumstances of particular cases. The most often encountered particularization of the rule states that a fiduciary may not purchase fiduciary property.[338] Corollaries to this rule are that a fiduciary may not lease[339] or take an option on fiduciary property[340] or acquire the renewal or reversion of any lease held for the beneficiary.[341] The purchase prohibition also extends to any buyer with whom the fiduciary has a personal[342] or business[343] relationship. Both the prohibition against purchase of fiduciary property and the relationship between fiduciary and buyer were very much in issue in *Apsassin*.[344]

The proscription against the purchase of, or other acquisition of an interest in, fiduciary property is based on the unfair advantage that the fiduciary would have in such a transaction. Aside from the obvious element of arranging to acquire the property at an advantageous price, the fiduciary can gain an advantage by arranging the timing of the purchase of commercially volatile property such as real estate or securities,[345] or by

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[338] The rule was first stated in *Ex p. James*, [1803-13] All E.R. 78, (1803) 32 E.R. 385, 8 Ves. Jun. 337; it has been more recently applied by the Supreme Court of Canada in *Osadchuk v. National Trust Co.*, [1943] 1 D.L.R. 689 (S.C.C.).

[339] *Seaton v. Lunney* (1879), 27 Gr. 169 (Ont. C.A.).

[340] Shepherd, *supra*, n. 20, at p. 160.

[341] *Keech v. Sanford* (1726), 25 E.R. 223, Sel. Cas. T. King 61; applied in *Tylee v. R.* (1877), 7 S.C.R. 651.

[342] Perell, *supra*, n. 302, at p. 27; Finn, *supra*, n. 66, at p. 193, citing *Tanti v. Carlson*, [1948] V.L.R. 401.

[343] *Krendel v. Frontwell Investments Ltd.*, [1967] 2 O.R. 579. See also Shepherd, *supra*, n. 20, at p. 165, citing *Wendt v. Fischer* (1926), 154 N.E. 303, *Re Postlethwaite* (1888), 59 L.T. 58, *Cooper v. Burchett* (1938), 279 N.Q. 598, *Goldman v. Kaplan* (1948), 170 F. 2d 503 and *Re International Equities Ltd.*, [1943] O.W.N. 514 aff'd [1943] 4 D.L.R. 806 (C.A.). Finn points out that courts will normally consider a sale to a company wholly owned by the fiduciary or to a partnership of which the fiduciary is a partner to be in substance a sale by the fiduciary to himself or herself (*supra*, n. 66, at p. 193).

[344] These issues are discussed in detail in Ch. VI.

[345] *Morgan v. Wright*, [1926] A.C. 788, at p. 798 (P.C.).

arranging self-advantageous credit terms,[346] interest rates or warranties.[347] A duplicitous fiduciary can, moreover, arrange to obtain appraisals under conditions that will keep values low, and can discourage competing purchasers. A fiduciary can also avail himself or herself of a variety of means, such as limited advertising, to offer a "highest" price that is lower than what might otherwise be obtainable. Similarly, by virtue of the fiduciary's association with the beneficiary, he or she is often in a position to know the lowest price that will be accepted for the property.[348] By the same token, in the purchase of a reversionary interest or the renewal of a lease, a fiduciary can unfairly benefit from knowledge not available to other potential purchasers and gained solely as a result of the fiduciary position to obtain the renewal or reversionary interest at less than its true value.[349]

The case law also sets out a general prohibition against contracts between fiduciary and beneficiary.[350] This extends to the sale of the fiduciary's property[351] or

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[346] *Ibid.*

[347] Shepherd, *supra*, n. 20, at p. 157.

[348] Shepherd, *ibid.*, at p. 158.

[349] Finn, *supra*, n. 66, at pp. 79 and 169.

[350] A distinction should be drawn at this point between various types of fiduciary relationship and different categories of beneficiary. The prohibitions against dealing with a beneficiary, including those relating to the purchase or sale of property, apply to transactions within the scope of the fiduciary relationship where the relationship is such that the fiduciary has the potential to influence the beneficiary in respect of the transaction. One such example might be that of a real estate agent, acting on behalf of a seller of property, who buys the property himself. Such an agent would be in a conflict of interest position, especially if the seller had been relying on the agent to advise as to an appropriate selling price.

The situation is somewhat different in the case of a true trust, however. The conflict of interest rule applies to transactions by a trustee that are carried out with the trust itself (e.g., a purchase or sale of trust property). Dealings with a trust beneficiary, such as the purchase of the beneficiary's interest itself, are not subject to the conflict of interest rule, although certain other constraints apply (see generally Oosterhoff and Gillese, *supra*, n. 65, at p. 396). Finn, however, notes at least one case in which the rule has been applied to the purchase of a beneficiary's interest (*supra*, n. 66, at p. 171, citing *Dougan v. McPherson*, [1902] A.C. 197).

The Crown/Indian relationship is much closer to the former category than to the latter. Because the services[352] to the beneficiary (i.e., the purchase thereof by the fiduciary on behalf of the beneficiary). In the case of a corporate fiduciary, the prohibition extends in some jurisdictions to the sale of its own shares to the beneficiary.[353] The contracting prohibition applies also to the making of loans by a fiduciary to a beneficiary, even at lower than prevailing interest rates.[354] By the same token, the rule proscribes the borrowing of money by a fiduciary from a beneficiary.[355]

Any misuse of any aspect of fiduciary property, including personal enjoyment by the fiduciary, is strictly prohibited.[356] In this regard, any use of fiduciary property that is not expressly or implicitly authorized by the terms of the fiduciary relationship will be considered to be a misuse of the property.[357]

The conflict of interest rule also precludes a fiduciary from using his or her position or fiduciary powers to compete with the beneficiary — by soliciting the beneficiary's clients, for example.[358] Similarly, the fiduciary may not use his or her

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Indian Act requires that all transactions involving reserve lands be transacted through the Crown as intermediary, *all* dealings with reserve lands fall within the scope of the Crown/Indian fiduciary relationship. It is therefore not possible for the Crown to purchase the Indian beneficiaries' interest outside the confines of the fiduciary relationship, as a true trustee might purchase a trust beneficiary's interest. For the purposes of this paper, then, future references to dealings with a beneficiary should be read as references to dealings with a beneficiary in a context similar to the Crown/Indian context.

[351] *Osadchuk v. National Trust Co.*, *supra*, n. 338, at p. 691; Scott, *supra*, n. 48, at p. 544.

[352] *Broughton v. Broughton*, *supra*, n. 304.

[353] *Ferrier v. Reid* (1966), 55 W.W.R. 299 (B.C.S.C.), applying s. 16(2) of the B.C. *Trustee Act*, R.S.B.C. 1960, c. 390, (now R.S.B.C. 1979, c. 414, s. 17(2)).

[354] Waters, *supra*, n. 24, at p. 726. Ellis cites *Higgins v. Higgins* (1932), 4 M.P.R. 365, as a possibly incorrectly decided exception to this rule (*supra*, n. 48, at p. 2.10).

[355] Waters, *ibid.*, at p. 727.

[356] Finn, *supra*, n. 66, at p. 79.

[357] Ellis, *supra*, n. 48, at p. 2.17.

[358] Ellis, *ibid.*, at p. 1.6.

position to usurp an opportunity available to the beneficiary, even where the beneficiary chooses to disregard the opportunity.[359]

The prohibitions against the purchase of fiduciary property and, in certain circumstances, against contracting with a beneficiary continue after the fiduciary relationship ceases,[360] primarily to prevent the fiduciary from obtaining an unfair advantage that may subsist after retirement, or from retiring from the position of fiduciary in order to make such a purchase.[361]

Potential vs Actualized Conflict of Interest

One aspect of the rule against conflict of interest on which there is some disagreement is whether a fiduciary must avoid placing himself or herself in any position in which a conflict of interest might arise, or whether the fiduciary is merely prohibited from acting against the interests of the beneficiary when a conflict of interest situation does arise. A number of writers have argued that a fiduciary breaches his or her duty to the beneficiary by placing himself or herself in a position where even the potential exists that a conflict of interest may arise.[362] Ellis advances this view based on the dicta in *Toronto v. Bowes* that "no person acting in a fiduciary capacity shall be allowed to put himself in a position where his duty and his interest *may* conflict"[363] and the statement in *Davis v. Kerr*, that "[no fiduciary] shall be allowed to enter into engagements or assume functions in which he has

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[359] *Canaero*, *supra*, n. 27, at p. 384; *Sinclair v. Rideout*, [1955] O.R. 167 (Ont. H.C.).

[360] *Re Long's Appeal* (1905), 9 O.L.R. 367; *Morgan v. Wright*, [1926] A.C. 788; *Canadian Aero Service Ltd. v. O'Malley*, *supra*, n. 27, at pp. 386-389. See, however, *Sandhu v. Shiell*, (May 31, 1994), (B.C.S.C.) File No. C921344).

[361] Finn, *supra*, n. 66, at p. 190.

[362] Ellis, *supra*, n. 48, at p. 2.3. See also, Waters, *supra*, n. 24, at p. 32; Ong, *supra*, n. 66, at p. 313; Owen, *supra*, n. 78, at p. 2; and Sealy, *supra*, n. 85, at p. 125.

[363] (1856) 6 Gr. 1 (Ont. C.A.), at p. 115. Emphasis added.

or can have a personal interest conflicting *or which possibly may conflict* with the interest of those he is bound to protect".[364]

It is submitted, however, that the better view is that in order to be answerable for a breach of fiduciary duty not only must an actual conflict of interest arise — a decision faced by the fiduciary within the scope of his or her duties in respect of which a duty to another or a conflicting personal interest exists — but the fiduciary must in fact act against the interests of the beneficiary in making that decision.[365] Fiduciary duties are essentially directed to the manner in which the fiduciary must *act*, or to the factors that the fiduciary may or may not take into account in *making a decision*.[366] In order to distinguish between a situation with a potential for conflict of interest and a situation constituting an actual conflict of interest, it is important to recognize that breaches of fiduciary duty arise in connection with the acts of the fiduciary rather than out of the relationship *per se*.[367] Shepherd explains the rationale for this view as follows:

> Analytically, a conflict of interest exists wherever an individual is faced with a choice between his own interest and his duty to another.... It is only when the

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[364] (1890) 17 S.C.R. 235, at p. 246, quoting *Aberdeen Railway Co. v. Blaikie Brothers* (1854), 1 Macq. 461 at p. 471 (H.L.). Emphasis added. Other cases cited by Ellis in support of this contention, although couched in terms of a prohibition against potential conflicts of interest, in fact dealt with actions that constituted actual conflicts of interest. In *Rose v. Rose* (1914), 22 D.L.R. 572 (Ont. C.A.), a trustee who purchased shares on his own behalf actually acted to the detriment of the trust, which as a result lost its majority shareholder position. In *McLennan v. Newton*, [1928] 1 D.L.R. 189, where the trustee had entered into a contract with the trust, the court again was dealing not with a potential, but instead with a consummated, conflict of interest.

[365] *Hawrelak v. Edmonton*, [1976] 1 S.C.R. 387.

[366] Although many formulations of fiduciary duties are expressed in the negative (e.g., "a fiduciary must *not* purchase the fiduciary property", "a fiduciary must *not* advance the interests of another over those of the beneficiary), these duties all contemplate an affirmative act or the exercise of a discretion on the part of the fiduciary. Until there is a decision to act (to sell the fiduciary property) or a discretion to be exercised (as to whose interests to favour), it cannot be said that any affirmative duty can be breached by the fiduciary. By extension, exercise of the fiduciary's encumbered power is the *sine qua non* for a breach of fiduciary duty to occur.

[367] See also Perell, *supra*, n. 302, at p. 13.

choice is made contrary to the duty ... that the fiduciary's liability arises. The legal system pounces on the fiduciary who has actualized his conflict of interest, not the fiduciary who is faced with it. When we say "a fiduciary may not put himself in a position where his interest and his duty conflict", we are completely wrong.... What he cannot do is choose in favour of his interest.[368]

Finn mirrors this view:

But so long as the possibility of a conflict of duties remains no more than a possibility, be it likely or unlikely ever to eventuate, there can be no breach of the rule. It is not enough that some ground for uneasiness as to ... future conduct arises. There must be a real, an actual, conflict in some present matter and not simply a theoretical conflict.[369]

As Shepherd points out,[370] the potential for conflict of interest is inherent in certain relationships,[371] while in other cases conflicts may arise entirely passively, independently of any participation by the fiduciary.[372] Frankel goes further, postulating that all fiduciary relationships possess the potential for conflict of interest:

An ideal fiduciary is one whose interests do not conflict with those of the entrustor.... However, finding this person is not a realistic possibility.[373]

That being said, there are instances in which a latent conflict of interest will be scrutinized by the courts, such as where irreparable harm could be caused by the fiduciary choosing to act against the beneficiary's interests,[374] where it is felt that the particular temptation would be too great in the circumstances, or where the court concludes that the

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[368] *Supra*, n. 20, at pp. 148-149.

[369] *Supra*, n. 66, at p. 253.

[370] *Supra*, n. 20, at p. 148.

[371] In the common situation of interlocking directorships between parent corporations and subsidiaries, for example.

[372] For example, where a director of one corporation, who holds shares in another corporation, is confronted with a proposal by the latter to enter into a contract with the former.

[373] *Supra*, n. 31, at p. 811.

[374] Shepherd, *supra*, n. 20, at p. 342, citing *Rose v. Rose*, *supra*, n. 364.

fiduciary would be unable to discern whether the conflict had influenced his or her actions.[375] In such circumstances, the court will entertain an application for removal of the fiduciary from his or her position.

The distinction between potential conflict of interest, actual conflict of interest and consummation of a conflict of interest[376] is relevant to the position of the Crown in its relationship with Indian peoples and their lands. Because, as described earlier, the scheme of the *Indian Act* places the Crown in an ongoing fiduciary relationship in respect of reserve lands, the Crown is unable in fact to avoid the possibility of being faced with a conflict of interest, so long as the possibility exists that a proposal will be put forward to use or purchase reserve lands for any federal purpose.[377] Recognizing that the rule merely prohibits the Crown from *acting* against the interests of a band when faced with such a proposal rationalizes the position of the Crown in this regard.

Potential for Conflict of Interest on the Part of the Crown

The prohibition against the purchase of fiduciary property inherent in the conflict of interest rule places the Crown in a very delicate position when it seeks to obtain or use reserve lands for its own purposes. Whether for purposes of relocating veterans after World War I[378] or II[379], or for the construction of rail lines[380] or airports[381], Indian

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[375] Shepherd, *ibid.*, citing *Re Holmes Trust* (1958), 139 A. 2d 548 (S.C. Penn.) and *Jones v. Stubbs* (1955), 288 P. 2d 939 (3rd) D.C.A. Cal.

[376] In the sense of acting against the beneficiary's interest.

[377] Waters also acknowledges the impossibility of the Crown's avoiding such situations, *supra*, n. 6, at p. 419.

[378] *Reese v. The Queen*, [1956] Ex. C.R. 94; *Wilson v. The King*, [1926] Ex. C.R. 8.

[379] The situation in *Apsassin*.

[380] *A.G. Canada v. C.P.R.*, [1986] 1 C.N.L.R. 1 (B.C.S.C.).

reserves have always presented a ready supply of land, already within federal jurisdiction, to attract the attention of the Crown.

In all such cases, the *Indian Act* requirement that all alienations of reserve land must be effected through the Crown as intermediary, and the resulting characterization of the Crown as a fiduciary in so acting, manifestly puts the Crown in the position of a fiduciary seeking to obtain fiduciary property. Because in every such disposition of reserve land the Indian interest, or the power of disposition over the Indian interest, is transferred to the Crown subject to the condition that it be used in the best interests of the band, the fact that the Crown has other objectives in mind, such as constructing a public work at a reasonable cost, creates a conflict of interest. The Crown is, as Waters puts it, "caught ... between the Scylla of Parliamentary demands for cost restraint and the Charybdis of Indian demands for top market value".[382]

Because of the significant quantity and the strategic location of reserve lands in Canada,[383] the Crown inevitably finds itself sooner or later being required to exercise its discretion as fiduciary in circumstances where reserve lands are sought or needed for public purposes.[384] As such, is it reasonable to declare the Crown to be in breach of its duties *ab initio*, simply by reason of being in a *position* where situations of conflicting interest could potentially arise? Should the Crown automatically be considered to be in breach as

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[381] *Kruger v. The Queen*, *supra*, n. 222.

[382] *Supra*, n. 6, at p. 420.

[383] Two much-publicized examples are the Cree and Naskapi lands affected by the James Bay hydro project and the reserve lands in Manitoba, subject to the Northern Flood Agreement, that have been more recently affected by hydro development in that province. The problem is particularly acute in the Province of British Columbia, where many reserves are strategically located in river valleys, at junctions of rivers and in protected harbours.

[384] Bryant, too, notes that conflicts of interest cannot be avoided in the Crown/aboriginal relationship, *supra*, n. 5, at p. 41.

soon as it finds itself confronted with a decision that involves a conflict of interest?

The better view, it is submitted, it to adopt the position that what the rule against conflict of interest prohibits is the consummation of the conflict of interest by choosing against the interests of the beneficiary or by benefitting personally when faced with such a decision. As such, the Crown should only be found to be in breach of its fiduciary obligations if it in fact acts contrary to the interests of the band involved, or if it acts to benefit itself, without the free and fully informed consent of the band.

To conclude otherwise would operate to the detriment of all parties. Because the Crown cannot shirk its obligations under the surrender provisions of the *Indian Act*, it cannot unilaterally remove itself as fiduciary simply on account of the possibility that a conflict of interest will arise. To categorically refuse to consider the possibility of negotiating for the use of reserve lands for a public purpose because of the potential for conflict of interest would also be detrimental, since to do so might deprive bands of opportunities to enter into potentially profitable transactions relating to public works. What Indian people should be concerned about is not that the Crown might someday be faced with a conflict of interest, but that the Crown, when faced with a decision in which it has a conflicting interest, will act in their interest and not benefit at their expense.

When such an eventuality does arise and the Crown is faced with a proposal to use reserve lands for a public purpose, in order to avoid the liability which would otherwise follow from acting under a conflict of interest, the Crown must avail itself of one of the few exceptions allowed to the conflict of interest rule. These exceptions, and notably the consent exception, are described in the following pages.

Consent as an Exception to the Rule

As suggested above, the prohibitions inherent in the conflict of interest rule are not absolute. A number of exceptions exist: certain otherwise prohibited actions can be authorized by the terms of a trust or other document establishing the fiduciary relationship[385] or can be approved on application to the courts.[386] In certain cases, a fiduciary may also be able to demonstrate that the impugned actions were taken in the exercise of a previously acquired right.[387] The principal exception, however, is that many otherwise proscribed actions can be taken with the consent of the beneficiary. As discussed earlier,[388] the giving of consent by a beneficiary has the effect of varying the conditions subject to which the fiduciary's power is to be exercised; in so doing it removes the consented-to action from the realm of duties owed by the fiduciary, and the taking of that action consequently does not constitute a breach of those duties.

As befits the rigour with which the rule against conflict of interest is applied, however, exceptions to the rule are tightly circumscribed. The courts have refused to give effect to provisions in corporate charters that purported to shield directors and officers from liability arising out of self-dealing,[389] for example, and have held that the terms of a trust "cannot relieve a trustee from liability for breaches of trust committed intentionally, in bad

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[385] *Field v. Banfield*, [1933] O.W.N. 39; see also DeMott, *supra*, n. 23, at pp. 879 and 909. As Frankel notes, however, the courts will always reserve the right to examine whether undue influence was used to cause the exculpatory provision to be included (*supra*, n. 31, at p. 822).

[386] *Molchan v. Omega Oil and Gas Ltd.*, [1988] 1 S.C.R. 348 at 370; Finn, *supra*, n. 66, at p. 195.

[387] Shepherd, *supra*, n. 20, at p. 170; *National Trustees, Executors & Agency Co. of Australasia v. Boyd* (1926), 39 C.L.R. 72 at p. 81.

[388] *Supra*, p. 85, and subject to the qualifications noted, *supra*, n. 301.

[389] *Irwin v. West End Dev. Co.* (1972), 342 F. Supp. 687 at 701 (D. Colo.).

faith, or with reckless indifference to the interests of the beneficiary".[390] An application to a court for approval of a fiduciary's purchase of fiduciary property will be granted only where the fiduciary can demonstrate that the sale of the property is absolutely necessary, that no other purchaser is available and that the fiduciary's offer is favourable or that the fiduciary will pay more for the property than any other prospective purchaser.[391]

The most common exception to the self-dealing rule — the obtaining of the consent of the beneficiary[392] to the fiduciary's proposed action — is similarly subject to strict constraints. The principal constraint is that the beneficiary's consent must be obtained upon full and informed disclosure by the fiduciary. This requires that the fiduciary disclose all information available to the fiduciary,[393] or at least all material information.[394] A fiduciary must therefore disclose any relationship with a prospective purchaser[395] and, if purchasing the property on his or her own behalf, whether the purchase is for the purpose of resale.[396] The fact that the beneficiary received what he or she expected to receive is immaterial to the question of whether the fiduciary breached the duty of disclosure.[397]

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[390] DeMott, *supra*, n. 23, at p. 923.

[391] *Hutton v. Justin* (1901), 2 O.L.R. 713 (Ont. C.A.); *Weagle v. Weagle*, [1955] 3 D.L.R. 58 (N.S.C.A.); *Molchan v. Omega Oil and Gas Ltd.*, *supra*, n. 386, at p. 393; *D'Atri v. Chilcott* (1975), 7 O.R. (2d) 249, 55 D.L.R. (3d) 30 (H.C.).

[392] In situations where there are multiple fiduciaries, consent can also be obtained from a majority of disinterested co-fiduciaries (Shepherd, *supra*, n. 20, at p. 172).

[393] Waters, *supra*, n. 24, at p. 716. See also *Nocton v. Lord Ashburton*, [1914] A.C. 932 (H.L.).

[394] *Deacon v. Varga*, *supra*, n. 303, at p. 659; Ellis, *supra*, n. 48, at p. 1.5; Perell, *supra*, n. 302, at p. 28. Finn quantifies this as being "all such matters known to [the fiduciary] as would probably influence a reasonable man in the beneficiary's position" (*supra*, n. 66, at p. 187). See also *Charles Baker Ltd. v. Baker*, [1954] 3 D.L.R. 432 (C.A.), at p. 439.

[395] *Krendel v. Frontwell Investments Ltd.*, *supra*, n. 343, at p. 584.

[396] *Re MacCullough; Price Waterhouse Ltd. v. MacCullough* (1986), 22 E.T.R. 34 (N.S.C.A.), at p. 49.

[397] *Thorne Riddell Inc. v. Rolfe*, [1984] 6 W.W.R. 240, at p. 246 (B.C.S.C.).

Waters suggests that a great majority of fiduciaries cannot meet the burden of showing that the consent of the beneficiary was given with as much information as the fiduciary possessed.[398] Shepherd, too, points out that even where the consent of the beneficiary has been obtained, the fiduciary might have obtained it through the exercise of undue influence, and that the fiduciary should therefore in turn be put to the task of demonstrating that this was not the case.[399]

A corollary to the obtaining of consent of the beneficiary exists in cases involving contracting parties where the fiduciary seeks to rely on an exculpatory clause to avoid liability for self-dealing. In accordance with the principles enunciated above, the beneficiary's release of the fiduciary from otherwise applicable fiduciary standards must be fully informed; the exculpatory clause must therefore bring to mind the nature of the exculpation sought. It would follow that only exculpatory clauses that specifically contemplate or identify the breach in question would be effective and, in line with the burden placed on the fiduciary in other consent situations, the *contra proferentum* should apply to the interpretation of the exculpatory clause.[400]

Another manner in which the fiduciary may obtain the consent of the beneficiary is by seeking the beneficiary's subsequent ratification of an action by the fiduciary that would otherwise be actionable as a breach of fiduciary duty. An *ex post facto* ratification is, understandably, subject to the same disclosure requirements as prior consent. A

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[398] *Supra*, n. 24, at p. 722.

[399] *Supra*, n. 20, at pp. 200-201. See also Scott, *supra*, n. 48, at p. 541.

[400] Flannigan, *supra*, n. 116, at p. 68. On this basis, Flannigan argues that the decisions in *Midcon Oil & Gas v. New British Dominion Oil Co. and Brook* (1958), 12 D.L.R. (2d) 705 (S.C.C.) and *Jirna Limited v. Mr. Donut of Canada Ltd.*, [1975] 1 S.C.R. 2, were analytically suspect. Weinrib had earlier come to the same conclusion regarding those cases, albeit for somewhat different reasons (*supra*, n. 21, at pp. 7-8).

beneficiary may ratify a breach of fiduciary duty by subsequent informed concurrence or acquiescence.[401] In determining whether a beneficiary has acquiesced, however, the court will not normally put the beneficiary to a duty to monitor or inquire into the actions of the fiduciary.[402] While, in theory, a fiduciary could apply to the courts for retrospective approval of an action in breach of his or her fiduciary duty, such approval would be granted only in exceptional circumstances.[403]

It has been suggested that, even where the fiduciary obtains the consent of the beneficiary, any purchase of fiduciary property must be at fair market value.[404] Ross goes even further, suggesting that

> the price paid for the property must be what the courts have characterized as righteous, one [*sic*] in that it is "as advantageous to the principal as any other price the agent could, by the exercise of diligence on his principal's behalf, have obtained from a third party".[405]

Shepherd posits the view, however, that a beneficiary may validly consent to a transaction at less than fair market value if the beneficiary is aware of that fact and is otherwise fully informed.[406] While the existence of a less-than-fair-market-value price would undoubtedly heighten the practical difficulty that a fiduciary would face in attempting to satisfy the onus of demonstrating such free and fully informed consent,[407] it is questionable whether a legal rationale exists for preferring informed consent at fair market

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[401] *Allcard v. Skinner*, [1886-90] All E.R. 90; *Brighouse v. Morton*, [1929] S.C.R. 512.

[402] *Re Gabourie; Casey v. Gabourie* (1887), 13 O.R. 635, at p. 639.

[403] *Molchan v. Omega Oil and Gas Ltd.*, *supra*, n. 386, at pp. 372 and 390.

[404] Finn, *supra*, n. 66, at p. 184; *Jerman v. O'Leary* (1985), 145 Ariz. 397, 701 P. 2d 1205.

[405] *Supra*, n. 49, at p. 180, citing *D'Atri v. Chilcott*, *supra*, n. 391.

[406] *Supra*, n. 20, at p. 169, citing *Lord Selsey v. Rhoades* (1824), 57 E.R. 260, 2 Sim & St. 41 (Ch.). Notwithstanding some other unqualified statements regarding the requirement of fair market value, Finn also seems to agree with this position (*supra*, n. 66, at p. 186).

[407] This would include the onus of disproving undue influence, discussed, *infra*, at p. 132.

value over informed consent at something less than fair market value. It does not follow, however, that payment of fair market value will itself exonerate a fiduciary. As Scott states,

> No matter how fair the price may be, [a purchase by a fiduciary] is voidable.... This is true not only where the fiduciary fixes the price of the sale, but also where the price is not fixed by him. The sale can be set aside even though the price is fixed by disinterested co-fiduciaries; it can be set aside even though the price is fixed by competitive bidding.[408]

In the context of the Crown/Indian fiduciary relationship and the surrender of reserve land, consent is most directly obtained by the Crown by means of the surrender process itself. As per *Guerin*, oral representations made by and to the band in the period leading up to the surrender are also relevant. In addition, where the surrender is not specified to be for purposes of a particular specified transaction, subsequent consultations with the band regarding the ultimate alienation are also relevant to the obtaining of proper consent. The manner in which the Crown must obtain the consent of a band is central to determination of the validity of the surrender transactions in *Apsassin*. Before turning to consideration of the specific issues raised in that respect, it will be useful to first briefly examine certain presumptions that the courts have come to apply in attempting to ascertain the true state of affairs in situations of alleged conflict of interest.

Presumptions and Shifts in the Burden of Proof

In situations of conflict of interest, a fiduciary has a great advantage in avoiding discovery. The fiduciary can arrange for evidence in his or her favour to be created or preserved, and for incriminating evidence to be lost or destroyed. In this manner, the fiduciary can manipulate the circumstances surrounding a breach to "sanitize their

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[408] *Supra*, n. 48, at p. 543.

appearance".[409] Because the fiduciary is often the beneficiary's only source of information relative to the fiduciary relationship, the beneficiary often may not possess sufficient information even to raise the suspicion of a breach by the fiduciary.[410] All of this puts the beneficiary at a considerable disadvantage in challenging an action by the fiduciary. In an attempt to redress this imbalance, the courts have devised a number of presumptions against the fiduciary that will be applied in situations of apparent conflict of interest.

A beneficiary is normally required to prove any allegation of breach of fiduciary duty against the fiduciary.[411] Where there is *prima facie* evidence of conflict of interest, however, the courts will apply certain presumptions, which operate to shift the burden of proof to the fiduciary to prove that the presumed fact or circumstance is not true in the case at hand.[412] This shift in allocation of the burden of proof is an evidentiary device that serves to level the fiduciary playing field between beneficiary and fiduciary. The use of presumptions has been justified by the practical difficulty that the beneficiary would otherwise have in proving a lack of *bona fides* on the part of the fiduciary:

> the law will not allow a fiduciary to place himself in a situation in which his judgment [was] likely to [have been] biased and then to escape liability by denying that in fact it was biased.[413]

The following presumptions have been applied in, or have been suggested to be appropriate to, the fiduciary context:

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[409] Flannigan, *supra*, n. 116, at p. 47. See also Gautreau, *supra*, n. 54, at pp. 26-27.

[410] Shepherd, *supra*, n. 20, at p. 158. Frankel, *supra*, n. 31, at p. 812. This aspect is also referred to by McLachlin J. in *Canson v. Boughton*, *supra*, n. 83, at p. 544.

[411] Finn, *supra*, n. 66, at p. 41.

[412] Finn, *supra*, n. 66, at p. 79.

[413] Gower, *Principles of Modern Company Law*, 4th ed. (1979), at p. 583, quoted in Shepherd, *supra*, n. 20, at p. 143.

- that adequate disclosure was not made in any situation in which the consent of the beneficiary has been obtained;[414]
- that any profit[415] realized by a fiduciary in the course of a transaction on behalf of the beneficiary has been realized through the misuse of fiduciary powers;[416]
- where there has been any purchase of fiduciary property by the fiduciary or any sale of the fiduciary's property to the trust, that the transfer has been effected through a misuse of fiduciary powers;[417]
- that a sale of fiduciary property to a third party with whom the fiduciary has a non-arm's-length relationship was for the benefit of the fiduciary;[418]
- that any use of the property of the beneficiary was a not permitted use;[419]
- that whenever a fiduciary hires herself or himself it is through a misuse of her or his fiduciary powers;[420] and
- that where a fiduciary has entered into a transaction with a beneficiary, the fiduciary has used a power of influence over the beneficiary in his or her own

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[414] *Charles Baker Ltd. v. Baker*, [1954] 3 D.L.R. 432 (Ont. C.A.); *Brusewitz v. Brown*, [1923] N.Z.L.R. 1106 (S.C.); Waters, *supra*, n. 24, at p. 716. In this regard, it is not sufficient that the fiduciary mistakenly believed that the beneficiary was aware of the pertinent information: *West-Can Communications Ltd. v. Standard International Underwriters Ltd.* (1985), 65 A.R. 81.

[415] In the sense of a personal profit by the fiduciary flowing from a transaction involving fiduciary property or accrued as a result of information acquired by the fiduciary acting in his or her fiduciary capacity. An example might be stock market speculation based on insider knowledge by a fiduciary charged with investing fiduciary assets.

[416] Shepherd, *supra*, n. 20, at p. 200; Frankel, *supra*, n. 31, at p. 824.

[417] Shepherd, *ibid.*, at pp. 164 and 176; Finn, *supra*, n. 66, at p. 82.

[418] Shepherd, *supra*, n. 20, at p. 167, citing *Upper Canada College v. Jackson* (1852), 3 Gr. 171 at p. 179 and *Fern Brand Waxes Ltd. v. Pearl* (1972), 29 D.L.R (3d) 662 (Ont. C.A.)

[419] *Lac Minerals*, *supra*, n. 22, at p. 642.

[420] Shepherd, *supra*, n. 20, at p. 185.

interest.[421]

Each of these presumptions provides an expedient connection between questionable conduct by a fiduciary and conduct for which a fiduciary will be legally liable. The first three presumptions set out above, involving dealings with fiduciary property, are justified by the assumption that a person who acts on both sides of a transaction, on the one side as fiduciary and on the other in a personal capacity, will use his or her fiduciary powers to benefit himself or herself.[422] The last-mentioned presumption, the presumption of undue influence, is based on the assumption that a fiduciary who has a power of influence over a beneficiary will, in transacting with the beneficiary, use that power to benefit personally.[423]

In certain instances, such as where the fiduciary has realized a personal profit from dealings involving fiduciary property, it has been held that the fact that the fiduciary acted in good faith throughout is not a defence to an action for breach of fiduciary duty.[424] Although the deterrent value of denial of the good faith defence may be questionable,[425] the practice may be justified where there is a proprietary element to the fiduciary relationship: the benefit of the fiduciary property belongs to the beneficiary and to the beneficiary only, and any additional or collateral profit arising out of a transaction

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[421] *Ibid.*, at p. 197.

[422] *Ibid.*, at p. 157.

[423] *Ibid.*, at p. 197.

[424] *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378 (H.L.); *Boardman v. Phipps*, [1967] 2 A.C. 46 (H.L.).

[425] Shepherd dismisses the deterrent value that has been ascribed to the denial of a good faith defence on the grounds that "the way to deter malefactors is not to find the innocent liable, but to make good and sure that you find the guilty liable" (*supra*, n. 20, at p. 132). To this extent he concludes (at pp. 82-83):

> Realistically, if a fiduciary wants to protect himself against the penalties of fiduciary obligation, it does no good for him to direct his energies towards being scrupulously honest; what he should concern himself with is not getting caught.

involving the fiduciary property should therefore also accrue to the beneficiary.[426] By the same reasoning, it is not open to a fiduciary to defend a charge of self-dealing by pointing out that the beneficiary also benefitted from the transaction.[427]

It also provides no defence to the fiduciary to demonstrate that the beneficiary could not have taken advantage of an opportunity from which the fiduciary profited.[428] In such circumstances it might be argued that, while the profit did not arise from the use of fiduciary property, it did arise out of the exercise of the fiduciary powers, and the benefit of the exercise of those powers ought also to accrue to the beneficiary.

Besides providing proof of consent to the collateral profit or transaction, there are two other ways in which a fiduciary may rebut a presumption of misuse of fiduciary powers in the circumstances outlined above. Firstly, the fiduciary may demonstrate that the benefit in question was obtained by the exercise of a pre-existing right, such as an option to purchase the fiduciary property obtained before the fiduciary relationship was established. Alternatively, the fiduciary may show that the benefit was obtained in a capacity other than the fiduciary capacity.[429]

Even where the fiduciary obtains the consent of the beneficiary to a transaction in which the fiduciary has an incipient conflict of interest, the fiduciary may be called upon to also demonstrate that the consent was not obtained through the exercise of undue influence. Undue influence may arise in any fiduciary relationship in which the fiduciary's powers give rise to a personal influence over the beneficiary. In the recent Supreme Court of

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[426] Shepherd, *supra*, n. 20, at p. 134.

[427] Ellis, *supra*, n. 48, at p. 1.3; *Canadian Aero Service Ltd. v. O'Malley*, *supra*, n. 27, at p. 663.

[428] *Keech v. Sanford*, *supra*, n. 341; *Canadian Aero Service Ltd. v. O'Malley*, *supra*, n. 27, at p. 384.

[429] Shepherd, *supra*, n. 20, at pp. 171-172, citing *Holder v. Holder*, [1968] 1 All E.R. 665 and *Crocker & Croquip Ltd. v. Tornroos*, 3 D.L.R. (2d) 9 (B.C. C.A.), rev'd [1957] S.C.R. 151; Finn, *supra*, n. 66, at p. 91.

Canada decision in *Geffen v. Goodman*, Wilson J. described the presumption as follows:

> Equity has recognized that transactions between persons standing in certain relationships with one another will be presumed to be relationships of influence until the contrary is shown. ... it has been generally agreed that the existence of some "special" relation must be shown in order to support the presumption although what constitutes such a "special" relationship is a matter of some doubt. In *Snell's Principles of Equity*, for instance, it is stated ... that the presumption applies when the transaction has been effected between parties in a fiduciary relationship to one another.[430]

This would normally include relationships such as religious advisers, solicitors and guardians, but can also extend to other types of fiduciary relationship.[431] The category of relationship is not determinative of the matter, however, since in every category some beneficiaries will be subject to the fiduciary's influence while others will not. Factors such as the history of the fiduciary relationship and the extent of vulnerability of the beneficiary will affect the determination of whether such an influence existed.[432]

Where in circumstances of potential undue influence the consent of a beneficiary is obtained to an otherwise prohibited exercise of the fiduciary's powers, it will be presumed that the consent was obtained by the use of that influence:

> Once the plaintiff has established that the circumstances are such as to trigger the application of the presumption, i.e., that apart from the details of the particular impugned transaction the nature of the relationship between the plaintiff and defendant was such that the potential for influence existed, the onus moves to the defendant to rebut it.[433]

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[430] (1991) 81 D.L.R. (4th) 211 (S.C.C.).

[431] Shepherd, *supra*, n. 20, at p. 198; Finn, *supra*, n. 66, at p. 84; Sir Robert E. Megarry, "Historical Development", *Fiduciary Duties, 1990 L.S.U.C. Special Lectures* 1 (Toronto: De Boo, 1991) at p. 7.

[432] Shepherd, *ibid.*, at p. 211.

[433] *Geffen v. Goodman*, *supra*, n. 430, at p. 228. See also *Brusewitz v. Brown*, *supra*, n. 414, at p. 1109, from which the following passage was cited in the *Apsassin* trial judgment (*supra*, n. 8, at p. 64):

> Where there is not merely an absence or inadequacy of consideration for the transfer of property, but there also exists between the grantor and the grantee some special relation of confidence, control, domination, influence, or other form of superiority, such as to render reasonable a

In order to rebut the presumption of undue influence, or to meet the burden of proof that the presumption entails, the fiduciary must demonstrate that the beneficiary had full knowledge and understanding of the transaction and entered into it of his or her own free will.[434] In this regard, while access by the beneficiary to independent legal advice may provide some evidence of free will,[435] it is not conclusive,[436] especially where the power the fiduciary exercises is coercive.[437] It is important to note that the fact that fair market value was paid does not negate the presumption; even where a transaction is entered into at fair market value, undue influence may have been used to cause the transaction to be entered into in the first place, but for non-economic reasons.[438] In a similar vein, it is not open to the fiduciary to argue that the transaction would have occurred even without the influence of the fiduciary; under such circumstances the fiduciary is nonetheless in breach.[439]

Justification for Presumptions in the Crown/Indian Relationship

As discussed earlier, each of the above presumptions operates to shift the burden

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presumption that the transaction was procured by the grantee through some unconscientious use of his power over the grantor, the law will make that presumption, and will place on the grantee the burden of supporting the transaction by which he so benefits, and of rebutting the presumption of its invalidity.

[434] *Geffen v. Goodman*, *ibid.*, at p. 228; Shepherd, *supra*, n. 20, at pp. 216 and 220; DeMott, *supra*, n. 23, at p. 904; Finn, *supra*, n. 66, at p. 83.

[435] *Geffen v. Goodman*, *supra*, n. 430, at p. 228; Oosterhoff and Gillese, *supra*, n. 65, at p. 484; Finn, *supra*, n. 66, at p. 87.

[436] *Inche Noriah v. Shaik Allie Bin Omar*, [1928] All E.R. 189 (P.C.), at 193.

[437] Shepherd, *supra*, n. 20, at p. 237.

[438] *Ibid.*, at p. 218. Shepherd also suggests, on moral grounds, that where a fiduciary has influenced a beneficiary to enter into a transaction but can demonstrate that the same transaction would have taken place in the absence of such influence, the fiduciary should nevertheless be disentitled from any benefit.

[439] *Ibid.*, at p. 218.

of proof to the fiduciary to prove that the presumption is not true in the case at hand. The presumptions are justified by the disparity in the ability of the fiduciary and beneficiary to prove the necessary facts, as a result of which the courts put the onus of proof on the fiduciary, who is in the better position to provide those facts.[440] For a number of reasons, this justification also applies in respect of the Crown/Indian relationship.

Let us look for a moment at the circumstances surrounding the preservation and presentation of evidence relating to reserve land surrenders. Without presuming to attribute any *mala fide* intent on the part of the Crown or its servants, the circumstances surrounding surrenders in many respects give the Crown an advantage over the band similar to the advantages available to self-dealing fiduciaries. For example, for all but the most recent surrenders,[441] the Crown is the only source of written records relating to both the surrender itself and to any subsequent alienations made pursuant to the surrender. In the past, the responsibility for producing such records fell to the Indian Affairs employees conducting the surrenders. Those employees therefore controlled the content of what did, and what did not, appear in those records. For this reason, the official records kept by the Crown often reflect a somewhat "sanitized" version of the event.[442]

Evidence of this can be seen in the *Guerin* decision. Indian Affairs officer Anfield's written request to the Ottawa appraiser questioned whether the proposed rent was "just and equitable",[443] to which an affirmative written reply was received. It was only subsequent oral testimony that disclosed that the reply was based on incomplete

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[440] *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, at p. 155.

[441] Pre-1980, by this author's estimate.

[442] See discussion, *supra*, p. 109 and comments by Flannigan and Gautreau, *supra*, n. 409.

[443] *Supra*, n. 3, at p. 328, n. 12, at p. 399.

information.[444] In fact, virtually all of the testimony favourable to the band in that case was provided orally, not through the written records of the Crown.[445]

The decision in *Kruger v. The Queen* provides another case in point. The official documentation relating to the expropriation of the first of the two parcels at issue in that case was created by the Department of Transport (DOT) and justified the expropriation on the grounds that "negotiations have not been successful owing to the excessive rental asked by the Indians".[446] What that documentation does not disclose is that it was the opinion of the Indian Commissioner for British Columbia that the rental amount requested by the band was not excessive,[447] and that the "negotiations" referred to consisted of a single offer submitted by Indian Affairs on behalf of the band to which the DOT's response was to expropriate. It is only from extensive correspondence between the Indian Commissioner and Indian Affairs headquarters, quoted in the reasons for judgment, that an accurate description of the transaction materializes.

The expropriation of the second parcel of land in the *Kruger* decision provides another example of the manner in which a beneficiary's lack of information can hinder presentation of a case of breach by the fiduciary. Notwithstanding that DOT had already obtained an Order in Council expropriating the land in question, before paying the agreed upon compensation DOT officials asked Indian Affairs to "arrange for whatever surrender is necessary from the Indian Band".[448] Although the band agreed to the surrender, they

[444] See discussion of *Guerin* facts, *supra*, p. 38.

[445] One exception might be the memorandum forwarded with the surrender documents to Anfield, in which Indian Affairs headquarters suggested that the 15% limitation on lease rental increases be removed (*supra*, n. 12, at p. 401).

[446] *Supra*, n. 222, at p. 601.

[447] *Ibid.*, at p. 601.

[448] *Ibid.*, at p. 618.

questioned why a surrender was necessary if the land had already been expropriated.[449] In fact, DOT had received legal advice that the land could not be expropriated, a circumstance which was not disclosed to the band.[450]

While in each of the above examples officials of the Crown may have acted only in accordance with what they felt were the obligations of their respective positions, the fact that Crown officials were ultimately the authors and archivists of the documentary record placed the bands in question at a disadvantage, one sufficient to justify the imposition of presumptions against the Crown in its dealings with them and the evidentiary shift that those presumptions entail. Most of the same evidentiary considerations apply to the *Apsassin* case, which provides a further example of a situation in which the Crown found its actions in its role as fiduciary questioned by its beneficiaries.

The circumstances of *Apsassin*, in particular those surrounding the 1945 surrender in that case, potentially call for the application of a number of presumptions: that adequate disclosure was not made in obtaining the consent of the beneficiary; that a purchase of fiduciary property by the fiduciary was effected through a misuse of fiduciary powers; that a sale of fiduciary property to a third party with whom the fiduciary has a non-arm's-length relationship was for the benefit of the fiduciary; and that in entering into a transaction with the beneficiary, the fiduciary used a power of influence over the beneficiary in its own interest. In all, the *Apsassin* case presents a complex application of the rules governing

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[449] *Ibid.*, at p. 619.

[450] The recital to a subsequent Order in Council, obtained by DOT for expenditure approval and not made available to the band at the time, revealed the reason for DOT's request for the surrender (*ibid.*, at p. 632):

> That, when the Deputy Minister of Justice was requested to submit the matter to the Exchequer Court for settlement, he advised that the interest of the Indians in this land could not be taken by proceedings under the Expropriation Act and that the transfer of the land could be made only by a surrender duly made at a proper meeting of the Indian band ...

conflict of interest by fiduciaries. For this reason it is proposed to examine the application of the concept of Crown conflict of interest in the context of that case and of the claims involving reserve lands advanced therein.

CHAPTER VI
CROWN CONFLICT OF INTEREST

As set out in the preceding chapter, the rule against conflict of interest in private law is essentially that a fiduciary must not enter into transactions involving fiduciary property if he or she has a conflicting interest. It has also been pointed out[451] that the prohibition extends to transactions with parties with whom the fiduciary has a personal or business relationship. As applied to the Crown/Indian relationship with respect to reserve lands, then, the conflict of interest rule would prohibit the Crown from purchasing or leasing reserve lands where either the Crown itself or a party connected to the Crown — for our purposes referred to as a non-arm's-length party — has an interest in the transaction. Broadly speaking, almost any circumstances where the Indian lands are to be used for public purposes would fall within the ambit of the prohibition.

As the ideas involved in Crown conflict of interest may be difficult to conceptualize in the abstract, I propose to discuss them within the frame of reference provided by the *Apsassin* case. Among other things, the subtlety of the relationship between the VLA Director and the Crown in that case provides a focus for the examination of the idea of identity of the Crown and the degree of independence exhibited by agencies established to fulfil public purposes.

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[451] *Supra*, p. 96.

It will be seen that the facts in *Apsassin* present a classic case of self-dealing by a fiduciary, in this case the Crown, and that this aspect was underemphasized at both trial and appeal. The case exemplifies the curial tendency to import the fiduciary label while failing to fully incorporate the private law principles inherent in the fiduciary concept. Although all appellate judges acknowledged the existence of a fiduciary relationship, it is submitted that none successfully applied recognized fiduciary principles, particularly those related to conflict of interest, to the determination of the issues in that case.

One of the primary conflict of interest allegations of the plaintiffs in *Apsassin* related to the conduct of the 1945 surrender of the whole of one of their reserves. By the terms of the 1945 surrender, the Beaver band surrendered to the Crown its entire interest in the reserve "in trust to ... sell or lease ... the same".[452] As recounted earlier,[453] the surrender was taken for the purpose of selling the subject lands to the VLA Director, to whom they were indeed subsequently sold.

At trial, Addy J. acknowledged that Indian Affairs and the VLA Director had different objectives and interests in mind in entering into the transfer of the surrendered lands:

> the former was seeking the best price available for the land and was interested in obtaining it immediately in order to purchase substitute reserves closer to the trap lines. The latter, on the other hand, wanted to secure good agricultural land at the lowest possible price in order to allow the veterans to obtain a greater benefit from the purchase.[454]

While competing interests are to be expected in the relationship between an arm's-length buyer and seller, in a non-arm's-length relationship they place the fiduciary in

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[452] *Supra*, n. 210, at p. 552.

[453] See recitation of *Apsassin* facts, *supra*, p. 57.

[454] *Supra*, n. 209, at p. 74.

a precarious position. The first consideration is therefore whether the Crown and the VLA Director enjoyed an arm's-length relationship or whether, in the alternative, the VLA Director was either an emanation of the Crown or a non-arm's-length third party. In either of the latter two eventualities, the disparate interests referred to by Addy J. above would constitute a conflict of interest for the Crown in its position as fiduciary to the band. Although some attention was paid to this issue at both trial and appeal, the courts' conclusions respecting this issue appear to be inconsistent and unclear.

The Relationship between the Crown and Third Parties

A conflict of interest can arise in the relationship between the Crown and a party to a transaction involving fiduciary property if the transacting party is either an emanation of the Crown or if it enjoys a non-arm's-length relationship with the Crown. For the purposes of this paper, "emanation of the Crown" is used to denote an entity that is part of the Crown itself, sometimes described as an "instrumentality of the Crown" or as "within the shield of the Crown".[455] A transacting party should be considered to be non-arm's-length if the purpose of the transaction is to further an objective of the Crown or an objective that that party shares in common with the Crown.

A party that is not part of the Crown, but that pursues Crown objectives, is frequently referred to as an "agent of the Crown". The courts consider an entity to be an agent of the Crown if it satisfies the common law test of control or if it is expressly designated as an agent of the Crown by statute.[456] Hogg explains the common law test as follows:[457]

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[455] P. Hogg, *Constitutional Law of Canada*, 2nd ed., (Toronto: Carswell, 1985) at p. 218.

[456] *Ibid.*

[457] *Ibid.*

the question whether a public corporation is an agent of the Crown depends upon "the nature and degree of control which the Crown exercises over it".[458] If the corporation is controlled by a minister (or a cabinet) in much the same way as a government department is controlled, then the corporation is an agent of the Crown. If, on the other hand, the corporation is largely free of ministerial control, then it is not an agent of the Crown. Between the extremes of full control and no control lies a continuum ... "the greater the control, the more likely it is that the person will be recognized as a Crown agent".[459]

The control relevant to the agency test is *de jure* control, not *de facto* control. In other words, it is the degree of control that the Crown is entitled to exercise, not the degree of control actually exercised, that is legally relevant. As such, the issue of control is determined by reference to the controlling power conferred by the statute governing the Crown/entity relationship, rather than by an assessment of the operation of the actual relationship.[460]

The *Apsassin* case illustrates the complexity of determining the nature of such a relationship. As a starting point for his consideration of the relationship between the Crown and the VLA Director in *Apsassin*, the trial judge cited *Reference re Saskatchewan Natural Resources*[461] as authority for the proposition that the Crown is a single entity for the purposes of holding land, notwithstanding that different governmental departments may have management and control of those lands at different times. Following from this, he reiterated the assertion expressed by Heald J. in *R. v. Kruger* that "the federal Crown cannot default on its fiduciary obligation to the Indians through a plea of competing considerations by different departments of Government".[462] None of the appellate judges

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[458] Citing *Westeel-Rosco v. Board of Governors of South Saskatchewan Hospital Centre*, [1977] 2 S.C.R. 238 at pp. 249-250 and *Fidelity Insurance Co. v. Cronkhite Supply*, [1979] 2 S.C.R. 27 at p. 29.

[459] Quoting Dickson J. in *R. v. Eldorado Nuclear*, [1983] 2 S.C.R. 551 at p. 573.

[460] Hogg, *supra*, n. 455, at p. 219.

[461] [1931] S.C.R. 263.

[462] *Supra*, n. 222, at p. 654.

in *Apsassin* appeared to have any difficulty with this position.

This makes sense. Notwithstanding some inconsistent *obiter dicta* found in *Kruger*,[463] there is little doubt that all government departments must be considered at law to be part of a single Crown entity.[464] Furthermore, there is nothing to suggest that the Crown, when acting as a fiduciary to an Indian band, can subordinate its fiduciary responsibilities to other governmental imperatives. Unlike the lesser constraints imposed on its actions in its legislative capacity,[465] the Crown as fiduciary is bound, as was confirmed in *Guerin*,[466] to act in the best interests of its Indian beneficiaries and only in their interests. Because by definition a fiduciary is one who exercises a received power on condition that it only be exercised in the interests of a beneficiary, to hold that the Crown is free to decide that competing interests permit it to act contrary to the interests of its Indian beneficiaries would in effect be to say that the Crown is not a fiduciary. Moreover, because any decision to act contrary to a band's interests on account of other government imperatives would constitute a political balancing of interests, to permit this would in effect be to reintroduce the political trust theory of Crown obligation. Both such possibilities have been expressly precluded by the Supreme Court's decision in *Guerin*.

The issue is not so clear, however, where the entity in question is not a

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[463] Although the *Kruger* decision was decided on the basis of expiration of limitation periods, Stone J. consistently referred to the Indian Affairs *branch*, as opposed to the Crown, as the entity entrusted with the fiduciary duty.

[464] Although, as Hogg points out (*supra*, n. 455, at pp. 216-217), the Crown in right of Canada may be considered as a separate legal entity from the Crown in right of a province, there is no suggestion that federal departments should be considered to be legal entities separate from each other or from the federal Crown itself. Dickson J. confirmed this position in *Mitchell v. Peguis Indian Band*, stating that "any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations" (*supra*, n. 228, at p. 209).

[465] See *Sparrow*, *supra*, n. 9, at p. 412 and discussion, *supra*, p. 54.

[466] *Supra*, n. 3, at p. 334.

government department. In *Apsassin*, Addy J. distinguished the *Saskatchewan Natural Resources* case (and implicitly Heald J.'s judgment in *Kruger*) on the ground that the VLA Director did not have the status of a government department but was instead a statutory corporation sole, independent of normal Ministerial control. He concluded that the transfer was therefore not an administrative transfer between government departments but was instead a transfer of title to an independent third party.[467]

He later undermined his conclusions about the Director's independence, however, when he observed that, by virtue of s. 3 of the *Veterans' Land Act, 1942*,[468] the Director was "responsible to the Minister of Veterans' Affairs and *subject to the latter's direction*".[469] This incongruity is particularly significant in light of the fact that at the time the negotiations for the surrender of the reserve were initiated, the VLA Director was responsible to the Minister of Mines and Resources, the same Minister responsible at that time for Indian Affairs.[470]

Much of the same uncertainty as to the relationship between the Crown and the VLA Director persisted on appeal. For the certain tactical reasons,[471] the plaintiffs

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[467] *Supra*, n. 209, at p. 75.

[468] S.C. 1942, c. 33. Complete text of provisions referred to is included in Appendix "B".

[469] *Supra*, n. 209, at p. 78. Emphasis added. Under ss. 18 and 20 of the Act, the Director also required Ministerial approval for certain dispositions of property. In addition, under s. 21 of the Act, the Director required Governor in Council approval for sales other than in accordance with s. 9 of the Act. Under s. 29, the Director also got free mail service.

[470] *Supra*, n. 210, at p. 515.

[471] Because of the significant lapse of time between the transactions in question and commencement of the action by the plaintiffs, limitation periods were very much at issue. The applicable limitation periods included an ultimate 30-year limitation for fiduciary claims involving fraud or deceit. The transfer of the surrendered land from Indian Affairs to the VLA Director took place in March of 1948, while the plaintiffs' statement of claim was issued in September of 1978, some 30 years and five months later.

This difficulty led the plaintiffs, in an attempt to preserve their rights, to proffer arguments designed to characterize the Crown's alleged breach of fiduciary duty as having occurred only after the transfer to the VLA Director. The plaintiffs consequently argued contended on appeal that the Crown's fiduciary duties in respect of the surrendered land were transmitted to the VLA Director in the process of transferring the surrendered lands to him. The appeal court's consequent focus on that aspect obscured considerations of conflict of interest that are arguably more relevant to the circumstances of the case.[472]

As has been noted, an entity will be deemed to be an agent of the Crown if it satisfies the common law test of control or if it is expressly designated by statute to be an agent of the Crown. In *Apsassin*, the status of the VLA Director's corporation sole can be determined by a combination of these two tests.

In *Apsassin*, the relationship between the Crown and the VLA Director can be clarified by focusing on the transfer of the land rather than the issue of transfer of fiduciary obligations.[473] Firstly, s. 5(1) of the *Veterans' Land Act, 1942* clearly provides that "for the purposes of acquiring, holding, conveying and transferring land" the VLA Director is an agent of the Crown. When one considers that the principal purpose of the Act — reflected in its preamble — was the acquisition and disposal of land on behalf of the government, and that the majority of the duties of the VLA Director set out in the Act

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(a) that no true transfer had taken place between Indian Affairs and the VLA Director;
(b) that instead merely an interdepartmental transfer of administrative control of the land occurred;
(c) that the Crown's breach of fiduciary duty took place only on the transfer of title to the veterans; and
(d) that the legal transfers of title to the veterans took place only after the veterans had finished paying for their land, all within the 30-year ultimate limitation period.

Having so characterized the alienation of the surrendered land, the thrust of the plaintiffs' legal argument was that, following the transfer from Indian Affairs, the VLA Director inherited all of the Crown's fiduciary obligations in respect of the land and that it was therefore the VLA Director who, on behalf of the Crown, breached those obligations in selling the land, with its mineral rights, to the veterans.

[472] In response to the plaintiffs' characterization of the transactions at issue, the judgments in the case, and especially those of the Court of Appeal, tended to focus on the aspect of whether the Crown's fiduciary duty was transmitted from Indian Affairs to the VLA Director, to the detriment of a more balanced analysis of the relationship of the actors and of the various transactions at issue. This aspect appears and reappears throughout the judgments.

[473] See discussion in preceding footnote and *infra*, p. 160.

relate to the *acquisition, holding, conveyance and transfer of land*, almost all of the functions of the VLA Director would appear to fall within the scope of the agency relationship set out in s. 5(1) of that Act.

Although Stone J. noted that in acquiring, holding and conveying land the VLA Director acted as an agent of the Crown[474] and that conveyances by the VLA Director had the same the effect as grants from the Crown,[475] because he was focusing only on the plaintiffs' contention that the VLA Director had inherited the Crown's general fiduciary duties, his conclusion was limited to the observation that the scope of the VLA Director's agency set out in s. 5(1) of the Act did not include acting as the Crown's agent for the purposes of fulfilling its fiduciary obligations:

> It is true, as s. 5(1) makes clear, that in acquiring, holding and conveying land the Director of V.L.A., as a corporation sole, acted as an agent of His Majesty.... I do not read the subsection as clothing him with the capacity or authority of acting as an agent of His Majesty for any other purpose.[476]

In so doing, he neglected to address the principal issue of whether for the purposes of the sale itself the VLA Director was acting as agent.[477]

Isaac C.J., on the other hand, was willing to concede that under s. 5(1) the VLA

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[474] Subsection 5(1) states as follows:

> 5. (1) For the purposes of acquiring, holding, conveying and transferring and of agreeing to convey, acquire or transfer any of the property which he is by this Act authorized to acquire, hold, convey or agree to transfer, but for such purposes only, the Director shall be a corporation sole and he and his successors shall have perpetual succession, and as such the agent of His Majesty in the right of Canada.

The complete text of s. 5 is included in Appendix "B".

[475] *Supra*, n. 210, at p. 582.

[476] *Ibid.*, at p. 582.

[477] Stone J.'s analysis is not necessarily inconsistent with a Crown agency conclusion with respect to the transfer of land, as his finding was that only for *other* purposes, namely acting as a fiduciary, was the VLA Director not a Crown agent. His conclusion that Crown agency is limited to land transfers is vitiated somewhat, however, by s. 33(5)(b) of the Act, which provides that the VLA Director may commence legal actions for certain purposes not related to land transfers "in the name of the Director as agent of His Majesty".

Director had the status of "a corporation sole ... and as such an agent of the Crown", but reasoned that the preceding words "but for such purposes only" limited the VLA Director's corporate status to the function of acquiring land. In addition, he pointed to s. 5(6) of the Act, which provided that, for the purposes of taxation and for such purposes only, the VLA Director was *not* an agent of the Crown. He further noted that two subsequent amendments to s. 5[478] each deemed that for certain narrowly defined purposes the VLA Director was to be deemed *not* to be an agent of the Crown.[479] Although this analysis accords better with the Crown agency principles set out above, in the end Isaac C.J. accepted the plaintiffs' contention that the transfer from Indian Affairs to the VLA Director was merely "an administrative transfer between Crown agencies".[480]

As noted earlier, when it is recognized that the majority of the duties of the VLA Director set out in the *Veterans' Land Act, 1942* relate to the acquisition and disposal of

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[478] Paragraph 5(1a), added by S.C. 1950, c. 51, s. 6, and s. 5(8), added by S.C. 1980-81-82, c. 78, s. 1.

[479] Isaac C.J.'s analysis of s. 5(6) and of the subsequent amendments to s. 5 is based on the principle of statutory interpretation embodied in the expression *expressio unius est exclusio alterius* — the expression of one thing is the exclusion of the other (see generally R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994), at pp. 168-176, and P.A. Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville, Quebec: Les Éditions Yvon Blais, 1991), at p. 281). Accordingly, the fact that these provisions purport to alter the status of the VLA Director to that of a non-agent for certain narrow purposes implies that for other purposes the status of the VLA Director is in fact that of an agent. To conclude otherwise would arguably be to render the provisions meaningless, offending another principle of statutory interpretation, that a statute is to be interpreted so as to give meaning to all of its provisions (Sullivan, p. 159; Côté, p. 309). In accordance with these principles but in apparent contradiction to his earlier conclusion that the VLA Director was an agent only for the purposes of acquiring land, Isaac C.J. interpreted these provisions as implying that for all purposes other than the purposes delineated in s. 5(1) the VLA Director *was* in fact acting as an agent of the Crown, which he felt befitted the VLA Director's status of Crown servant (*supra*, n. 210, at p. 534).

[480] *Supra*, n. 210, at p. 528. Apparently on the basis that, for all purposes other than the transfer of land, particularly that of assuming the Crown's fiduciary obligations, the VLA Director was a servant of the Crown, not an independent corporate entity (p. 532). Isaac C.J. relied *inter alia* on the argument that, by definition, corporations sole "are always holders of a public office" (citing *Jowitt's Dictionary of English Law*, 2nd ed.). Hogg, however, expresses the view that, because a public corporation is a legal person separate from the Crown, it is inappropriate to describe it as a servant of the Crown (*supra*, n. 455, at p. 218).

land on behalf of the federal government, almost all of the functions of the VLA Director would appear to fall within the scope of the agency relationship set out in s. 5(1) of that Act. In this light, it would appear reasonable to interpret the non-agency exceptions noted by Isaac C.J.[481] as exceptions from the general purpose of "acquiring, holding, conveying and transferring land" set out in that subsection. Isaac C.J.'s agency analysis therefore supports the view that the *Veterans' Land Act, 1942* expressly provides that in purchasing land the VLA Director was acting as an agent of the Crown.

Such an interpretation is also supported by the common law test of agency. Firstly, the VLA Director's objective in later transferring the surrendered land to veterans was one and the same as that of the Crown — to provide a government benefit to returning veterans at the least cost to the taxpayer. Secondly, the *Veterans' Land Act, 1942* provides for a substantial degree of control over the VLA Director: s. 3 provides that the VLA Director "shall be responsible only to the Minister"; s. 18 requires that the Minister approve certain sales of seized property; s. 20 requires that the Minister approve any disposition, other than by lease, of land pending sale; s. 21 requires Governor in Council approval of any sale made other than in accordance with the terms set out in s. 9 of the Act; s. 37 requires Governor in Council approval of any regulations made by the Director regarding a host of matters relating to the administration of the Act; and s. 38 requires that the Director's financial statements be laid before Parliament at the beginning of each Parliamentary session. Considered together, these provisions indicate a substantial degree of Crown control over the operations of the VLA Director.

The decision in *Bain v. Director, Veterans' Land Act* lends support to this conclusion. The decision, cited by Isaac C.J. in *Apsassin*, was a mechanics' lien action in

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[481] Set out in ss. 5(1a), (6) and (8).

which the VLA Director was characterized as "an emanation, or more properly the agent, of the Dominion Crown" in respect of the ownership of property. It concluded that the VLA Director operated "under the superintendence of the Minister of Veterans' Affairs" and was an entity over whom "in the last analysis, the Government or Parliament is to exercise complete control".[482] The most appropriate conclusion would therefore appear to be that, for the purposes of acquiring and disposing of the reserve land surrendered in *Apsassin*, the VLA Director was acting as agent for the Crown (the principal in the agency relationship) and not as an independent entity.

On this basis, it would appear fair to conclude that in transferring the land surrendered pursuant to the 1945 surrender to the VLA Director, the Crown was in fact selling the land to its own agent, an entity which by definition is acting on its behalf, to be subsequently resold by that agent on its behalf once more. Such a situation clearly falls within the scope of the self-dealing prohibition of the conflict of interest rule.

Because of his differing view of the Crown's relationship to the VLA Director, Isaac C.J. offered a different analysis of the transfer of the surrendered land to the VLA Director. He did not consider that a true transfer had taken place, but instead characterized the transaction as a simple transfer of administrative control from one Crown emanation to another, with no transfer of legal title.

Even if one for the moment accepts Isaac C.J.'s characterization, it is submitted that the Crown was nonetheless in a position of conflict of interest and that the transfer constituted a case of self-dealing. Two factors support this:

(1) the transfer was from a branch of the Crown whose purpose was to hold the land for the benefit of the band to another entity whose objectives — conversion of the

[482] [1947] O.W.N. 917 (H.C.J.), at p. 918.

land for the benefit of third parties — were totally inconsistent with those purposes; and

(2) compensation was paid by the transferee, confirming an intention to permanently divest the band of its interest in the land.

Isaac C.J. seemed to recognize this when he characterized the purported negotiations between Indian Affairs and the VLA Director regarding the sale price as "a case of self-dealing in its most elementary form".[483] Such a characterization, while inconsistent with his position that no transfer had taken place, is nevertheless consistent with a view of the transfer to the VLA Director as a sale by the government to itself: the purchase of fiduciary property by a fiduciary.

Compare, for example, an analogous situation in private law, in which a corporate trustee "transfers" trust assets to another branch of the same corporation (the sales branch), whose function it is to sell assets for purposes unrelated to the trust, compensating the trust with cash transferred from the sales branch. Such an action, it is submitted, would invariably be considered to be a purchase of fiduciary property by a fiduciary and, as such, a clear breach of fiduciary duty.[484] One could not credibly contend that no actual transfer had taken place and that the corporate trustee continued to hold the assets in the same manner as before. Although it is possible that, while the sales branch continued to hold the assets, a court could order that they be restored, this cannot to be construed as negating the fact that a transfer has taken place or that a breach of fiduciary duty occurred at the time of

[483] *Supra*, n. 210, at p. 530.

[484] *Osadchuk v. National Trust Co.*, *supra*, n. 338; Scott, *supra*, n. 48, at p. 545. Another often-encountered analogy is that of the solicitor who misappropriates trust funds by simply transferring them from the firm's trust account to its operating account.

the transfer to the sales branch.[485]

Under Isaac C.J.'s characterization of the transaction in *Apsassin*, the fiduciary asset (the surrendered land) was transferred, for a stipulated price, from one emanation of the Crown (Indian Affairs), whose function it was to fulfil the Crown's fiduciary obligations in respect of the surrender, to another (the VLA Director), whose function it was to sell such assets for purposes unrelated to the surrender and those fiduciary obligations. Under private law standards of fiduciary conduct, such a transfer would constitute a clear case of self-dealing by a fiduciary.

Either of the above characterizations of the transaction, as a sale by the Crown as principal to its own agent or as an internal governmental transfer of assets for purposes unrelated to the fiduciary relationship, would constitute a case of self-dealing by the Crown. Indeed, a sale by the Crown to its own agent could be considered as a purchase by the Crown itself as the principal in the Crown/VLA Director agency relationship. Either characterization entails significant implications with respect to the strictness with which the Crown will be judged in fulfilling its fiduciary obligations relating to the lands in question, since, as noted earlier,[486] legal presumptions and associated burdens of proof differ markedly as between cases of self-dealing by a fiduciary on the one hand and arm's-length transactions on the other. In the context of the *Apsassin* case, the existence of a conflict of interest on the part of the Crown has two important implications:

(a) it shifts to the Crown the burden of showing that consent to the transaction was not obtained through the exercise of undue influence; and

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[485] Although until the fiduciary assets are sold to an innocent purchaser the transaction is susceptible to a court-ordered rescission, this does not mean that no breach of fiduciary duty occurs until the assets are sold by the fiduciary: an action for breach of fiduciary duty can proceed in respect of the self-dealing, even if there is never any subsequent sale to a third party.

[486] *Supra*, p. 110.

(b) it places on the Crown the onus of demonstrating that the consent of the band to the impugned transaction was fully informed.

The first of these implications is discussed in the section that follows.

Exercise of Undue Influence by the Crown

As was discussed earlier,[487] where a fiduciary obtains the consent of the beneficiary to a transaction in which the fiduciary has an incipient conflict of interest, and where the potential for undue influence exists, the fiduciary will be presumed to have exercised that influence and the onus shifts to the fiduciary to rebut the presumption. In the context of the Crown/Indian relationship, where reserve lands are to be transferred to the Crown or to an agent of the Crown, this presumption would shift to the Crown the burden of proving that the band entered into the transaction of its own free will and that it was not influenced by the Crown to do so.

In *Apsassin*, a principal point of contention at trial was whether the band had freely given its consent, informed or otherwise, to the inclusion of the reserve's mineral rights in the 1945 surrender: i.e., whether the band's members were unduly influenced by the Crown in their decision to enter into the transaction. Counsel for the plaintiffs alleged that the Crown had exploited its superior position *vis-à-vis* the band to obtain the surrender to suit its own purposes and that, in furtherance of those purposes, servants of the Crown had withheld important information and given improper advice to the band.[488]

Two factors support the plaintiffs' contention that the Crown's relationship with the band gave rise to an influence over the band. First, as has been submitted, the Crown's

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[487] *Supra*, p. 113.

[488] *Supra*, n. 209, at p. 64.

ongoing relationship with the Beaver Band in respect of their reserve lands was of a fiduciary nature.[489] Because the *Indian Act* required that the band act through the Crown in any disposition of its lands, the Crown was in a natural position to influence decisions by the band regarding its land dispositions in general. Second, the trial court found as fact that the band "relied to a large extent on advice and guidance from the Department's staff" in the management of its financial affairs. As Stone J. noted on appeal, paternalism was a marked feature of the relationship between the band and Indian Affairs at that time:

> during the period from the 1920's to the 1950's, those responsible for Indian affairs were actuated by the twin principles of protection and advancement. In furtherance of these principles the Crown accepted to protect the Indians of Canada, regarded in law as minors, from the acts of unscrupulous people and from the results of their own folly, and to advance the Indian people toward self-sufficiency both socially and economically. Government decisions were to be taken in the best interest of the Indian people and government officials were considered to be the best judges of that interest.[490]

As La Forest J. notes in his discussion of undue influence in *Norberg v. Wynrib*,

> The general notion of submission to an "authority" figure indicates an inequality of power between the parties such that the existence of genuine consent is questionable.[491]

Taken together, the nature of the band's relationship with the Crown and its reliance on the Crown for guidance appear *prima facie* to present at least a potential for the exercise of undue influence by the Crown.

In the private law context, it has been noted that where "the nature of the relationship between the plaintiff and defendant was such that the potential for influence existed", the onus is put on the fiduciary to show that his or her influence was not used to

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[489] *Supra*, p. 66.

[490] *Supra*, n. 210, at p. 555.

[491] *Supra*, n. 33, at p. 252.

obtain the beneficiary's consent.[492] This argument was advanced by the plaintiffs at trial, citing as authority *Brusewitz v. Brown*.[493] The application of this presumption to the circumstances of *Apsassin* would impose upon the Crown the onus to put forward evidence to show that it had not used any influence that it might have had as a result of its ongoing relationship with the band to persuade the band to enter into the 1945 surrender transaction.

Notwithstanding the above, the presumption of undue influence and the accompanying reverse onus it entailed was rejected at trial.[494] Certain additional facts pertaining to the surrender not mentioned in the trial judgment but noted on appeal cast some doubt on this rejection, however. On appeal Isaac C.J. noted that two earlier requests for surrender of the land, one by the Soldier Settlement Board following the First World

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[492] *Geffen v. Goodman*, *supra*, n. 430, at p. 228.

[493] *Supra*, n. 433.

[494] *Supra*, n. 209, at p. 65. Addy J. stated his position as follows:

> Finally even where there exists a special relationship between the parties, when an agreement in writing is being challenged and especially an indenture under seal such as the present one, it seems that there would have to be something more than a bare allegation of improper conduct before there is any duty on the person in the dominant position to adduce evidence to establish that the special duty was properly fulfilled.

With respect, having acknowledged that the agreement related to a self-dealing transaction by the fiduciary, it appears that, rather than distinguishing the case from one in which the undue influence principle would apply, Addy J. was simply proffering an opinion that the presumption itself is unwarranted — i.e., that a reverse onus should not be applied. He may have thought it necessary to take such a position in order to avoid addressing the plaintiffs' contention that presumption required that the Crown prove positively that it had fully explained to the band some sixteen matters enumerated by the plaintiffs (not set out in the judgment), most of which Addy J. dismissed as irrelevant, redundant, unnecessary or inapplicable (*supra*, n. 209, at p. 65). Stating that the plaintiffs had overstated the evidence necessary to satisfy the burden on the Crown is qualitatively different, however, from stating that the burden does not exist.

Two other aspects of Addy J.'s rejection of the undue influence presumption are problematic. Firstly, his inference that situations involving an agreement in writing and "especially an indenture under seal" merit different consideration seems to ignore at least one rationale behind the presumption — that the influence may have been used to cause the transaction to be entered into in the first place. In this respect, the fact that the ensuing transaction was recorded in writing or was under seal is irrelevant. A second difficulty relates to his observation that "it would be manifestly ludicrous to require now, 40 years after the event ... that the defendant establish positively that advice was given on all these matters". However, this is an argument not against the application of a reverse onus principle, but rather in favour of the imposition of a reasonable limitation period, an unrelated issue.

War and another by the Province of British Columbia in 1935, had been refused by Indian Affairs, presumably in furtherance of its stated firm policy "against alienation by sale of lands for which there is any likelihood of Indian need in future years".[495] While it is possible that the offer of other lands in substitution might have justified a departure from that policy, Isaac C.J. pointed to two additional factors that cast Indian Affairs' decision to consider selling the reserve in a somewhat less flattering light:

(1) at the time of the decision by the Deputy Minister of Indian Affairs, the government was under political pressure to make lands available to returning veterans; and

(2) the same Minister to whom the Deputy Minister of Indian Affairs reported was also responsible for veterans' affairs and for the administration of the *Veterans' Land Act, 1942*.

These factors alone would appear to be sufficient to raise at least a *prima facie* suspicion that the government might have been motivated by extraneous considerations to persuade the band to surrender its lands.

It has been noted that the Crown, in the context of its ongoing fiduciary relationship with the band, was contemplating a transfer of fiduciary property to an entity purchasing the land as its own agent. When one considers the incipient conflict of interest created by that situation in conjunction with the potential for undue influence created by the combination of the band's lack of business sophistication, its corresponding reliance on Indian Affairs' advice and the close relationship between the government officials responsible for administering the band's lands and those responsible for purchasing veterans' lands, a strong presumption of the exercise of undue influence on the part of the

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[495] From the 1945 annual report of the Director of Indian Affairs, quoted *supra*, n. 210, at p. 514.

Crown is necessarily justified.

Notwithstanding the above considerations, Addy J. found, on the evidence presented, that none of the Indian Affairs officials had attempted to influence the band to proceed with the surrender and concluded that the band had given its consent freely.[496] What is not clear from the trial judgment, however, is whether he reached this conclusion as a result of affirmative evidence put forth by the Crown or on the basis that the plaintiffs had not proven otherwise. Had a presumption of undue influence on the part of the Crown been applied, it would have been incumbent on the Crown to produce affirmative evidence in this regard sufficient to rebut the presumption. The failure of the trial judgment to indicate whether this reverse onus was met may present a significant gap in the evidence for purposes of appeal. Were the Crown on the evidence to be found *not* to have satisfied this onus, it might be open to the band to claim that the surrender would never have taken place and that the lands, with their mineral rights intact, would still be in the band's possession. The implications of such a claim are discussed later, at page 167.

Consent to the 1945 Surrender

As noted above, in addition to avoiding or satisfying the presumption of undue influence, a fiduciary acting in a situation of conflict of interest must demonstrate that the beneficiary's consent to the impugned transaction was fully informed. The circumstances of *Apsassin* illustrate some of the difficulties that can be encountered in attempting to ascertain whether such consent was given.

It was the position of counsel for the plaintiffs in *Apsassin* that the band's consent to the inclusion of the mineral rights in the 1945 surrender was not an informed consent:

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[496] *Supra*, n. 209, at p. 66.

that as the band had not had time to properly consider the implications of surrendering the reserve, its consent was not fully informed. At trial, after considering the evidence pertaining to the 1945 surrender in great detail,[497] Addy J. made the following determinations of fact:

- the band had had sufficient advance notice of the proposed surrender;
- there had been at least three formal meetings with departmental representatives to discuss the matter;
- the band members had on many occasions informally discussed the proposed surrender among themselves;
- the proposed surrender was fully discussed at the surrender meeting and its consequences fully explained to the band;
- the band members did in fact understand that they were giving up all rights to the reserve forever; and
- the band members had already given consideration to, and had chosen, alternative sites for a new reserve.

On this basis, he concluded that all members of the band present gave their free and informed consent to the surrender[498] and that, in ceding all of its property rights in the reserve, the band must be taken to have intended to include in the 1945 surrender whatever mineral rights it had in the entire reserve.[499]

This view was generally accepted by the majority of the Court of Appeal.[500]

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[497] Set out in pp. 199-129 of the C.N.L.R. report (*supra*, n. 209). These details were omitted from the abbreviated F.C. report.

[498] *Supra*, n. 209, pp. 66-67.

[499] *Supra*, n. 210, at p. 53.

[500] Stone J. quoted the trial judgment findings in this regard (*ibid.*, at p. 553).

Based on the evidence at trial, Stone J. was satisfied that the band's consent to the surrender of all rights in the reserve and to the broad wording of the 1945 surrender document was sufficient to indicate that the band intended that the 1945 surrender for sale should include the minerals previously surrendered for lease in 1940.[501]

Isaac C.J., dissenting, concluded that the Crown had not discharged its obligation to ensure that the band knew that the mineral rights surrendered in 1940 were to be included in any sale made pursuant to the 1945 surrender.[502] He was of the view that a mere implication was not sufficient, and that the Crown, as a fiduciary, had the onus of demonstrating that the necessary consent had been given:

> the Crown was under an obligation to advise the Indians that it intended to sell, rather than lease, [the mineral] rights before it took the 1945 surrender of surface rights. Put another way, because the Crown was under a fiduciary obligation, in the absence of full disclosure, it must be presumed *not* to have intended to have included the mineral rights in the 1945 surrender. There is no evidence that the Crown did so, and in my view, it is inappropriate in the context of a fiduciary relationship — particularly a relationship between the Crown and a group of people of the Band's level of legal unsophistication — to interpret silence as meaning either that the party in a position of vulnerability was acceding to the permanent divestiture of its interest, or that the fiduciary was intending such a divesture.[503]

Isaac C.J.'s first conclusion — that the Crown's fiduciary duty arising out of the 1940 surrender burdened it with a positive obligation to inform the band that the mineral rights would be included in the lands sold pursuant to the 1945 surrender — is readily justifiable. It is evident that among the fiduciary's duties is the duty to apprise the beneficiary of all information relevant to any decision to be made by the beneficiary.[504]

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[501] *Ibid.*, at p. 576.

[502] *Ibid.*, at p. 526.

[503] *Ibid.*, at pp. 524-525.

[504] *Hope v. Beard*, *supra*, n. 306; DeMott, *supra*, n. 23, at p. 900.

Under the circumstances, the fiduciary (the Crown) was contemplating an exercise of its discretion (selling the land) in a manner not contemplated in the original transfer of power (which anticipated leasing the land). It would therefore have been incumbent upon the Crown as fiduciary to seek the consent of the beneficiary band to the proposed departure. In the circumstances, this would have translated into a duty to inform the band, as the beneficiary of the 1940 surrender, of all information relevant to the shift from leasing their mineral interests pursuant to the 1940 surrender to selling those interests pursuant to the 1945 surrender.

On the other hand, Isaac C.J.'s assessment that "because the Crown was under a fiduciary obligation, in the absence of full disclosure, it must be presumed *not* to have intended to have included the mineral rights in the 1945 surrender" is less persuasive. As noted above, his major premise — that the Crown was acting as a fiduciary in respect of the mineral rights — is sustainable. Even if his minor premise — that the Crown did not fully inform the band — is conceded, his stated conclusion that the Crown "must be presumed *not* to have intended to have included the mineral rights in the 1945 surrender" does not necessarily follow.

With respect, the question of whether a fiduciary acted in breach of a fiduciary duty — in this case whether the mineral rights were included in the 1945 surrender — must be approached as a question of fact. In *Apsassin*, all judges were in agreement that the mineral rights were in fact included in the eventual grants from the VLA Director to the veterans. In order to have transferred the mineral rights to the veterans, the corporate entity constituting the VLA Director must necessarily have held them. It could only have held the mineral rights by virtue of having received them from the Crown in the 1948 transfer, which in turn was effected pursuant to the 1945 surrender. This trail of ownership does not appear to leave any room for an inference that the Crown never intended to, and therefore never did, transfer the mineral rights. The fact that the Crown may have breached its fiduciary obligations in transferring the mineral rights does not nullify the effect of its actions.[505]

Neither court in *Apsassin* explicitly considered the evidence of consent of the band in light of the reverse onus applicable in a situation of conflict of interest. If, as is argued above, such a conflict of interest existed in the relationship between the Crown and the VLA Director, it might be argued that the evidence of band consent to the 1945 surrender should be reconsidered from the point of view of whether the Crown satisfied the requisite burden of proof.[506]

In addition to presenting issues of free and informed consent, the *Apsassin* case also poses questions regarding *how* the consent of a beneficiary must be obtained where the beneficiary is comprised of a group of individuals and how, once obtained, that consent can be withdrawn or modified. Both issues are implicated in the plaintiffs' claim that a formal revocation of the 1940 surrender was required as a precondition to the 1945 surrender, an analysis of which follows.

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[505] The legal consequence of an action by a fiduciary that is inconsistent with the constraints of the fiduciary relationship and taken without the consent of the beneficiary is a finding of a *breach of fiduciary duty*. While a breach of fiduciary duty certainly renders the fiduciary liable to the beneficiary, it does not affect the substance of the transaction that constituted the breach. For this reason, a breach of fiduciary duty makes the subject transaction *voidable*, not void (see discussion *infra*, p. 151) and any property transferred pursuant to a voidable transaction may be subsequently irrevocably alienated to an innocent third party purchaser (Paul D. Finn, "The Liability of Third Parties for Knowing Receipt or Assistance", in *Equity, Fiduciaries and Trusts, 1993*, ed. Donovan W.M. Waters, Toronto: Carswell, 1993, p. 195 at p. 202).

[506] Such a re-examination would not necessarily undermine the validity of the trial judge's conclusions regarding consent to the 1945 surrender. Preliminary to his consideration of the consent issue, Addy J. stated that the plaintiffs had raised sufficient doubt to cast upon the Crown the burden of demonstrating that it had fulfilled its fiduciary duties in this regard. While such an observation may not have been appropriate to Addy J.'s analysis of the relationship, it may nevertheless establish the facts relating to consent to have been proven by the Crown sufficiently to satisfy a reverse onus.

Alleged Surrender Revocation Requirement

A principal issue argued on appeal was whether, as a matter of property law, the mineral rights surrendered in 1940 were included in the subsequent 1945 surrender. In the course of exploring this issue the appeal court was forced to consider the issue of how the Crown, having obtained instructions from a band in the course of a surrender, should have sought to have those instructions amended in order to address changing circumstances. In particular, the question presented was how the Crown should have obtained a variance (or release) from the band's instructions contained in the 1940 mineral rights surrender in order to proceed with the 1945 surrender of all interests in the entire reserve.

Addy J. had cursorily disposed of the issue at trial by holding that, as "not only a rule of common law but one of common sense",[507] the 1945 surrender must have included whatever rights, including mineral rights, the band had in the entire reserve.[508] On the facts, he found that the band's 1945 surrender by necessary implication constituted a revocation of their instructions given in the 1940 surrender.[509]

On appeal, however, Isaac C.J. viewed the 1940 surrender somewhat differently. He agreed with the plaintiffs' contention, rejected at trial, that under the *Indian Act* the 1940 surrender had the effect of severing the subject minerals from the reserve, as a result of which they were legally incapable of being included in the 1945 surrender. From this he

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[507] *Supra*, n. 209, at p. 54.

[508] Much of the argument in respect of the mineral rights surrender had been directed to the issue of whether, as a matter of property law, the surrender had the effect of severing the mineral rights from the rest of the band's interest in the reserve and whether, in such a case, the mineral rights would thereby have been automatically excluded from the 1945 surrender.

[509] It is uncertain whether the implied revocation conclusion reached by Addy J. is at odds with the evidence given by an Indian Affairs official and referred to by Isaac C.J. (*supra*, n. 210, at p. 527) that in the official's opinion, "it was necessary to 'cancel' a prior surrender by Order in Council in order to execute another surrender which conflicted with its terms".

inferred that the minerals were necessarily excluded from the subsequent transfer to the VLA Director.[510] From this premise it followed that after the 1945 surrender the mineral rights were still held by the Crown, subject to the original requirement that they be leased for the benefit of the band.[511] He accepted the argument advanced by the plaintiffs that, in order for the mineral rights to have been included in the 1945 surrender, the *Indian Act* required that the 1940 surrender would have had to have been formally revoked.[512] This, he felt, was "supported on a plain reading of the statute".[513]

On this point Stone J. disagreed. He dismissed the plaintiff's argument that a formal revocation of the 1940 surrender was required before the subject mineral rights could be included in the 1945 surrender, pointing out that the *Indian Act* made no provision for revocation of surrenders and that the assent by the band to the 1945 surrender had the same effect as a revocation.[514]

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[510] *Supra*, n. 210, at pp. 526-528. His reasoning was based on his reading of s. 54 and the definitions of "Indian lands" and reserve" in s. 2 of the *Indian Act*, in which "Indian lands" were defined as "any reserve or portion of a reserve" that had been surrendered and "Reserve" was defined as one or more tracts that have not been surrendered, including "minerals, metals and other valuables thereon or therein." Based on the mutually exclusive definitions of "Indian lands" and "Reserve" and the fact that only the latter were capable of being surrendered, he concluded that minerals alone could constitute "Indian lands". This syllogism is somewhat suspect, however, in that it is neither logically necessary, nor does it always legally follow, that if "A" includes "B", and if "C" can be a part of "A", then "B" must be "C" (where A = a reserve, B = mineral rights, and C = a portion of a reserve). Addy J. rejected the plaintiffs' arguments on this point for similar reasons (*supra*, n. 209, at p. 56), although his reasoning was partly based on the premise that the band's property interest in the reserve was "merely an usufructuary interest", a characterization at odds with that of the Supreme Court in *Guerin*.

[511] *Ibid.*, at p. 536.

[512] He relied largely on the evidence of the Indian Affairs official (referred to *supra*, n. 509) regarding present-day administrative practices of Indian Affairs used to "cancel" a surrender, which require a band revocation vote and the Governor in Council's acceptance thereof. It is somewhat odd that the Chief Justice would give such weight to what is essentially the legal opinion of a non-lawyer regarding a matter of statutory interpretation. Moreover, as evidence of modern rather than historical practice, the opinion is of questionable assistance in assessing the propriety of the actions of Indian Affairs in 1945.

[513] *Supra*, n. 210, at p. 527.

[514] *Ibid.*, at p. 577.

The issue of whether a formal revocation was necessary can be resolved by examining the revocation concept within the framework of fiduciary theory. Although the concept of implied revocation was not specifically addressed by the court in *Guerin*, in that case Dickson J. held that the Crown had a responsibility as fiduciary to secure new instructions from the band in any situation in which the original instructions could no longer be fulfilled.[515] Proceeding from that observation, it would appear that, were a band to be apprised that it was impossible to proceed as originally proposed, it would be open to the band to withdraw from the proposed transaction. Furthermore, because of the binding nature accorded in *Guerin* to the band's oral representations respecting the surrender,[516] it would seem evident that any such instructions to withdraw could be given orally to Indian Affairs. Therefore, if a band were to instruct the Crown to withdraw from a proposed transaction, although the fiduciary obligations specific to the surrender would arguably continue, the fiduciary relationship would be subject to the additional overriding encumbrance that no power was to be exercised under the relationship pending further notice from the band.

Carrying this example a step further, on learning that the original proposal had become impossible to carry out, it would seem to be equally open to the band to direct the Crown to proceed under a modified version of the original plan. The observation by Dickson J. in *Guerin* that the Crown "should have returned to the band to seek their counsel on *how to proceed*"[517] indicates that the possibility of proceeding differently should not be ruled out, nor should doing so be considered as a potential breach of fiduciary duty.

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[515] *Supra*, n. 3, at p. 344.

[516] See discussion, *supra*, p. 88.

[517] *Supra*, n. 3, at p. 344.

Three separate issues are in fact under consideration here. The first relates to what formal requirements attach to a decision by a band not to proceed with a transaction contemplated by a surrender. Once a direction to withdraw from the contemplated transaction is given by the band, then, according to *Guerin*, the Crown's discretion is fully constrained.[518] Any suggestion that it would be open to the Crown, having obtained such a direction, to refuse to comply with the direction would be inconsistent with *Guerin* and with the encumbered character of the fiduciary's power. This suggests, therefore, that the Crown cannot withhold its consent to such a withdrawal, and that a formal acceptance of the band's direction to withdraw (a revocation by the Governor in Council) is unnecessary. Hence one must conclude that, as a matter of principle, a formal revocation of a surrender is not essential and that a direction to withdraw is in itself a sufficient revocation.[519]

The second issue relates to what level of assent is required when the Crown seeks "the counsel" of a band, whether to withdraw from a transaction or to proceed differently. The most logical answer is that it should seek the same level of assent to the new course of action as was obtained in respect of the original instructions, which, in the circumstances of *Apsassin*, would be that of "a majority of the male members of the band of the full age of twenty-one years, at a meeting or council" of the band, the same assent required for the original 1940 surrender.[520]

The third issue is whether a request by a band to proceed differently should be

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[518] As McMurtry and Pratt point out, "it must be accepted that Indian bands have the right to remove the Crown's discretion by means of an unequivocal instruction" (*supra*, n. 15, at p. 38).

[519] Any argument that the *Statute of Frauds* would require that the band's direction be in writing would appear to be precluded by Dickson J.'s comments regarding oral statements in *Guerin*. It would also require that the interest being surrendered be considered to be proprietary in nature, which Dickson J. was unwilling to do so (see discussion, *supra*, p. 46).

[520] As per s. 51 of the R.S.C. 1927 *Indian Act*. Had the formal assent requirements changed in the interim, it might be arguable that the new requirements would govern.

subject to any additional requirements. It has been submitted that it is not open to the Crown to refuse a band's direction to withdraw from a contemplated surrender transaction. Can the Crown refuse, however, to enter into a transaction different from the one originally contemplated? The answer, it would appear, depends on whether the new transaction falls within the scope of — i.e., the range of transactions provided for in — the original surrender. In originally accepting the surrender, the Crown undertook to dispose of the band's lands in accordance with the terms of the surrender. If the new course of action proposed by the band falls within the terms of the original undertaking, it would appear that the Crown could not refuse to carry out the new course of action without breaching that undertaking. It is submitted, therefore, that not only may the Crown proceed with a new transaction that is within the scope of the original surrender, but that it is obliged to do so.

However, if the new transaction contemplated is not within the scope of the original surrender, the Crown finds itself in a somewhat different position. In its capacity as fiduciary, the Crown cannot proceed with the original surrender in the face of its new instructions. All other things being equal, a band's request to pursue such a new transaction would be sufficient, in the context of its ongoing fiduciary relationship with the Crown, to create a new and independent fiduciary obligation on the part of Crown to proceed with the new proposal. All things are not otherwise equal, however, as the Crown is constrained by the terms of the *Indian Act*, which requires that all alienations of reserve land be preceded by an appropriate surrender.[521] Since, as postulated, the new proposed transaction is beyond the scope of the original surrender, in order to authorize it a new, broader surrender must be obtained. This requirement is purely a statutory condition

[521] New oral instructions would not suffice to rewrite the scope of the 1940 surrender: as per Dickson J. in *Guerin*, "there is no merit in the appellant's submission that ... a surrender can be considered independently of its [written] terms" (*supra*, n. 3. at p. 343).

precedent, and should not be understood to be a product of the Crown's fiduciary duties, *per se*.

That Addy J. seemed to have recognized the band's capacity to change instructions and that appropriate effect should be given to the *Indian Act*'s surrender provisions is evident in his following *reductio ad absurdum* reasoning:

> there is nothing in the *Indian Act* prohibiting the Band from changing its mind and giving approval and consent to another arrangement with the Crown. Counsel for the plaintiffs were in fact arguing that, because of the trust for lease imposed on the Crown by the 1940 surrender, that surrender rendered the interests of the Indians in mineral rights incapable of any other type of alienation except by means of lease even if both the Crown and the Indians subsequently agreed to a sale or to a further type of alienation as part of the whole reserve. This would lead to the absurd conclusion that these oil and gas rights would be forever incapable of sale although the remaining rights in the reserve could be surrendered for that purpose.[522]

The above reasoning suggests that, in the circumstances encountered in *Apsassin*, it should not have been incumbent upon the Crown to obtain a revocation of the 1940 mineral rights surrender as a condition precedent to disposing of those interests in a manner other than that contemplated by the 1940 surrender. It was necessary, however, for the Crown to obtain the band's assent to the proposed departure from the type of transaction contemplated by the 1940 surrender, and since the new proposal, the sale to the VLA Director, was clearly outside the scope of the 1940 surrender, a new surrender conferring a broader power of disposition was required. The new surrender, obtained in 1945, was assented to by the same majority as had assented to the 1940 surrender.

The question that remains is whether the band, in entering into the new 1945 surrender, *intended* to override the 1940 surrender and to thereby include the mineral rights in any eventual disposition. Any determination of the band's intent, in turn, is largely

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[522] *Supra*, n. 209, at p. 57.

dependent on whether the matter of the surrendered mineral rights was brought to the attention of the band at the time of the 1945 surrender, a necessary condition precedent to obtaining the band's informed consent to alteration of its 1940 surrender instructions. The issues of whether the band's consent was fully informed, and whether the decision to surrender was freely made, have been canvassed above. It is submitted that the resolution of the question of whether the mineral rights were included in the 1945 surrender is to be found in the determination of those issues — fully informed consent and the presence or absence of undue influence — and not in the search for a formal revocation of the 1940 surrender.

One issue that will often influence the court's view as to whether a conflict of interest exists will be the adequacy of the eventual sale price of the fiduciary property.[523] A fully informed beneficiary will be aware of the fair market value of the fiduciary property, and is unlikely in other than exceptional circumstances to consent to a sale of that property at below its fair market value. An absence of fair market value will consequently predispose a court to finding an absence of fully informed consent.[524] The relevance of this issue in the *Apsassin* case is discussed in the section that follows.

Inadequacy of Negotiated Sale Price in Apsassin

As discussed earlier,[525] in negotiating the price to be paid for the surrendered land in *Apsassin*, Indian Affairs and the VLA Director had differing objectives: the former wanted to obtain the best price available in order to purchase more or better land for the

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[523] Shepherd, *supra*, n. 20, at p. 169. As noted *supra*, p. 108, however, this will not necessarily be determinative of the legal issue of conflict of interest.

[524] Finn, *supra*, n. 66, at p. 86.

[525] *Supra*, p. 120.

band, while the latter wanted to secure the land at the lowest possible price, to reduce the demands on its budget and to enable it to resell the land to veterans at a low price.[526] Evidence was led at trial that Indian Affairs had had the surrendered land appraised at a value of $93,160, but eventually sold the land to the VLA Director for $70,000. On the evidence, Addy J. found that the Department was "fully aware of a discrepancy between the appraised price of its own appraiser and the sale price",[527] and that it was unable to justify that discrepancy. He consequently found the Crown to be in breach of its fiduciary duty towards the plaintiffs in that regard.[528]

The majority on appeal fully agreed with the Addy J.'s views that a full and fair price was not paid.[529] Isaac C.J., although in dissent, also agreed as to the insufficiency of the payment exacted by Indian Affairs,[530] despite the apparent conflict this created with his opinion that the transfer was merely "an administrative transfer between Crown agencies"[531] and not an actual alienation of the land.

On the basis of the conclusions reached earlier in this paper — that the VLA

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[526] *Supra*, n. 209, at p. 74.

[527] *Ibid.*, at p. 76.

[528] *Ibid.*

[529] *Ibid.*; *supra*, n. 210, at p. 584.

[530] In dismissing the Crown's cross-appeal, *supra*, n. 210, at p. 539. Oddly enough, although Isaac C.J. held that the actual alienation took place on the eventual transfer of the lands to the veterans (*supra*, n. 210, at p. 539), he did not address the issue of the sufficiency of the eventual sale price to the veterans. Given his position that the Crown's breach of fiduciary duty occurred at the time of the later alienation to the veterans, what should properly have been in issue for him was not the price paid on the transfer to the VLA Director but rather the price paid in the subsequent sales to veterans. In his disposition of the Crown's cross-appeal, however, Isaac C.J. focused solely on the first transaction — the sale to the VLA Director. Moreover, if the premise of his judgment was that the VLA Director, as new host of the Crown's fiduciary obligations, was in fact disposing of the lands on behalf of the band, it is surprising that he did not comment on the fact that the proceeds from the sales to the veterans were never credited to the band's account.

[531] *Ibid.*, at p. 528.

Director was acting in the transaction as agent of the Crown and was therefore not at arm's-length — it would appear to be appropriate to apply a reverse onus in respect of proof of adequacy of the sale price.[532] One practical aspect of such a determination might be that the Crown, instead of being put to the burden of demonstrating merely that fair market value was paid, could be held to the higher standard that Finn suggests is applicable to a purchase by a fiduciary of fiduciary assets: i.e., the requirement to demonstrate that it paid not only a fair market price but the highest price obtainable at the time.[533]

Although on the basis of the preceding analysis I have concluded that the VLA Director should be considered to be an agent of the Crown for the purposes of acquiring land and that the transfer to him was consequently a case of self-dealing by the Crown, there will be other situations in which such a non-arm's-length relationship will be lacking or unprovable, and an impugned transfer of reserve lands will have to be analysed as a transfer to an independent third party, much as Stone J. considered the *Apsassin* transfer to be.[534] Even where reserve lands are transferred to an arm's-length third party, however, a band may not be totally without recourse against the third party purchaser if the transfer was preceded by a breach of fiduciary duty of which the purchaser was aware.

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[532] Somewhat incongruously, although the trial judge and the majority on appeal considered that the transaction was carried on at arm's length, they nonetheless subjected the Crown to a reverse onus that would only properly be applicable to a fiduciary ensnared in a conflict of interest. Addy J., with whom Stone J. fully agreed, stated that "the onus of establishing that a full and fair price was in fact obtained" was not discharged by the Crown (*supra*, n. 209, at p. 76). One might speculate that their inconsistent characterization could have been a product of their ambivalence regarding the status of the VLA Director, perhaps reflecting on the one hand a hesitancy to characterize the Crown as being in a conflict of interest position, while on the other being unable to ignore the aura of inequity surrounding the transaction.

[533] *Supra*, n. 66. As noted earlier (*supra*, n. 406), however, some writers dispute this contention.

[534] As noted earlier, Stone J. concluded that the transfer by the Crown to the VLA Director was neither a "mere interdepartmental transfer" nor a sale by the Crown to its own agent, but was instead a transfer to an independent third party (*supra*, n. 210, at p. 582).

Implications of Crown Breach for Third Parties

Because of the ultimate involvement of third party purchasers in most surrenders of reserve land, the remedy of equitable tracing[535] is of particular relevance to Indian bands who are victims of a breach of fiduciary duty on the part of the Crown. In addition, because of the general increase in land values over time, the constructive trust remedy is also likely to be attractive to bands who have been dispossessed of reserve land under circumstances constituting a breach of the Crown's fiduciary obligations. Questions of the appropriateness and applicability of both remedies figure prominently in the *Apsassin* case, and an examination of the arguments in that case is therefore instructive. Prior to examining the potential impact of each remedy in *Apsassin*, its application in the private law context will be considered.

One of the more significant remedies available for a breach of fiduciary duty that involves the transfer of fiduciary property is the entitlement of the beneficiary to trace the fiduciary property into mixed funds or to any products into which the property, or any profit derived from it, has been converted,[536] and to trace it to third parties who obtain the property with notice of the breach. The latter are sometimes referred to as

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[535] Although some writers consider tracing to be simply an equitable *tool* leading to the imposition of certain remedies such as the constructive trust or equitable lien, others treat it as a distinct remedy. As it is submitted that the distinction is semantic only, the latter approach will be followed here.

[536] Waters, *supra*, n. 24, at p. 398. See also Ruth Sullivan, "Strangers to the Trust", (1986/87) 8 *Est. & Tr. Q.* 217, at p. 261. The following rules related to tracing into mixed funds were set out in *Re Kolari* (1981), 36 O.R. (2d) 473, at p. 479:

(a) if the beneficiary's money is mixed with the fiduciary's own funds and afterwards withdrawals are made, the fiduciary must be taken to have drawn out his own money first;

(b) where a fiduciary has mixed trust money with his own, the beneficiary is entitled to a charge on the property purchased for the amount of the trust money used in the purchase; and

(c) if there is confusion in the tracing, the onus is on the fiduciary to identify his own funds.

intermeddling strangers.[537] Once the property has been traced, it may be restored by way of the constructive trust remedy or made subject to an equitable lien in the amount of its value.[538]

The courts have traditionally treated an unauthorized purchase by the fiduciary of fiduciary property as a *voidable*, rather than a *void*, transaction.[539] Because of this, the fiduciary is capable of passing good title to the property to a bona fide purchaser for value who takes without notice of the breach (hereinafter referred to as an "innocent purchaser"). As Sealy puts it, "The transfer may still for some reason be 'open to inquiry' or voidable, but the beneficial ownership is broken".[540] An innocent purchaser takes free of any interest of the beneficiary.[541] The converse, of course, is that under any other circumstances a third party purchaser[542] may be held to account to the beneficiary.[543]

Tracing will be available in circumstances where the third party gave fair value but actually or constructively knew of the breach[544] and in those in which the third party was a donee of the property but was unaware of the breach.[545] To avoid tracing, the court must be convinced that the transaction is genuine; where the transaction is at less than

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[537] Oosterhoff and Gillese, *supra*, n. 65, at p. 385.

[538] *Ibid.*, at p. 385.

[539] Finn, *supra*, n. 66, at pp. 48, 189 and 223.

[540] *Supra*, n. 85, at p. 127.

[541] Oosterhoff and Gillese, *supra*, n. 65, at p. 478.

[542] Including another beneficiary: Ellis, *supra*, n. 48, at p. 2.19, citing *Roblin v. Jackson* (1901), 13 Man R. 328 (C.A.).

[543] Ellis, *supra*, n. 48, at p. 20.17, citing *Bank of Nova Scotia v. Bank of Montreal* (1982), 14 E.T.R. 222 (Ont. H.C.) and *Carl B. Potter Ltd. v. Mercantile Bank of Canada*, *supra*, n. 332; Waters, *supra*, n. 24, at pp. 381 and 395.

[544] Waters, *supra*, n. 24, at p. 1046, citing *Chandler & Massey Ltd. v. Irish* (1911), 13 D.L.R. 829 (Ont. C.A.).

[545] Waters, *ibid.*, at p. 1034.

fair market value, however, the court may conclude that the third party knew of the breach of fiduciary duty.[546]

Following the Supreme Court's decision in *Guerin*, the Musqueam band attempted to trace its lands into the hands of the Shaughnessy Heights Golf Club. Had the golf course negotiators realised at the time of the transaction that they were getting the "deal of the century" and if, indeed, they had persuaded the Indian Affairs officials involved to favour their terms, the Musqueam band might have been able to demonstrate the degree of knowledge necessary to have the courts rescind the transaction. The claim was dismissed, however, on the grounds that it was essentially *res judicata*.[547]

The fact that only an innocent purchaser is shielded from potential liability is of significance in *Apsassin*. If Stone J.'s analysis that the VLA Director was an arm's-length third party in its transactions with the Crown is accepted, then the bona fides of the VLA Director, or any absence thereof, becomes significant in determining whether liability for a breach of fiduciary duty by the Crown should be extended to him.

The relevant issue in that case is therefore whether, even if one accepts the status of the VLA Director in the transaction as that of an independent third party, the VLA Director can in the circumstances be considered to have been an innocent purchaser. What is of importance in this respect is whether the VLA Director knew at the time of the transfer, or would have known "had he made the inquiries that an honest and reasonable man would have made in the circumstances"[548], that the land was being transferred to him

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[546] Waters, *ibid.*, at p. 1043, citing the Court of Appeal judgment in *Crocker & Croquip Ltd. v. Tornroos*, *supra*, n. 429.

[547] *Grant v. The Queen*, [1990] 2 C.N.L.R. 26 (F.C.T.D.)

[548] Sullivan, 536, at p. 237. As Professor Sullivan points out, "a person cannot avoid responsibility for his actions by relying on his own lack of perception or moral acumen." The standard has been otherwise described as what the person knew or ought, as an honest and reasonable man, to have known

at less than fair market value. Such knowledge is generally considered to be indicative of a lack of bona fides.[549]

In this respect, while the trial judgement makes no comment on this aspect of the evidence, knowledge that the transfer was made at less than fair market value must be imputed to the VLA Director; it is inconceivable that, in the course of bargaining with another Crown entity, even an independent one, Indian Affairs would not have advised the VLA Director of the appraised value of the lands in question. The appraisal results would have formed a natural starting point for any negotiations regarding the transfer of the land, and this information would therefore inevitably have been conveyed at the outsert of the negotiations. No evidence was presented that the VLA Director in any way disputed the accuracy of the appraisal figures,[550] and it would therefore appear to be virtually certain that in purchasing the land for a lower price he knew that he was obtaining the land at below its market value. In addition, as a senior government official, it is reasonable to assume that the VLA Director would have been aware of the role that the Crown, through Indian Affairs, played in respect of Indian lands and of the general nature of the Crown's obligations in that regard.[551]

In the end result, it would appear to be fair to conclude that the VLA Director had actual knowledge of all of the pertinent facts surrounding the Crown's breach of

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(see Waters, *supra*, n. 24, at p. 401 and Finn, 505, at p. 217.).

[549] Oosterhoff and Gillese, *supra*, n. 65, at p. 741.

[550] For example, there was no indication given in the judgments that the VLA Director had had any independent appraisal done.

[551] Such a conclusion is reinforced by Iacobucci J.'s observation in *Air Canada v. M & L Travel Ltd*, [1993] 3 S.C.R. 787 at p. 812,

> Whether the trust is created by statute or by contract may have an impact on the question of the stranger's knowledge of the trust. If the trust was imposed by statute, then he or she will be deemed to have known of it.

fiduciary duty and cannot therefore be considered to have been an innocent purchaser. On Finn's sliding scale of imputed knowledge, "from relative certainty, to suspicion, to possible hypothesis",[552] the VLA Director would surely have ranked very highly.

Because of this, the finding of the majority on appeal that the VLA Director was independent of the Crown does not preclude a finding of liability on his part. Applying the rules applicable to a purchaser taking with notice of a trust in private law, it would appear that, all other things being equal, the property could have been traced into the hands of the VLA Director.

All other things were not equal, however. The fact is that prior to commencement of the action all of the property in question was transferred to veterans who, the judges unanimously agreed, were innocent purchasers. All judges similarly agreed, on property law grounds, that the transfers of fee simple title to the veterans included all minerals other than precious metals.[553] The veterans, as innocent purchasers, would therefore appear to be free from liability in respect of their purchases.

Such an outcome will not always be the case where reserve lands have been alienated by the Crown in breach of a fiduciary duty. Moreover, the fact that the lands in *Apsassin* were subsequently transferred to innocent purchasers does not exhaust the band's potential remedies against the VLA Director. It is therefore useful to examine the types of remedies, and in particular that of the constructive trust, that are available against a complicitous third party.

Where an intermeddling stranger subsequently sells the fiduciary property to an

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[552] *Supra*, n. 505, at p. 216.

[553] *Supra*, n. 209, at p. 73, relying on *A.G. B.C. v. A.G. Canada* (1889), 14 A.C. 295 (P.C.); *supra*, n. 210, at pp. 536 and 579. Although he did not explicitly address the issue, Stone J. dismissed the band's arguments that mineral rights were statutorily required to be withheld from the transfer to the veterans.

innocent third party, the court may also impose a constructive trust on the proceeds of the sale.[554] Oosterhoff and Gillese describe the remedies available in conjunction with[555] tracing as follows:

> A stranger [who is found liable] may be subject to the proprietary remedy of the constructive trust, or the personal remedies of account or compensation.... A stranger who receives trust property improperly and who ought to be held liable to the trust, may be regarded as a constructive trustee since there is trust property to which the trust can attach. Alternatively, it may be said that the property can be traced into the stranger's hands.[556]

Tracing also enables the plaintiff to have the traced property subjected to an equitable lien.[557]

Oosterhoff and Gillese provide the following very general description of a constructive trust:

> The constructive trust is a vehicle of equity whereby one person, who is called a constructive trustee, is required to transfer property to another in certain circumstances. The constructive trust is thus restitutive.[558]

Waters describes the *raison d'être* of the constructive trust as follows:

> The constructive trust ... should afford to the claimant, who asserts successfully that an obligation owed to him at law or in equity has been breached, the remedy giving him specific property owned or possessed or under the control of the defendant.[559]

A plaintiff will seek a constructive trust order in preference to monetary compensation in

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[554] Oosterhoff and Gillese, *supra*, n. 65, at p. 482. As has been noted above, however, the beneficiary may not trace the property itself into the hands of the innocent third party (*ibid.*, at p. 720). The beneficiary may, however, still have recourse to personal remedies against the intermeddling stranger.

[555] Although some may contend that tracing includes, rather than leads to the imposition of, certain equitable remedies, it is submitted that this is largely a matter of semantics.

[556] *Supra*, n. 65, at p. 460.

[557] *Ibid.*, at pp. 385-386.

[558] *Ibid.*, at p. 370.

[559] "The Constructive Trust in Evolution: Substantive *and* Remedial" (1991), 10 E. & T.J. 334, at p. 335.

circumstances where the property, or a product into which it has been converted, has increased in value between the time of unjust enrichment and the time of judgment.[560] The remedy is therefore particularly appropriate to claims involving alienated reserve lands which, like other lands, almost invariably increase in value over time.

Moving beyond this level of generality, however, one soon confronts the issue of whether the constructive trust is purely remedial or whether, although remedial in nature, it retains elements of a substantive trust. An allegation of substantive trust is at the basis of the plaintiffs' claim in *Apsassin* that the VLA Director assumed the Crown's fiduciary responsibilities following the transfer of the surrendered land to him. The crux of this issue is whether a constructive trust arises automatically whenever a defendant receives fiduciary property or whether, on the other hand, it comes into being only at the time the court makes an order granting restitution of the property by the defendant. McLachlin J. stated the issue in the following terms:

> Is the doctrine of constructive trust as it has developed in Canada a substantive doctrine of trust, automatically conferring a property interest where the basic criteria for the trust are made out? Or is it a remedy, to be applied where necessary to remedy unjust enrichment?[561]

Oosterhoff and Gillese describe the theory of the constructive trust that pre-dated the Supreme Court of Canada's decision in *Petkus v. Becker* as follows:

> Indeed, until recently, the constructive trust was largely employed in Anglo-Canadian and Commonwealth law in the fiduciary context.... As a result, the constructive trust was thought of as a substantive institution, like the express trust, in which the parties stood in a fiduciary relationship and which imposed various rights and obligations upon the parties.[562]

The present state of the law in Canada appears to be that the constructive trust is

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[560] Oosterhoff and Gillese, *supra*, n. 65, at p. 386; McCamus, *supra*, n. 98, at p. 59.

[561] In *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, at p. 107.

[562] *Supra*, n. 65, at p. 370. See also Mccamus, *supra*, n. 98, at p. 64.

a purely remedial and purely proprietary remedy. McLachlin J., speaking for the minority in *Rawluk*, propounded this view of the constructive trust and concluded that as such it does not come into existence until the court declares it:

> The significance of the remedial nature of the constructive trust is not that it cannot confer a property interest, but that the conferring of such an interest is discretionary and dependent on the inadequacy of other remedies for the unjust enrichment in question.... Thus, even where the tests for constructive trust are met ... the property interest does not automatically arise.[563]

Oosterhoff and Gillese agree that the imposition of a constructive trust should be within the discretion of the court, from which it follows that the right of the plaintiff to the property — the plaintiff's property interest — should not be considered to automatically arise. This accords with the view expressed by Waters, who cites the Supreme Court's decision in *Sorochan v. Sorochan* in support of the discretionary nature of the constructive trust remedy:

> Dickson C.J.C., for the court, stressed that the constructive trust constitutes but one important judicial means of remedying unjust enrichment ... that monetary damages are an alternative, [and] that the circumstances in which a constructive trust is appropriate are for the court to determine.[564]

This also accords with McLachlin J.'s majority judgment in *Peter v. Beblow*.[565]

Waters confirms that the existence of a discretion in the court is inconsistent with the concept of an independently arising proprietary interest:

> if the court has the discretion to decide whether a compensatory award (restitution of benefit) is adequate in the particular case, it must follow that at its discretion the court decides whether the occasion calls for the restitution of specific property. Surely this confirms that it is the court order that creates the claimant's "right to specific property".[566]

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[563] *Supra*, n. 561, at pp. 103-104.

[564] *Supra*, n. 559, at p. 347, citing *Sorochan v. Sorochan* (1986), 29 D.L.R. (4th) 1, at p. 7.

[565] (1993), 101 D.L.R. (4th) 621 (S.C.C.), at p. 650.

[566] *Supra*, n. 559, at p. 356.

This is persuasive. To contend that a constructive trust, and hence a proprietary interest, automatically arises is to argue that the claimant has an automatic *right* to have a constructive trust imposed in such situations. Such a right is inimical to the nature of the constructive trust as an equitable remedy — a remedy that is, by definition, discretionary. As Sullivan states,

> the constructive trust will not always be available. It is a discretionary remedy and should be withheld where the personal remedy is adequate or in the opinion of the court it would be unjust to impose a trust.[567]

It follows that a constructive trust should be left to be imposed at the discretion of the court in the exercise of its equitable jurisdiction. The equitable character of the remedy requires that it not be considered to automatically flow from a particular transaction or circumstance.[568]

The constructive trust is, moreover, a strictly proprietary remedy.[569] As Oosterhoff and Gillese note, prior to *Petkus v. Becker*, the constructive trust was thought to impose various rights and obligations upon the parties.[570] As they explain, however, the modern constructive trust is no longer considered to confer on the beneficiary any rights other than the right to restoration of the property that is subject to the constructive trust:

> A constructive trust does look somewhat like an express trust, because the

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[567] *Supra*, n. 505, at p. 266. See also the judgment of La Forest J. in *Canson v. Boughton*, [1991] 3 S.C.R. 534, at p. 585.

[568] The proposition that a constructive trust only comes into being at the time it is declared by a court is not, however, inconsistent with a retrospective application of the remedy to the time at which the unjust enrichment occurred. This was essence of McLachlin J.'s position in *Rawluk*, (*supra*, n. 561, at p. 103) when she stated as follows:

> When the court declares a constructive trust, at that point the beneficiary obtains an interest in the property subject to the trust. That property, it appears, may be taken as extending back to the date when the trust was "earned" or perfected.

[569] *Peter v. Beblow*, *supra*, n. 565, at p. 649.

[570] *Supra*, n. 65, at p. 370.

> constructive trustee typically has title to property and is required to convey it to another person, just as an express trustee must do at the termination of the trust.... However, a constructive trustee does not have the same obligations as an express trustee, such as duties of management. The duty of a constructive trustee is simply to convey.
>
> It follows that a person who is not allowed to keep property because he or she would otherwise be unjustly enriched is not converted into an express trustee and is not treated as one. He or she is merely required to surrender the property held.[571]
>
> . . .
>
> Normally the constructive trustee's only obligation is to convey the property to the beneficiary once a constructive trust decree is made, or, if the beneficiary is under a disability, to hold it until the trustee is replaced. In the meantime, however, the constructive trustee has no active duties of management.... *It must be remembered that a constructive trustee does not stand in a fiduciary relationship to the beneficiary of the trust, unlike the express trustee.*[572]

As a discretionary remedy designed to restore property to a beneficiary,[573] the constructive trust is necessarily limited, in its application to transactions involving complicitous third parties, to situations in which that party still holds the alienated property, or the proceeds of its disposition, at the time of judgment. In situations such as *Apsassin*, the declaration of a constructive trust in respect of the reserve lands themselves would be pointless, since all of the sought-after lands had long since been conveyed to innocent third parties. As Oosterhoff and Gillese put it:

> the constructive trust is imposed upon a person who has title to, or possession or control of, property. It is, therefore, a remedy that affects property ... a proprietary remedy. Thus, there can be no constructive trust unless there is property to which it can attach.[574]

Moreover, as a proprietary remedy, the constructive trust does not afford to the *Apsassin*

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[571] *Ibid.*, at p. 371.

[572] *Ibid.*, at p. 388. Emphasis added.

[573] Or, in cases of usurpation of opportunity, to award property to a plaintiff.

[574] *Supra*, n. 65, at p. 373.

plaintiffs any mechanism by which to affix the Crown's fiduciary obligations in respect of the management of reserve lands to the persona of the VLA Director, which was one of the objectives of the plaintiffs in that case.

As against the VLA Director, the only remedies available to the plaintiffs in *Apsassin* would appear to be compensation for the difference between the value paid by the VLA Director and the value that the court finds he should have paid for the lands received by him, plus interest, or, if the total of the subsequent resale prices exceeded the latter total, an accounting of those profits. Any such profits could also form the subject of a constructive trust as against the VLA Director, which the court could order restored to the plaintiffs.

Because the VLA Director no longer holds either the property or the mineral rights, the *Apsassin* plaintiffs would be limited to seeking compensation from the Crown for the undervalue of the sale price to the VLA Director and the value of the lost mineral rights. In order to obtain such compensation, however, a plaintiff must demonstrate a causal connection between the alleged breach of fiduciary duty and the loss suffered. In *Apsassin*, the most significant claim for compensation relates to lost oil and gas revenues derived from the surrendered lands, and it is in respect of this claim that the issue of causation will be examined.

Causation and Damages

In the preceding chapters I have discussed three possible characterizations of the transfer of the surrendered lands in the *Apsassin* case and the implications each poses for the Crown in its role as fiduciary. In summary, the three possible characterizations discussed were

(1) that there was no transfer by the Crown;

(2) that the assets were purchased by an agent of the Crown, and therefore effectively by the Crown itself; and

(3) that the assets were purchased by, and transferred to, an independent third party.

The first characterization is that argued for by the plaintiffs and implicitly accepted by Isaac C.J.; the second is that argued by this paper to be the most accurate representation of the transaction; and the third is that accepted by the trial judge and the majority of the Court of Appeal. As has been discussed, each of these characterizations has its own consequences as regards the potential breaches of fiduciary duty on the part of the Crown. In their quest to recover compensation in respect of lost oil and gas revenues, however, the plaintiffs must do more than demonstrate that the Crown is in breach; they must establish in addition that any proven breach of fiduciary duty was legally the cause of the loss of the oil and gas revenues.[575]

As has been noted, all judges were in agreement that the mineral rights were included in the eventual transfers of a fee simple title to the veterans and that the veterans were innocent purchasers. The plaintiffs argued, however, that the Crown, as fiduciary, was negligent in not recognizing the value of the mineral rights in the surrendered land and either retaining those rights or obtaining suitable compensation for them.

At trial, based on expert evidence regarding the knowledge of the oil and gas potential of that area at that time, Addy J. found that none of the Crown agents involved, "exercising due care, consideration and attention in the discharge of [their] fiduciary duties", could reasonably have been expected to have known that the mineral rights to the reserve had any significant potential value. He therefore concluded that there was no

[575] Oosterhoff and Gillese, *supra*, n. 65, at p. 685.

breach of fiduciary duty in transferring those rights to the VLA Director.[576] The majority of the Court of Appeal concurred in this, adding that the Crown, in applying its policy of retaining mineral rights only where the existence of valuable minerals was known or likely, did not breach any fiduciary duty.[577]

If one accepts the trial finding that no one could have possibly known about the oil field at the time of the transfers of the land to the VLA Director or at the time of the eventual transfers to the veterans,[578] the issue then becomes one as to whether any breach of fiduciary duty that might be proven warrants a disregard of the legal foreseeability constraints that would otherwise apply to a common law action. Can it be argued, in other words, that the Crown, having breached its fiduciary obligations to the band, should be held accountable to compensate the band for all of the increase in the value of the land accruing on account of the discovery of oil some 18 years later?

It is a prevalent view in fiduciary law that compensation in equity is not limited by the common law principles governing remoteness of damage.[579] The relevant principles were discussed and clarified by the Supreme Court of Canada in *Canson v. Boughton*. McLachlin J. stated the applicable policy considerations as follows:

> it does not lie in the mouth of a fiduciary who has assumed the special

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[576] *Supra*, n. 209, at p. 49. This accords with Maddaugh's opinion that a failure by a geologist to recognize the mineral potential of an area would give rise to a claim in negligence for failure to use due care in the performance of an undertaking, rather than to a claim for breach of fiduciary duty (*supra*, n. 44, at p. 30).

[577] *Supra*, n. 210, at p. 579. Because Isaac C.J., in dissent, had concluded that the mineral rights were throughout the period in question held by the Crown for lease subject to the original 1940 surrender,he did not address the issue of whether the minerals should have been excluded from the transfer to the VLA Director on the ground of their potential value.

[578] The evidence in this respect was largely uncontroverted.

[579] *Re D[illegible]on; Union Fidelity Trustee Co. Ltd. v. Perpetual Trustee Co. Ltd* (1966), 84 W.N. (Pt. 1) (N.S.W.) [illegible] at 404, cited by Wilson J. in *Guerin*, *supra*, n. 3, at p. 365, and McLachlin J. in *Canson v. Boughton*, *supra*, n. 83, at p. 552.

> responsibility of trust to say the loss could not reasonably have been foreseen. In negligence we wish to protect reasonable freedom of action of the defendant, and the reasonableness of his or her action may be judged by what consequences can be foreseen. In the case of a breach of fiduciary duty, ... we do not have to look to the consequences to judge the reasonableness of the actions. A breach of fiduciary duty is a wrong in itself, regardless of whether a loss can be foreseen.
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> . . .
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> This approach ... accords with the basic rule of equitable compensation that the injured party will be reimbursed for all losses flowing directly from the breach.[580]

None the less, as Davies puts it, "Problems of factual causation can ... occur in fiduciary law — a fiduciary may be in breach of an obligation without a loss being attributable to it."[581] For this reason, the Court in *Canson* qualified the foreseeability principle so as to limit recovery of losses to those described as "not too remote, with remoteness determined by a common sense view of the strength of causation and not by considerations of foreseeability or what the parties contemplated."[582] McLachlin clarified the distinction further in the following manner:

> While foreseeability of loss does not enter into the calculation of compensation for breach of fiduciary duty, liability is not unlimited. Just as restitution *in specie* is limited to the property under the trustee's control, so equitable compensation must be limited to loss flowing from the trustee's acts in relation to the interest he undertook to protect. ... it is imperative to ascertain the loss *resulting from breach of the relevant equitable duty*. The need for a link between the equitable breach and the loss for which compensation is awarded is fair and sound policy and is supported by *Guerin*.
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> . . .
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> The requirement that the loss must result from the breach of the relevant equitable duty does not negate the fact that "causality" in the legal sense as limited by foreseeability at the time of breach does not apply in equity. It is in this sense that I read the statement of Street J. in *Re Dawson* that "causation, foreseeability and remoteness do not readily enter into the matter".[583]

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[580] *Supra*, n. 83, at pp. 552-554.

[581] *Supra*, n. 332, at p. 303.

[582] La Forest J., *supra*, n. 83, at p. 564, quoting Lambert J. of the British Columbia Court of Appeal.

[583] *Supra*, n. 83, at pp. 551-552.

. . .

The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach.[584]

R.D. Gibbens rationalizes this causation requirement as follows:

If the courts were to employ an unrestricted remedy in conjunction with fiduciary obligations, it would not be long before the courts would reveal an extreme reluctance to find a fiduciary relationship in all but those relations with the most obvious trust-like features.[585]

To illustrate the causation requirement in *Canson*, La Forest J. cited *McKenzie v. McDonald*,[586] a case whose facts are somewhat analogous to those of *Apsassin*. That case involved circumstances in which an agent purchased property from his principal at a price that was less than fair market value. The court assessed compensation, properly in the view of La Forest J., as the difference between the amount received by the plaintiff and the value of the land at the time of sale, not at the time of trial, on the basis that the plaintiff would, absent the breach, have proceeded with the sale anyway.[587]

In *Huff v. Price*, the British Columbia Court of Appeal made the following observations about the causal connection required to be demonstrated in the context of a fiduciary relationship:

If a plaintiff is able to establish a breach of fiduciary duty owed to that plaintiff, or a fraud perpetrated on him, the evidentiary burden of proving that a loss that he has in fact been shown to have suffered was caused by the breach of fiduciary duty will be discharged, at least in a *prima facie* way, by a minimum amount of evidence *indicating that the breach of fiduciary duty or the fraud was linked to*

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[584] *Ibid.*, at p. 556.

[585] "Causation and Fiduciary Duties", (August, 1991) 18 *Can. Bus. L.J.* 301 at p. 305.

[586] [1927] V.L.R. 134.

[587] In *Canson*, Stevenson J. took some exception to the findings in *McKenzie*, although he would have substituted the value at the time of resale by the defaulting fiduciary, not at the time of trial.

the risk that turned out to result in the loss.[588]

Although Davies questions whether after the *Canson* decision the assessment of the evidentiary burden in *Huff v. Price* still applies,[589] he expresses some frustration at the lack of specific guidance in that regard given by the court in *Canson*:

> Nor is much assistance afforded when [the judgements] indicate that a "link" is required. This better describes the result in *Canson* than tells us what to look for in order to establish one. ... firm guidance on a rule of remoteness cannot ... be deduced from the reasons which the court in *Canson* actually gave for its decision.[590]

At a minimum, *Canson* requires that there be more than a "cause-in-fact relationship" between the loss and the breach of fiduciary duty[591] — that something more than a strict "but for" test will be needed.[592] This much is clear, since in *Canson* the court denied liability even though it was accepted that the plaintiff would not have proceeded with the purchase were it not for the defendant fiduciary's breach.[593] The question, however, is "where, beyond reasonable contemplation and foreseeability, recovery is to stop, given that *Canson* tells us that it has to stop somewhere".[594]

It is submitted that the effect of the application of the causation principles to *Apsassin* will ultimately be determined by the court's decision as to whether the Crown

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[588] *Huff v. Price* (1990), 76 D.L.R. (4th) 138 at p. 173. Emphasis added.

[589] *Supra*, n. 332, at p. 308.

[590] *Ibid.*, at pp. 307 and 309.

[591] Gibbens, *supra*, n. 585, at p. 304.

[592] Davies, *supra*, n. 332, at p. 308.

[593] This aspect of the agreed statement of facts in *Canson* has been greeted with some scepticism (see Davies, *supra*, n. 332, at p. 298). McEachern, C.J. expressed similar doubts regarding the plaintiff's protestations in the British Columbia Court of Appeal's judgement in *Hodgkinson v. Simms* (1992), 65 B.C.L.R. (2d) 264 (B.C. C.A.) at p. 269.

[594] Davies, *supra*, n. 332, at p. 310.

unduly influenced the band to enter into the 1945 surrender. Only a determination of undue influence would appear to allow the court sufficient latitude to connect a breach by the Crown to the eventual loss of mineral rights revenues.

If it is accepted, as it was at trial, that the band freely entered into the surrender for sale of its reserve lands, then it is submitted that it is irrelevant to the issue of liability for loss of mineral rights whether the subsequent transfer to the VLA Director is characterized as a mere administrative transfer of control and management, as a sale by the Crown to itself, or as a sale to a non-arm's-length third party. If it is accepted that the band intended to sell the land, then the fact that the sale was conducted improperly or that inadequate consideration was received — the misconduct alleged to constitute the Crown's breach of fiduciary duty — is irrelevant to the loss of the mineral rights revenues. If the band is accepted as having independently intended to sell its lands to fund the purchase of new reserves, then it would appear that its only justifiable expectation was that the Crown would get the best possible value for its land — a value based on its known character as agricultural land, not on its unknown, and at that time unknowable, potential as oil-producing land.

In such a case, the Crown's breach of fiduciary duty lies in its failure to obtain an adequate sale price. In order for a court to find a causative link between the breach as to sale price and the loss of the oil rights, the court would have to find that a sale to another purchaser at an adequate price, or a diligent attempt to sell at such a price, would have avoided the loss of the oil revenues.

Because the oil potential of the land was not discovered until 1976, an adequate sale price to the VLA Director or to another purchaser before that time would have reflected the reserve's value as agricultural land, and would not therefore have compensated the band for potential oil revenues. In order to posit that the obtaining of an adequate sale price would have resulted in retention of, or adequate compensation for, the mineral rights, the court would have to find as fact that the quest for an adequate sale price would have caused the Crown not only to have rejected the VLA Director's offer to purchase, but to have rejected every subsequent proposed sale of the surrendered land to any other purchaser during the years between 1948 and the discovery of oil in 1976.[595] This, it is submitted, would be an untenable assumption. Faced with similar circumstances in *Guerin*, the court concluded that the lands in question would eventually have been disposed of pursuant to the surrender, albeit on more favourable terms. In the face of an accepted intention by the band to sell, it would be difficult to reach any different conclusion in *Apsassin*.

If, on the other hand, the court were ultimately to find that the Crown had used its relationship to unduly influence the band to sell the reserve,[596] then it would be open to the court to conclude that, *but for* the breach, the band would never have had reason to consider surrendering its lands and that its successor bands would accordingly still hold those lands, with their oil and gas deposits, today. Such a finding of exercise of undue influence is independent of the manner in which the subsequent transfer to the VLA Director was effected. This, of course, is a "but for" analysis, and the Supreme Court in *Canson* suggests that more than this is needed. The *Apsassin* case may in fact provide the court with the opportunity to provide some guidance as to exactly what that "more" is. In the event that undue influence is found to have been exercised in *Apsassin*, the Court's ultimate decision as to whether sufficient additional justification can be derived from either

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[595] This is the only mechanism whereby the mineral rights would not have been transferred to another eventual purchaser.

[596] Although this is contrary to the findings at trial, it is possible that a contrary conclusion could be reached if a reverse evidentiary onus were applied, as I have submitted is appropriate to the circumstances surrounding the actions of the Crown.

the nature of the fiduciary relationship, the fact that the fiduciary asset in question was land or the conduct of the parties — in all, the equities of the situation — will likely amount more to the making of a policy determination than to an exercise in legal analysis.[597]

Limitation Period Issues

Notwithstanding that the courts may from time to time ascertain that the Crown has acted in conflict of interest or has otherwise breached its fiduciary obligations to Indian peoples, the often lengthy passage of time between the alleged misfeasance and the bringing of an action will frequently require that issues of limitation periods be addressed.[598] It was on this basis that the action in *Kruger* was dismissed.[599]

In some jurisdictions the running of limitation periods may be stayed where fiduciary obligations have been breached. In *Guerin*, the court employed the concept of equitable fraud to stay the running of limitation periods in that action.[600] Based on *Kitchen v. Royal Air Force Assn.*,[601] the court in *Guerin* found that the withholding of lease information from the Musqueam Band prevented that band from pursuing their cause of action in a timely fashion.

In *Apsassin*, too, Isaac C.J. stated, without elaboration, that "the circumstances

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[597] In *Hodgkinson v. Simms*, *supra*, n. 18, at p. 452, for example, the Supreme Court justified its adoption of what was essentially a "but for" analysis on policy grounds:

> From a *policy perspective* it is simply unjust to place the risk of market fluctuations on a plaintiff who would not have entered into a given transaction but for the defendant's wrongful conduct. [Emphasis added.]

[598] Under s. 39 of the *Federal Court Act*, R.S.C. 1985, c. F-7, provincial limitation and prescription periods apply to proceedings by or against the federal Crown in that province. See generally, Paul Lordon, *Crown Law* (Toronto: Butterworths, 1991), at pp. 210-206.

[599] *Supra*, n. 222.

[600] *Supra*, n. 3, at p. 345.

[601] [1958] 1 W.L.R. 563 (C.A.), at p. 569.

surrounding this case amount to fraud in the equitable sense". He did not, however, point to any evidence of concealment of information on the part of the Crown, as *Kitchen* and *Guerin*[602] suggest would be necessary to support that finding. Moreover, as *Kitchen* points out, the burden of proof of "active concealment" is on the claimant seeking to avoid the application of the limitation period and it would therefore appear to be incumbent on the *Apsassin* plaintiffs to produce some evidence in this regard.[603]

Nevertheless, such evidence may exist. As regards the inadequacy of the sale price to the VLA Director, one might speculate as to whether the facts regarding the difference between the appraised value of the land and the value paid by the VLA Director were made available to the band at the time; given the relationship between Indian Affairs and the band described earlier, such an occurrence is unlikely. It is possible that evidence of such concealment might be sufficient to support a finding of equitable fraud in respect of the undervaluing of the land in the sale to the VLA Director.[604]

It might be questioned, however, whether any legally relevant connection can be drawn between concealment of the undervalue paid on the ultimate sale of the lands and the more important issue, from the band's point of view, of whether undue influence was exercised in initially obtaining the surrender. Because the surrender preceded the sale by some three years, it would appear unlikely that the surrender was initiated by the Crown with the eventual unfair sale price in mind; it is much more likely that the Crown's only immediate objective in obtaining the surrender was to satisfy its need for land for veterans.

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[602] *Supra*, n. 3, at p. 345.

[603] *Supra*, n. 601, at p. 567.

[604] One might note the caveat expressed by Youdan, *supra*, n. 99, at p. 98, however, that "Cases dealing with the applicability of the limitation statutes to trustees in general and to constructive trustees in particular are notoriously unreliable as authorities outside their particular context."

In other words, if undue influence was exercised by the Crown, it was likely exercised for the purpose of inducing the band to consent to the otherwise proscribed sale of fiduciary assets to it as fiduciary, rather than for the purpose of influencing the band to sell the property at a value that was less than fair market value.[605] If so, there would appear to be no legally relevant causal connection between any undue influence by the Crown in obtaining the surrender and its later negotiation of inadequate compensation for the land. Any subsequent concealment of the appraisal or sale price differences would therefore appear to be unrelated to a breach by the Crown's in exercising undue influence. A concealment in respect of the former might not therefore afford any reason to delay the running of limitation periods in respect of the latter.

One of the few options open to a band stymied by the operation of limitation periods is to submit a claim under the federal specific claims program. Under this program, the Crown has agreed to waive limitations arguments and to consider claims that would otherwise be statute-barred.[606] Under the terms of the program, this option should be open even to claimants who have unsuccessfully pursued an action before the courts. This would be especially valuable to a band that has lost a court action due only to the operation of applicable limitation periods.[607]

Conclusions regarding Crown Conflict of Interest

According to the rules applicable to a fiduciary in private law, discussed earlier in Chapter V, the Crown as a fiduciary would normally be prohibited from entering into any

[605] The evidence led regarding the surrender meeting discussions made no mention of any discussion of proposed sale price.

[606] *Outstanding Business: A Native Claims Policy*. Department of Indian Affairs and Northern Development, 1982.

[607] E.g., the Penticton Band in *Kruger v. The Queen, supra*, n. 222.

transaction involving reserve lands in which it had an interest itself or in which a party related to it had an interest. As is apparent from the judgments in *Apsassin*, it is not always easy to determine whether such a non-arm's-length relationship exists. It will generally be found where a governing statute deems the other transacting party to be an agent of the Crown, or where the party is subject to a sufficient degree of ministerial or Cabinet control. In *Apsassin*, the wording of the *Veterans' Land Act, 1942* indicates that, for the purpose of acquiring the lands at issue in that case, the VLA Director was acting as an agent of the Crown.

The finding of a non-arm's-length relationship between the Crown and a purchaser of, or other party transacting in respect of, Indian lands has a number of important consequences. Firstly, it reverses the usual onus of proof of breach, shifting to the Crown the burden of demonstrating that it did not breach its fiduciary duties in carrying out the transaction. Secondly, where there is any suggestion that the band was reliant upon the Crown for guidance in such a transaction, the Crown may be required to prove that it did not exercise undue influence in persuading the band to consent to the transaction, or to consent to the transaction at a disadvantageous price. While this presumption might not be difficult for the Crown to rebut when it is dealing with a wealthy and sophisticated band acting on the advice of independent legal counsel, this will not always be the case. In disputes dating back more than two or three decades it will be rare to find such Indian independence in matters relating to real property transactions. Even today, one will find many cases in which certain Indian bands do not have the financial resources necessary to retain lawyers to advise on every real estate proposal, especially given that many may never come to fruition. It is natural for bands in such circumstances to look to Indian Affairs for advice as to the commendability of a proposed transaction. In such circumstances where the Crown is itself, or is related to, the party wishing to obtain the land, the burden of demonstrating an absence of undue influence may be very difficult to satisfy.

Given the potential for the exercise of undue influence on the part of the Crown in acquiring reserve land for public purposes, where there is any possibility that a band may be influenced by the Crown, it should be incumbent on the Crown to provide the band with the means to employ independent legal counsel and appraisers[608] and, in some circumstances, business advisers as well. Only by doing so can the Crown hope to meet the burden of proof necessary to demonstrate that it did not exercise undue influence. Given the likely reaction of the courts to transactions by a fiduciary at less than fair-market value, as a practical matter it will be necessary for the Crown to ensure that fair consideration is paid for the rights or interests purchased. This may involve demonstrating that the Crown paid *more* than any other available purchaser would offer, i.e., more than fair-market value. In order to avoid the natural conflict faced by the Crown in seeking to conserve public funds on the one hand and attempting to fulfil its duties to a band on the other, it may be advisable for the Crown to appoint an independent arbitrator to determine compensation in such cases. In the circumstances of *Apsassin*, none of the above measures were taken, and it is therefore open to question whether the Crown met the onerous burden of proof, required of it in the circumstances, to demonstrate that it did not unduly influence the Beaver Band to enter into the 1945 surrender.

Even where the Crown can demonstrate that there was no potential for undue influence or that, where the potential existed, none was used, in a situation of apparent conflict of interest it must still assume the burden of showing that fully informed consent

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[608] As Perell points out, a fiduciary purchasing from a beneficiary may be required to account for appraisal and other fees in any case (*supra*, n. 302, at p. 29).

was given by the beneficiary to the otherwise prohibited act.[609] This can be an onerous obligation, especially as regards transactions occurring many decades ago in respect of which few written records survive. Where insufficient documentary evidence exists, the Crown may in fact be unable to prove that informed consent to the transaction was given, and may find itself liable "by default". Although in *Apsassin* the trial judge concluded that informed consent had been given, he gave no indication as to whether this conclusion was reached on the basis of affirmative evidence tendered by the Crown, or because of a lack of evidence to the contrary presented on behalf of the plaintiffs.

What *Guerin* makes clear, and what the majority were in accord with in *Apsassin*, is that determination of band consent is not limited by the wording of surrender documents or by the absence of a formally accepted revocation of surrender. As Dickson J. noted in *Guerin*, a band's oral representations bind the discretion of the Crown as fiduciary. By the same token a band can orally consent to a variation in the terms of an alienation or surrendered land, as long as the new terms fall within the scope of the original surrender. In addition, because a band's expressed wishes bind the Crown, it can even withdraw completely from a proposed alienation solely on the basis of oral instructions.

Even a third party purchaser of reserve lands who is found to be independent of the Crown can be held liable to account to a band if the Crown has breached a fiduciary obligation in entering into the transaction and it can be demonstrated that the purchaser was aware of that breach. By far the most common circumstance in which this will arise is where reserve lands are sold to a third party at less than a fair market value and the purchaser can be shown to have been aware of that fact. Such a claim was raised by the

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[609] Although it has been suggested that receipt by a band of independent legal advice negates this duty (Owen, *supra*, n. 78, at p. 12), no persuasive support has been given for such a position.

plaintiffs in the *Guerin* case, but only after the fact, and was unsuccessful for that reason. In *Apsassin*, a strong argument can be made that the VLA Director would have known that he was acquiring the lands at less than their appraised value, as a result of which the property could at one time have been traced into his hands. Having long since alienated the property to innocent third parties, however, this option no longer existed at the time of trial. For the same reason, it would be pointless for the plaintiffs to request that a constructive trust be imposed in respect of the land. As a remedial device, a constructive trust is useful only where the stranger taking with knowledge of the breach still holds the alienated property at the time of judgment. The band's claim against the VLA Director in respect of the undervalue paid would therefore appear to be limited to an accounting of any profits received by him on his resale of the lands to veterans.

Even where a breach of fiduciary duty is proven, there still rests on the claimant the onus of demonstrating that the loss for which a remedy is claimed was caused by the breach in question. This would appear to require something more than a "but for" determination, but somewhat less than a reasonable foreseeability standard. The major component of the claim advanced in *Apsassin* was for compensation for lost oil and gas revenues from the surrendered lands. If the Supreme Court determines that the Crown unduly influenced the band to enter into the surrender, and that *but for* that influence the band would not have alienated its lands at any time before oil was discovered, it is conceivable that the Court could identify sufficient additional causality to find the Crown liable for the loss of the oil and gas revenues. If, on the other hand, the Court were to find that the band would have eventually sold the surrendered lands as agricultural lands, albeit at a somewhat higher price, before oil or gas was discovered, it is unlikely that a sufficient linkage to the lost oil and gas revenues can be demonstrated.

Notwithstanding any success that Indian plaintiffs might have in proving one or more breaches of fiduciary duty and the necessary causal connections to losses suffered, because of the age of many outstanding claims, they will often have to address issues of expiration of relevant limitation periods. Although relief from certain limitations may be obtained by demonstrating that actions on the part of defendants amounted to equitable fraud, the existence of ultimate limitation periods will continue to frustrate many aboriginal claims.

Although the burden of proving causation and the limitations on the bringing of older claims may cause problems for bands in some cases, proper application of conflict of interest presumptions can assist bands in others. Where the Crown has dealt with reserve lands for public purposes, the reversal of the burden of proof that accompanies demonstration of a *prima facie* case of conflict of interest on the part of the Crown can assist a band in obtaining judgment against the Crown by requiring the Crown to prove both that it did not exert undue influence on the band in question and that the band gave its fully informed consent to the transaction. The key to doing so is the recognition of the conflict of interest that the Crown as fiduciary faces when it seeks to use reserve lands for purposes other than those that are in the best interests of the band concerned.

CHAPTER VII
CONCLUDING COMMENTS

Madame Justice McLachlin, speaking extra-judicially, recently gave the following assessment of the state of equitable remedies in Canada today:

> the first flush of satisfaction at the heady embrace of new-style equity has given way to a reflective concern about the relationship of the new forms of relief to the traditional legal remedies under tort, contract and statute. While Canadian

> courts remain open to applying equity in new situations, the initial burst of creativity may be yielding to a period of consolidation with the courts increasingly preoccupied with establishing appropriate doctrinal limits for the new equitable remedies and ensuring that they mesh with other rules governing civil redress, to the end of assuring a comprehensive, coherent set of legal remedies for civil wrongs.[610]

Much the same can be said for the introduction of the fiduciary concept into government/Indian relations in Canada. While the courts must keep an open mind regarding the application of fiduciary principles in areas other than the surrender of reserve land considered in *Guerin*, they must also take care to ensure that their application of the fiduciary concept meshes with existing principles of fiduciary accountability, so as to preserve a comprehensive and coherent principle of fiduciary relationships. It is the thesis of this paper that the only manner in which to do so is to maintain the principles regulating private law fiduciary relationships as a basis for the application of fiduciary principles in public law.

In order to guide parties to a relationship the law must be ascertainable, and to be ascertainable it must be amenable to objective analysis and capable of predicting the eventual response of the courts. If the body of law relating to fiduciary relationships is analysed, it is apparent that a common element in all relationships accepted to be fiduciary in nature is a transfer of power or property to the fiduciary conditional on its use solely for the benefit of the intended beneficiary. Such a conditional transfer theory appears to provide the requisite analytical objectivity and predictive value necessary to be of practical utility.

When one examines the Crown/Indian relationship, this element of conditional transfer can be discerned in the *Indian Act*'s requirement that a band wishing to deal with a

[610] *Supra*, n. 96, at p. 103.

third party must first cede that interest to the Crown, subject to the statutory confirmation that the Crown will deal with such lands for the benefit of the surrendering band. This requirement, combined with the discretion accorded the Crown in so acting, causes a conditional transfer of power, and arguably of property, from the band to the Crown. This accords completely with the model of private law fiduciary relationships described in this paper, and nothing in the Crown/Indian relationship suggests any reason to depart from the private law model in judging the actions of the Crown in its dealings with reserve lands.

The broad scope of the conditional transfer theory commends itself to application to other aspects of the Crown/Indian relationship. As has been noted, the theory would encompass transactions involving Indian lands under ss. 18(2), 28(2) and 58 of the *Indian Act*, as well as transactions involving timber, hydrocarbons and minerals under regulations made under that Act. In other areas, such as the administration of Indian estates and the handling of Indian monies, the actions of the Crown are even more clearly those of a fiduciary. Indeed, in those areas the Crown is likely a true trustee, owing the same affirmative obligations regarding investment owed by a trustee in private law.

The Crown's position as a fiduciary can be problematic, raising issues of conflict of interest when it from time to time finds itself seeking to obtain the use of reserve lands for public purposes. It may also face the same difficulties in its handling of Indian monies placed in the Consolidated Revenue Fund, the funds of which serve public purposes. In order to ensure that free and fully informed consent is given by Indian beneficiaries to any governmental use of Indian property, the Crown must ensure that its conduct is beyond reproach. This likely entails ensuring that the band receives the highest possible transaction price or investment return, that the band's decision is made with knowledge of all relevant information and that the band receives independent professional advice in making its decisions. To permit otherwise would be to leave the Crown vulnerable to claims that it exercised undue influence or elicited uninformed consent to its actions.

This does not mean, however, that the notorious floodgates of litigation are about to be thrown open. Provided that fiduciary obligations are limited to situations in which the Crown is in fact dealing with Indian assets which have been entrusted to it to be used for the sole benefit of the Indian beneficiaries, there should be no injustice in ultimately holding the Crown to the same obligations expected of a fiduciary in private law. As Mr. Justice La Forest stated in *Norberg v. Wynrib*:

> In summary, the constraints inherent in the principles governing fiduciary relationships belie the contention that the recognition of a fiduciary obligation in this case will open the floodgates to unmeritorious claims.... In so far as application of those principles in this case might be argued to give encouragement to new categories of claims, the governing principles offer assurance against unlimited liability while at the same time promising a greater measure of justice for the exploited.[611]

By the same token, a proper application of fiduciary principles should deny fiduciary obligation where no power or property has been transferred. Attempting to impose fiduciary obligations in areas such as the making of legislation or the disbursement of discretionary funding only serves to obscure the rationale for their legitimate application in appropriate cases. As Madame Justice McLachlin points out,

> the desire to do rough justice must be weighed against other interests, including a measure of certainty in the law, the legitimate expectations of parties, the right of parties to order their affairs by contract, and the right of legislators to exercise their best judgment without fear of reprise. Even in Canada, then, equitable relief may have its limits.[612]

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[611] *Supra*, n. 33, at p. 293.

[612] *Supra*, n. 96, at p. 55. Maddaugh, too, warns that allegiance to an overly broad fiduciary concept poses a "danger of curtailing legitimate transactions and thereby frustrating free enterprise" (*supra*, n. 44, at p. 16). In the same vein, Sir Robert Megarry cautions (*supra*, n. 431, at p. 11):

> The traditional beauty of a land flowing with milk and honey is marred by the realisation that it would be very sticky. What of a land awash with fiduciary relationships?

Moreover, contemporary governmental fiduciary obligations are neither unlimited nor eternal. As bands manage more and more of their own affairs and advance towards self-government, the scope of the Crown's discretion and the power that it exercises on bands' behalf will inevitably lessen.[613] In the event that self-government statutes eliminate governmental involvement and discretionary power altogether, it appears that the basis for the fiduciary relationship would similarly be eliminated.

In the meantime, fiduciary principles should be invoked to govern the relationship between Indian bands and the Crown in circumstances that are appropriate: i.e., where power or property has been transferred by a band to the Crown to be used for the band's benefit. This should include the application of appropriate presumptions against the interest of the Crown where it appears that the Crown is acting in conflict of interest. In order to preserve the comprehensive and coherent theory of fiduciary obligations that the common law has bequeathed to us, however, it is essential that the same fiduciary principles be applied to the Crown as are applied to fiduciaries in private law. Because of its relatively recent introduction to the Crown/Indian relationship, and the attraction of its *sui generis* roots, the courts have exhibited a regrettable tendency to address the Crown/Indian fiduciary relationship in isolation from the body of established fiduciary law. Although as Oosterhoff and Gillese note, "the concept of the "fiduciary" stirs the imagination",[614] it should not be invoked as a judicial talisman to produce an instant remedy to every difficult legal issue that arises between the Crown and aboriginal peoples. The fiduciary principle

[613] Indeed, it has even been suggested that the present Crown/Indian fiduciary relationship is already limited in practice to the relatively narrow relationship of agency. As McMurtry and Pratt note (*supra*, n. 15, at p. 39),

> The present fiduciary relationship, in this age of recognizing self-government, must be seen as tending toward agency as mature and informed peoples take control of their futures.

[614] Oosterhoff and Gillese, *supra*, n. 65, at p. 392.

must instead be reserved to regulate situations in which a band has conditionally ceded power to the Crown, and its accompanying remedies invoked only where that power has been abused. To permit otherwise invites Equitable indeterminacy.

APPENDIX "A"

INDIAN ACT PROVISIONS

Surrender Provisions, Indian Act, R.S.C. 1927, c. 98

50. (1) Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Part; but he superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber.

(2) The Governor in Council may make regulations enabling the Superintendent General without surrender to issue leases for surface rights on Indian reserves, upon such terms and conditions as may be considered proper in the interest of the Indians covering such areas only as may be necessary for the mining of the precious metals by any one otherwise authorized to mine such metals, said terms to include provision of compensating any occupant of land for any damage that may be caused thereon as determined by the Superintendent General.

51. (1) Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.

(2) No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.

(3) The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before any person having authority to take affidavits and having jurisdiction within the place where the oath is administered.

(4) When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.

Surrender Provisions, Indian Act, R.S.C. 1952, c. 149

37. Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or other wise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart.

38. (1) A band may surrender to Her Majesty any right or interest of the band and its members in a reserve.

(2) A surrender is void unless

(a) it is made to Her Majesty,

(b) it is assented to by a majority of the electors of the band at

(i) a general meeting o the band called by the council of the band, or

(ii) a special meeting of the band called by the Minister for the purpose of considering a proposed surrender, and

(c) it is accepted by the Governor in Council.

(2) Where a majority of the electors of a band did not vote at a meeting called pursuant to subsection (1) of this section or pursuant to section 51 of the Indian Act, chapter 98 of the Revised Statutes of Canada, 1927, the Minister may, if the proposed surrender was assented to by a majority of the electors who did vote, call another meeting by giving thirty days' notice thereof.

(3) Where a meeting is called pursuant to subsection (2) and the proposed surrender is assented to at the meeting by a majority of the members voting, the surrender shall be deemed, for the purpose of this section, to have been assented to by a majority of the electors of the band.

(4) The Minister may, at the request of the council of the band or whenever he considers it advisable, order that a vote at any meeting under this sections shall be by secret ballot.

(5) Every meeting under this section shall be held in the presence of the superintendent or some other officer of the Department designated by the Minister.

40. When a proposed surrender has been assented to by the band in accordance with section 39, it shall be certified on oath by the superintendent or other officer who attended the meeting and by the chief or a member of the council of the band, and shall then be submitted to the Governor in Council for acceptance or refusal.

41. A surrender shall be deemed to confer all rights that are necessary to enable Her Majesty to carry out the terms of the surrender.

18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

(2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for those purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian, in such amount as may be agreed between the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct.

. . .

28. (1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

. . .

35. (1) Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.

. . .

37. (1) Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty pursuant to subsection 38(1) by the band for whose use and benefit in common the reserve was set apart.

(2) Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been surrendered to Her Majesty pursuant to subsection 38(2) by the band for whose use and benefit in common the reserve was set apart.

38. (1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.

(2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.

39. (1) An absolute surrender or a designation is void unless

(*a*) it is made to Her Majesty;

(*b*) it is assented to by a majority of the electors of the band

(i) at a general meeting of the band called by the council of the band,

(ii) at a special meeting of the band called by the Minister for the purpose of considering a proposed absolute surrender or designation, or

(iii) by a referendum as provided in the regulations; and

(*c*) it is accepted by the Governor in Council.

(2) Where a majority of the electors of a band did not vote at a meeting or referendum called pursuant to subsection (1), the Minister may, if the proposed absolute surrender or designation was assented to by a majority of the electors who did vote, call another meeting by giving thirty days notice thereof or another referendum as provided in the regulations.

(3) Where a meeting is called pursuant to subsection (2) and the proposed absolute surrender or designation is assented to at the meeting or referendum by a majority of the electors voting, the surrender or designation shall be deemed, for the purposes of this section, to have been assented to by a majority of the electors of the band.

(4) The Minister may, at the request of the council of the band or whenever he considers it advisable, order that a vote at any meeting under this section shall be by secret ballot.

(5) Every meeting under this section shall be held in the presence of the superintendent or some other officer of the Department designated by the Minister.

40. A proposed absolute surrender or designation that is assented to by the band in accordance with section 39 shall be certified on oath by the superintendent or other officer who attended the meeting and by the chief or a member of the council of the band, and then submitted to the Governor in Council for acceptance or refusal.

41. An absolute surrender or a designation shall be deemed to confer all rights that are necessary to enable Her Majesty to carry out the terms of the surrender or designation.

42. (1) Subject to this Act, all jurisdiction and authority in relation to matters and causes testamentary, with respect to deceased Indians, is vested exclusively in the Minister and shall be exercised subject to and in accordance with regulations of the Governor in Council.

. . .

51. (1) Subject to this section, all jurisdiction and authority in relation to the property of mentally incompetent Indians is vested exclusively in the Minister.

. . .

58. (1) Where land in a reserve is uncultivated or unused, the Minister may, with the consent of the council of the band,

(*a*) improve or cultivate that land and employ persons therefor, and authorize and direct the expenditure of such amount of the capital funds of the band as he considers necessary for that improvement or cultivation including the purchase of such stock, machinery or material or for the employment of such labour as the Minister considers necessary;

(*b*) where the land is in the lawful possession of any individual, grant a lease of that land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession of the land; and

(*c*) where the land is not in the lawful possession of any individual, grant for the benefit of the band a lease of that land for agricultural or grazing purposes.

(2) Out of the proceeds derived from the improvement or cultivation of lands pursuant to paragraph (1)(*b*), a reasonable rent shall be paid to the individual in lawful possession of the lands or any part thereof and the remainder of the proceeds shall be placed to the credit of the band, but if improvements are made on the lands occupied by an individual, the Minister may deduct the value of the improvements from the rent payable to the individual under this subsection.

(3) The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.

(4) Notwithstanding anything in this Act, the Minister may, without an absolute surrender or a designation

(*a*) dispose of wild grass or dead or fallen timber; and

(*b*) with the consent of the council of the band, dispose of sand, gravel, clay and other non-metallic substances on or under lands in a reserve, or, where that consent cannot be obtained without undue difficulty or delay, may issue temporary permits for the taking of sand, gravel, clay and other non-metallic substances on or under lands in a reserve, renewable only with the consent of the council of the band.

. . .

61. (1) Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which Indian moneys are used or are to be used is for the use and benefit of the band.

(2) Interest on Indian moneys held in the Consolidated Revenue Fund shall be allowed at a rate to be fixed from time to time by the Governor in Council.

62. All Indian moneys derived from the sale of surrendered lands or the sale of capital assets of a band shall be deemed to be capital moneys of the band and all Indian moneys other than capital moneys shall be deemed to be revenue moneys of the band.

. . .

64. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band

(*a*) to distribute per capita to the members of the band an amount not exceeding fifty per cent of the capital moneys of the band derived from the sale of surrendered lands;

(*b*) to construct and maintain roads, bridges, ditches and watercourses on reserves or on surrendered lands;

(*c*) to construct and maintain outer boundary fences on reserves;

(*d*) to purchase land for use by the band as a reserve or as an addition to a reserve;

(*e*) to purchase for the band the interest of a member of the band in lands on a reserve;

(*f*) to purchase livestock and farm implements, farm equipment or machinery for the band;

(*g*) to construct and maintain on or in connection with a reserve such permanent improvements or works as in the opinion of the Minister will be of permanent value to the band or will constitute a capital investment;

(*h*) to make to members of the band, for the purpose of promoting the welfare of the band, loans not exceeding one-half of the total value of

(i) the chattels owned by the borrower, and

(ii) the land with respect to which he holds or is eligible to receive a Certificate of Possession,

and may charge interest and take security therefor;

(*i*) to meet expenses necessarily incidental to the management of lands on a reserve, surrendered lands and any band property;

(*j*) to construct houses for members of the band, to make loans to members of the band for building purposes with or without security and to provide for the guarantee of loans made to members of the band for building purposes; and

(*k*) for any other purpose that in the opinion of the Minister is for the benefit of the band.

. . .

66. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of revenue moneys for any purpose that in the opinion of the Minister will promote the general progress and welfare of the band or any member of the band.

(2) The Minister may make expenditures out of the revenue moneys of the band to assist sick, disabled, aged or destitute Indians of the band, to provide for the burial of deceased indigent members of the band and to provide for the payment of contributions under the *Unemployment Insurance Act* on behalf of employed persons who are paid in respect of their employment out of moneys of the band.

APPENDIX "B"

VETERANS' LAND ACT, 1942 PROVISIONS

3. (1) The Governor in Council may appoint an officer to be known as "The Director, The Veterans' Land Act" (hereinafter referred to as "the Director") who shall be responsible only to the Minister and who shall have the rank and standing of a Deputy Head.

. . .

5. (1) For the purposes of acquiring, holding, conveying and transferring and of agreeing to convey, acquire or transfer any of the property which he is by this Act authorized to acquire, hold, convey or agree to transfer, but for such purposes only, the Director shall be a corporation sole and he and his successors shall have perpetual succession, and as such the agent of His Majesty in the right of Canada.

. . .

18. In the event of the rescission of any such contract or agreement by the Director he may, subject to the provisions of section sixteen, hold, sell, exchange or otherwise dispose of such property to a veteran or with the approval of the Minister to any other person.

. . .

20. Any land or other property purchased or held by the Director may, pending sale, or resale, as the case may be, be leased by the Director or otherwise dealt with upon terms satisfactory to the Minister.

21. If the Director deems that any land or other property acquired by him cannot or ought not to be sold subject, whether as to sale or otherwise, to the provisions of section nine, he shall report to the Minister the circumstances, with a statement of the cost of such property and shall recommend another sale price or other terms of sale, whereafter any sale of such property shall be made for such sale price, or upon such terms, to any person as the Governor in Council may approve.

. . .

29. all mail matter deposited in any post office in Canada addressed to the Director or any officer attached to his service at the offices of the Director at Ottawa and all mail matter addressed by the Director or any officer attached to his service at the offices of the Director at Ottawa to any place in Canada and bearing thereon by imprint or writing the words "The Director, Veterans' Land Act" shall be carried free, registered or otherwise, in the canadian mails other than air mail.

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