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FIDUCIARY DUTY IN THE RELATIONSHIP OF ABORIGINAL PEOPLES AND THE CANADIAN MILITARY

By Alex Weatherston

Submitted in partial fulfilment for the degree of Masters of Law
University of Ottawa

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of Canada

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Abstract

This thesis is a legal analysis of the fiduciary duty in the relationship between the Crown and Aboriginal Peoples in Canada as it specifically applies to the exercise of power by the Federal Government for national defence under section 91(7) of the *Constitution Act, 1867*, the federal power of "Militia, Military and Naval Service, and Defence," and under the royal prerogative.

In Canada the fiduciary duty concept in the relationship of Aboriginal Peoples and the Crown has been examined in the two recent cases of *Guerin* v. *The Queen* and *R.* v. *Sparrow*, decided by the Supreme Court of Canada in 1984 and 1990 respectively. The Court has also commented briefly upon fiduciary duty and Aboriginal Peoples in the cases of *Canadian Pacific Ltd.* v. *Paul et al.* and in *Bear Island Foundation et al.* v. *Attorney General of Ontario*, decided in 1988 and 1991 respectively. In addition, the Supreme Court of Canada commented extensively in November, 1991 upon the decision in *Guerin* and the fiduciary duty concept applied to the Aboriginal-Crown relationship in its decision in *Canson Enterprises Ltd. et al.* v. *Boughton & Co. et al.*, a case involving fiduciary duty in a private law commercial setting.

While some commentators regarded the decision of the Court in *Guerin* as restricting the fiduciary duty of the Crown solely to circumstances in which Indian reserve land was surrendered, the Court in *Sparrow* declared that the words "recognized and affirmed" in subsection 35(1) of the *Constitution Act, 1982* incorporated the fiduciary relationship into that section and thus placed restraint on any exercise of sovereign power by the Crown.

The Court subsequently in *Sparrow* developed a justification test for the *prima facie* infringement of Aboriginal and treaty rights protected by subsection 35(1). The two-part test consisted of the following:

1. The determination of valid legislative objectives; and

2. Consideration of the special trust relationship and the responsibility of the government which is at stake in dealings with Aboriginal Peoples.

This test was developed by the Court in the *Sparrow* case in the context of the direct regulation by the Federal Government of Aboriginal fishing rights.

Aboriginal and treaty rights may also be infringed by defence activities conducted by the Canadian Forces and by foreign military allies training in Canada. Defence activities usually occur in non-residential areas in Canada and it in these areas that Aboriginal and treaty rights are often exercised by the holders of these rights. The nature of defence activities with mechanized equipment and low-flying aircraft is unfortunately such that interference may arise with the exercise of Aboriginal and treaty rights, such as hunting, fishing, trapping and gathering. For example, the Innu people in Labrador consider that the low-level military jet flying training conducted out of the Goose Bay air base seriously affects the hunting of caribou in Labrador and Quebec, and thus threatens their traditional way of life. Such conflicts between the exercise of Aboriginal or treaty rights and the conduct of defence activities have been evident in several recent civil court actions commenced by groups of Aboriginal Peoples, such as the Innu, and also by the Crown in prosecutions of Aboriginal Peoples. These proceedings, both civil and quasi-criminal, including some before subsection 35(1) came into force, will be examined in the thesis with a view to understanding the legal interests and considering the impact of subsection 35(1) on defence activities.

In applying the justification test developed in *Sparrow* to the infringement by defence activities of Aboriginal and treaty rights that are now "recognized and affirmed" in subsection 35(1), I submit in the thesis that different legal interests need to be considered in assessing the justification of such activities. Under the first part of the justification test, valid objectives in the *Sparrow* case dealing with the regulation of salmon fishing were considered by the Court to be those aimed at preserving subsection 35(1) rights by conserving and managing a natural resource; purporting to prevent the exercise of subsection 35(1) rights that would cause harm to the general

populace or to Aboriginal peoples themselves; or found to be compelling and substantial. Regulations simply in the public interest, however, were considered not to be compelling and substantial. Inasmuch as national defence legislation, while normally compelling and substantial for defence and emergency purposes, could not otherwise be assessed against the objectives enumerated in *Sparrow*, the first part of the *Sparrow* test addressing the validity of legislative objectives should not be applied to defence activities that may infringe subsection 35(1) rights.

In the test of justification of regulations under the second part of the *Sparrow* test, the scheme of allocation of resource product among Aboriginal groups, and competing commercial and non-commercial groups, was one of the hallmark interpretive principles in assessing the honour of the Crown. Specifically in *Sparrow*, the Court found that priority had to be given in the federal fishing regulations to Indian food fishing, immediately after conservation needs were satisfied, and before allocations for commercial and sport fishing were made. In the case of national defence activities infringing section 35 rights, however, there would not be a scheme of priorities to be determined, but instead a conflict of interest between the Crown's responsibilities for Aboriginal Peoples and for conducting activities in the fulfilment of defence policy to be resolved.

An assessment of justification would be made to ensure that the honour of the Crown was upheld and that any necessary infringement was minimized in resolving the conflict of interest. This assessment would be based on a full examination of the conduct of the Crown and of defence officials in the planning and implementation of any defence activity with real or potential impact on section 35 rights. Such an examination would involve considerations such as planning and identification of Aboriginal and treaty rights potentially affected in defence areas; alternative defence activities considered; consultation with Aboriginal Peoples; disclosure of information to Aboriginal Peoples concerning planned defence activities; the record of consideration by defence officials of information provided by affected Aboriginal Peoples; the adequacy of compensation

for affected or extinguished rights; completion of other statutory reviews; and proportionality of degree or seriousness of infringement and effort to minimize. Legal issues in these various considerations are analyzed in the thesis.

Acknowledgements

I wish to express my sincere appreciation for the considerable assistance and time provided by Professor Brad Morse in the review of this thesis, particularly in the first half of 1992 when he was extremely busy with aboriginal law matters at the Multilateral Meetings on the Constitution. Much of my insight and background into aboriginal law necessary for this thesis was provided during the Aboriginal Peoples' law course taught so expertly by Professor Morse and Roger Jones in the Fall of 1991. I have also been assisted in many ways by various staff in the libraries of the University of Ottawa Law School and DIAND, and by personnel in DND. Lastly, and perhaps most importantly, I wish to thank my wife, Terry, and daughter, Christine, for their assistance in the proofing of text in the thesis and their patience during the completion of necessary work at home.

August 1992

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Chapter 1 - Introduction

The fiduciary duty in the relationship of the Crown and Aboriginal Peoples[1] in Canada has been elaborated in the two recent cases of *Guerin* v. *The Queen*[2] and *R.* v. *Sparrow*[3] decided by the Supreme Court of Canada in 1984 and 1990 respectively. The focus of this thesis is to examine critically this duty and other legal issues specifically pertaining to the exercise of power by the federal government for defence under the royal prerogative and under the federal power of "Militia, Military and Naval Service, and Defence" in section 91(7) of the *Constitution Act, 1867*,[4] given the real and potential conflicts of defence activities with the exercise of aboriginal and treaty rights protected by section 35 of the *Constitution Act, 1982*. Treaty rights would of course include the rights acquired under land claims agreements by Aboriginal Peoples, as provided by section 35(3) of the *Constitution Act, 1982*.

Such conflicts have been evident, as will be discussed, in several recent legal challenges made by Aboriginal Peoples to various defence activities in Canada. While there was significant conflict in 1885 in the post-confederation history of Canada with the Métis and Indians, after Canadian Militia units were despatched to the then Districts of Assiniboia and Saskatchewan during the relatively brief North-West Rebellion, and also confrontation in 1990 at Kanesatake and Kahnawake in Quebec, the history of Canada, unlike that of the United States, has fortunately not otherwise been one of armed conflict with Aboriginal Peoples or of significant challenges to defence training

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1 For purposes of this thesis, I have used the definition in subsection 35(2) of the *Constitution Act, 1982*, enacted by the *Canada Act, 1982 (U.K.)* c. 11, Schedule B, which provides that Aboriginal Peoples of Canada "includes the Indian, Inuit and Métis peoples of Canada." The terms "First Nations," "indigenous population," "native people," and "native peoples" are also often used in the same context, *i.e.*, to refer to the descendants of the original inhabitants of the North American continent, including people of Indian, Inuit and Métis descent.

2 (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, 20 E.T.R. 6, 36 R.P.R. 1, 55 N.R. 161.

3 [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, [1990] 3 C.N.L.R. 160, 56 C.C.C. (3d) 263, 111 N.R. 241.

4 30 & 31 Victoria, c. 3.

and operations. In pre-confederation Canada, on the other hand, the roles of various groups of Aboriginal Peoples in military relations, both as allies and as enemies of the French and British colonists during several battles and campaigns, were very important factors in the history and development of North America.[5]

To discuss these legal principles and conflicts in respect of national defence and Aboriginal Peoples, this dissertation is divided into six chapters exclusive of Chapters 1 and 8 that comprise the introduction and conclusion respectively. Chapter 2 focuses on the legislative and regulatory framework for national defence activities in Canada under the *National Defence Act*,[6] and the *Queen's Regulations and Orders for the Canadian Forces*[7] made under that *Act*, as well as the current policy for defence activities in Canada and the scope of these activities. A general description of land held in Canada, either outright in the name of Her Majesty in right of Canada or leased, and of operations and activities of the Canadian Forces in Canada on such land and in other areas, will also be provided.

In Chapter 3, I will examine past and current legal challenges to defence activities in Canada made by groups of Aboriginal Peoples. This will include a review of case law and pending actions by groups of Aboriginal Peoples against the Crown in right of

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[5] As noted by Diamond Jenness, Canada's most distinguished pioneer anthropologist, in his seminal work *The Indians of Canada* (7th ed) (University of Toronto Press: Toronto, 1977) at p. 1, Samuel Champlain could not have foreseen in 1603 when sailing up the St. Lawrence River and agreeing to support the Algonkian Indians at Tadoussac against the aggression of the Iroquois that "the petty strife between those two insignificant hordes of 'savages' would one day decide the fate of New France ...."

[6] R.S.C. 1985, c. N-5, as amended.

[7] Pursuant to section 15 of the *Statutory Instruments Regulations*, C.R.C. 1978, c. 1509, which have been made pursuant to the *Statutory Instruments Act*, R.S.C. 1985, S-22, these regulations and orders made under the *National Defence Act* are exempt from publication in the Canada Gazette. They are of course widely available at all military units, and in most law schools and larger public libraries, and may be purchased from The Queen's Printer. Notice of the exemption from publication is also provided periodically in the Canada Gazette, which provides that the regulations and orders may be inspected at the Director of Documentation and Drawing Services, National Defence Headquarters, Ottawa.

Canada with impact on defence matters and an analysis of the legal issues raised. I will also examine those cases in which Aboriginal Peoples have appeared as accused in criminal proceedings related to defence activities. My review will involve an examination of the international treaties and memoranda of understanding that permit the military operations of foreign allies in Canada, e.g., flying operations at Goose Bay, Labrador, and that have been subject to legal challenge by Aboriginal Peoples.

Chapter 4 will be an examination of the Aboriginal-defence related legal issues arising out of the modern day comprehensive land agreements, such as the James Bay and Northern Quebec Agreement, the Northeastern Quebec Agreement and the Western Arctic - Inuvialuit Final Agreement, which have been finalized. I will also review the applicable provisions in the other unratified pending major land claim agreements with the Tungavik Federation of Nunavut, the Council of Yukon Indians and the Gwich'in, and the effect on the right of access under the *National Defence Act* to Aboriginal settlement lands for training purposes by military units.

In Chapter 5, I will consider the development of the fiduciary concept in Canada in respect of the relationship of Aboriginal Peoples and the Crown as first developed by Dickson, J., as he then was, in *Guerin*, *supra*, and the contrasting approaches of trust and agency also outlined in that case by other members of the Court. The origin of the fiduciary duty concept, the breach of the duty and the remedy for a breach will be discussed as developed in *Guerin*. I will also consider the application of the *Guerin* decision to subsequent cases involving Aboriginal Peoples and the Crown

I will further examine the concept of fiduciary duty in Chapter 6 as it was used in the leading case of *Sparrow*, *supra*, in which the Court gives a liberal and purposive interpretation of the breadth of section 35 with considerable sensitivity to the needs of Aboriginal Peoples. The fiduciary duty concept was included as part of the justification test for the *prima facie* infringement by the Crown of aboriginal and treaty rights that

are constitutionally protected under subsection 35(1)[8] in Part II of the *Constitution Act, 1982*. While this justification test was developed in the context of regulations that restricted the exercise of aboriginal fishing rights in competition with commercial, conservation and other non-aboriginal fishing interests, I will postulate an equivalent test for justification of national defence activities that do not purport to regulate the exercise of aboriginal and treaty rights directly, but may nevertheless infringe the rights of Aboriginal Peoples. Such a test, unlike the test in *Sparrow*, will consist not of two parts, but only one. This one part will involve an examination of the planning and implementation of the defence activities to ensure that the honour in the Aboriginal-Crown relationship and the fiduciary duty have been respected. I will argue that the first part of the *Sparrow* test, *i.e.*, the examination to assess if compelling and substantial reasons are present for the national defence activities that infringe, or potentially infringe, aboriginal and treaty rights, is not appropriate in considering the justification of infringement by national defence activities.

National defence activities of the Canadian Forces will be considered under two categories: those for training purposes, and those in time of an emergency. In the latter category, I will consider justification for national defence action taken pursuant to an "emergency," as defined in section 2 of the *National Defence Act* to mean "war, invasion, riot or insurrection, real or apprehended" and for a "national emergency" as defined in section 3 of the *Emergencies Act*[9] as:

> an urgent and critical situation of a temporary nature that
>
> (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or
>
> (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada
> and that cannot be effectively dealt with under any other law of Canada.

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[8] All further references to section 35 will be to subsection 35(1) unless otherwise indicated.

[9] R.S.C. 1985, c. 22 (4th Supp).

I will also consider justification for the military training, as discussed in Chapter 2, conducted by foreign allies pursuant to international agreements made pursuant to the royal prerogative, and not under statutory authority.

Chapter 7 will be a re-examination of the justification test developed in Chapter 6 for defence activities given leading post-*Sparrow* cases such as *Delgamuukw et al.* v. *The Queen in Right of British Columbia et al.*[10] which have considered the fiduciary duty and relationship between the Crown and Aboriginal Peoples. I will also consider the impact on the existence and scope of the Aboriginal-Crown fiduciary relationship given the recent Supreme Court of Canada case *Canson Enterprises Ltd. et al.* v. *Boughton & Co et al.*,[11] which deals with the general fiduciary duty concept and the issue of damages for breach of the duty in a commercial relationship between a solicitor and his client, and comments extensively on the *Guerin* decision. While the fiduciary responsibility in commercial settings such as *Canson* has received much judicial review and scholarly comment, the legal issues in the Aboriginal-Crown relationship are different and unique, and development of the law in the two areas appears to continue to be separate and distinct.

In Chapter 8, my concluding chapter, I will provide some additional comments on the assessment of justification and fiduciary duty for national defence activities in light of the proposed constitutional changes affecting Aboriginal Peoples which have been reported, at least in a general fashion, in the July 1992 report of the Multilateral Meetings on the Constitution.[12]

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[10] (1991), 79 D.L.R. (4th) 185, [1991] 3 W.W.R. 97 (B.C.S.C.).

[11] (1991), 85 D.L.R. (4th) 129 (S.C.C.).

[12] "Status Report - The Multilateral Meetings on the Constitution," July 16, 1992, at pp. 14-18.

Chapter 2 - Legal Framework, Current Defence Policy and National Defence Operations in Canada

Legal Framework - Command of the Armed Forces in Canada

Under section 15 of the *Constitution Act, 1867*, the "Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen." However, in the Letters Patent[1] constituting the office of the Governor General of Canada effective October 1, George the Sixth has stated:

> I. We do hereby constitute, order, and declare that there shall be a Governor General and Commander-in-Chief in and over Canada ....
>
> II. And We do hereby authorize and empower Our Governor General, with the advice of Our Privy Council for Canada or of any members thereof or individually, as the case requires, to exercise all powers and authorities lawfully belonging to Us in respect of Canada ....

Accordingly, as the Governor General and Sovereign's representative in Canada, the Governor General of Canada, presently His Excellency the Right Honourable Ramon John Hnatyshyn, is the Commander in Chief of the Canadian Forces.[2]

Section 15 of the *Constitution Act, 1867* received brief mention in *Operation Dismantle Inc.* v. *The Queen et al.*[3] in which counsel for the respondent at the Supreme Court of Canada (the Federal Crown) submitted that both at common law and by section 15 decisions relating to national defence fell within the authority of the royal prerogative. As the royal prerogative was a source of power existing independently of Parliament, and paragraph 32(1)(a) of the *Canadian Charter of Rights and Freedoms*[4] provided that

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1 The Letters Patent of 1947 are reproduced in R.S.C. 1985, Appendix II, No. 31.

2 While in law the Governor General is nominally the Commander in Chief of the Canadian Forces, the longstanding practice is that the Chief of the Defence Staff takes direction from the Ministers of National Defence, who in turn are accountable as ministers of the Crown to the Prime Minister. There is no case law on this point.

3 (1985), 18 D.L.R. (4th) 481, [1985] 1 S.C.R 441, 13 C.R.R. 287, 59 N.R. 1 (S.C.C.) (hereinafter *Operation Dismantle*).

4 Part 1 of the *Constitution Act, 1982*, enacted by the *Canada Act 1982 (U.K.)*, c. 11.

the *Charter of Rights* applied "to the Parliament and government of Canada in respect of all matters within the authority of Parliament," it was argued that the *Charter of Rights* could not apply to the exercise of the royal prerogative. Wilson J., however, found on this issue that the words of limitation "within the authority of Parliament" were merely a reference to the division of powers under sections 91 and 92 of the *Constitution Act, 1867*, and that the royal prerogative was within the authority of Parliament and decisions made in its exercise were thus subject to review under the *Charter of Rights*.[5]

Part I of the National Defence Act - The Department of National Defence

Parliament, acting under the constitutional authority of subsection 91(7) of the *Constitution Act, 1867* that has assigned "Militia, Military and Naval Service, and Defence" as a matter to the federal government, has enacted the *National Defence Act*.[6] Section 3 in Part I of the *National Defence Act* provides that "[t]here is established a department of the Government of Canada called the Department of National Defence (hereinafter DND) over which the Minister of National Defence appointed by commission under the Great Seal shall preside." Under section 4 of the *National Defence Act*, the Minister, presently the Honourable Marcel Masse, holds office during pleasure and has:

> the management and direction of the Canadian Forces and of all matters relating to national defence and is responsible for
>
> (a) the construction and maintenance of all defence establishments and works for the defence of Canada; and
>
> (b) research relating to the defence of Canada and to the development of and

---

[5] *Supra*, note 3, at pp. 497-8.

[6] R.S.C. 1985, c. N-5, as amended. Various judicial tests have also been enunciated by the courts as to the "peace, order and good government of Canada" (p.o.g.g.) power afforded by these introductory words in section 91, the section which enumerates the federal powers, including "Militia, Military and Naval Service, and Defence." The p.o.g.g. power as interpreted by the Privy Council in the *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.*, [1923] A.C. 695 at 705 could arguably be used in an emergency to authorize laws necessary for some aspect of defence that dealt with matters in normal times that would only be within the competence of the provinces.

improvements in materiel.

The Minister of National Defence is the vice-chairman of the Cabinet Committee on Foreign and Defence Policy. This Committee, composed of nine members who formulate policy on foreign and defence issues, is headed by the Secretary of State for External Affairs.

In addition to the Minister of National Defence, the Associate Minister of National Defence, currently the Honourable Mary Collins, has been appointed by the Governor General pursuant to section 12 of the *National Defence Act* and has shared responsibilities with the Minister of National Defence in DND. Legal advice in the Department is provided to the Ministers by the Judge Advocate General who is appointed pursuant to section 9[7] of the *National Defence Act*.

Under section 12 of the *National Defence Act*, the Governor in Council and Minister may make regulations "for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces and generally for the carrying the purposes and provisions of the Act into effect." Such regulations presently include the three volume *Queen's Regulations and Orders for the Canadian Forces* (*QR & O*)[8], covering administrative, disciplinary and financial aspects of the Canadian Forces.

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[7] The only formal condition under section 9 for appointment as Judge Advocate General is that of standing as a barrister or advocate for not less than ten years. While there is no legal requirement that the Judge Advocate General be a serving officer of the Canadian Forces, the practice has always been that the person appointed has been one of the senior legal officers in the Canadian Forces. Judge Advocates General in recent times have normally been appointed for three to four year terms terminating on or about their release age of age 60 under Table "B" to article 15.17 of the Queen's Regulations and Orders for the Canadian Forces (PC 1988-486 of March 17, 1988). The present Judge Advocate General is Commodore Peter R. Partner, of the Nova Scotia Bar, who was appointed to a three-year term in November 1990.

[8] As noted in Chapter 1, *QR & O* are exempt from registration and publication pursuant to the *Statutory Instruments Regulations*, C.R.C. 1978, c. 1509.

Article 1.03 of the *QR & O* provides in part that:

> ... *QR & O* and all orders and instructions issued to the Canadian Forces under authority of the *National Defence Act*, apply:
>
> (a) to the Regular Force;
> (b) to the Special Force;
> (c) to the Reserve Force when subject to the Code of Service Discipline;[9] and
> (d) unless the Minister otherwise directs, to all persons other than those mentioned in subparagraphs (a), (b) and (c) of this article if they are subject to the Code of Service Discipline.

As for persons in category (d) to whom QR & O would apply by virtue of being subject to the Code of Service Discipline, section 55 of the *National Defence Act* sets out an exhaustive list of such persons subject to the Code. In addition to members of the Canadian Forces subject to the Code of Service Discipline pursuant to paragraphs 55(1) (a) to (c) , the following would also be subject to the Code:

1. A member of a foreign military forces seconded or attached to the Canadian Forces (paragraph 55(1)(d));

2. A person, not otherwise subject to the Code of Service Discipline, who is serving in the position of an officer or non-commissioned member of any force raised and maintained outside Canada by Her Majesty in right of Canada and commanded by an officer of the Canadian Forces (paragraph 55(1)(e);

3. A person, not otherwise subject to the Code of Service Discipline, who accompanies any unit or other element of the Canadian Forces that is on service or active service in any place. This does not include dependants of members in Canada, but would include teachers at the schools on Canadian Forces bases in Germany and also the dependants of members and teachers at these bases or any other unit outside Canada (paragraph 55(1)(f) and subsection 55(4));

4. Subject to such exceptions, adaptations and modifications as the Governor in Council may prescribe in regulations, a person attending a military educational institution such as one of the three military colleges for cadets (paragraph 55(1)(g));

5. An alleged spy for the enemy (paragraph 55(1)(h));

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[9] The Code of Service Discipline is defined under section 2 of the *National Defence Act* as meaning the provisions of Parts IV to IX of the *Act*. These Parts deal with service offences, military jurisdiction and procedures at service tribunals for these offences.

6. A person, not otherwise subject to the Code of Service Discipline, who, in respect of any service offence committed or alleged to have been committed by him, is in civil custody or in service custody (paragraph 55(1)(i)); and

7. A person, not otherwise subject to the Code of Service Discipline, while serving with the Canadian Forces under an engagement with the Minister whereby he agreed to be subject to that Code (paragraph 55(1)(j)).

In addition to regulations made by the Governor in Council and Minister under section 12 of the *Act*, Treasury Board may also make regulations pursuant to that section prescribing the rates and conditions of pay and allowances of officers and non-commissioned members, and the forfeitures and deductions to which the pay and allowances of members are subject. Each article in *QR & O* is either a regulation or order, and is marked as having been made by the Governor in Council, the Minister of National Defence, Treasury Board or the Chief of the Defence Staff.

All matters relating to the management and operation of DND can be considered and reported on pursuant to Standing Order 108(1) and 108(2) of the House of Commons by the Standing Committee on National Defence and Veteran's Affairs (SCONDVA). The Committee is also empowered to consider and enquire into matters referred to its members by the House of Commons.

Part II of the National Defence Act - The Canadian Forces

Military operations are under the control of the Canadian Forces, which is established pursuant to section 14 of Part II of the *National Defence Act* as "the armed forces of Her Majesty raised by Canada and consist of one Service called the Canadian Armed Forces." While DND with employees appointed under the *Public Service Employment Act*,[10] and the Canadian Forces with enrolled military members, are established under different parts of the *National Defence Act*, National Defence Headquarters at Ottawa is a unified headquarters of civilian and military personnel for all national defence matters.

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[10] R.S.C. 1985, c. P-33.

Under section 15 of the *National Defence Act*, there are two components of the Canadian Forces, the Regular Force, consisting of members who are enrolled for continuing, full-time military service, and the Reserve Force, composed of members who are enrolled for other than continuing, full-time military service. A third component, the Special Force, may be authorized under section 16 in "an emergency, or if considered desirable in consequence of any action undertaken by Canada under the United Nations Charter, the North Atlantic Treaty or any other similar instrument for collective security." The last Special Force was established for personnel who served in action in the Korean War.[11]

Military commands, formations, bases, stations and units are embodied in either the Regular or Reserve Force components. The commands are the major organizational elements of the Regular Forces and consist of three major environmental ones - Maritime, Mobile (land forces) and Air, a Training System, and separate commands for Communication, Northern Region and Canadian Forces Europe.

The Chief of the Defence Staff, appointed by the Governor in Council[12] pursuant to section 18 of the *National Defence Act*, presently General A.J.G.D. (John) de Chastelain, is the senior Canadian military officer and is charged under subsection 18(1) with the control and administration of the Canadian Forces. Under subsection 18(2), all orders and instructions to the Canadian Forces that are required to give effect to the decisions and to carry out the directions of the Government of Canada shall be issued by or through the Chief of the Defence Staff unless the Governor in Council

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[11] The establishment of a Special Force in law should not be confused with "the placing of forces on active service" by the Governor in Council under section 31 of the *National Defence Act*. While active service was deemed necessary and so ordered for those members participating in the recent Gulf War, its effect is largely political and also symbolic given the effect of Order in Council PC 1989-583 dated 6 April 1989 which placed members of the Regular Force on active service anywhere in the world, and members of the Reserve Force on active service who are serving outside of Canada.

[12] The Chief of the Defence Staff and the Judge Advocate General are the only two members in the Canadian Forces appointed by the Governor in Council.

otherwise directs. Further direction is provided in article 1.23[13] of the *QR & O* which provides that, except in matters involving the accounting of public funds, "the Chief of the Defence Staff may issue orders and instructions not inconsistent with the *National Defence Act* or with any regulations made by the Governor in Council, the Treasury Board or the Minister:

> (a) in the discharge of his duties under the *National Defence Act*; or
> (b) in explanation or implementation of regulations."

An additional responsibility of the Chief of the Defence Staff is the call out of the Canadian Forces in aid of the civil power under Part XI of the *National Defence Act*, which requires the requisition of a provincial attorney general, as in the case of the deployment of military forces at Kanesatake and Kahnawake in Quebec in 1990.[14] This deployment of the Canadian Forces was not without criticism, as noted in the "Presentation by the Indigenous Bar Association to the Standing Committee on Aboriginal Affairs Regarding the Events at Kanesatake and Kahnawake during the Summer of 1990."[15] Detailed accounts of the dramatic events at Kanesatake and Kahnawake in 1990 have been provided in several recent books.[16]

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[13] Pursuant to this section, the *Canadian Forces Administrative Orders* dealing with the many aspects of military administration have been made by the Chief of Defence Staff. These orders complete the three-level hierarchy of basic military instructions for members of the Canadian Forces, the first and second levels being the *National Defence Act* and the *QR & O* respectively.

[14] As reported at p. 14 of the Defence 90 Annual Report (published by the Minister of Supply and Services 1991), approximately 4000 Regular and Reserve Force members from all commands of the Canadian Forces, but mainly from 5e Brigade mécanisée with headquarters at Quebec City, including the famous 22nd Regiment Third Battalion of Valcartier, Quebec, were called out in aid of the civil power in August 1990 at the request of the attorney general of Quebec.

[15] [1991] 2 C.N.L.R 1-10.

[16] The most authoritative of such books is that written by Geoffrey York and Loreen Pindera entitled *Peoples of the Pines - The Warriors and the Legacy of Oka* (Little, Brown and Company (Canada) Limited: Toronto, 1991). Other books on this subject include *One Nation Under the Gun* by Rick Hornung (Stoddart Publishing Co. Limited: Toronto, 1991), which also discusses the difficulties at Akwesasne in 1989 and 1990, and also *Oka: Dernier alibi du Canada anglais* by Robin Philpot (VLB Éditeur: Montréal, 1991).

On such aid of the civil power deployments, the Chief of the Defence Staff is the authority, pursuant to section 278 of the *National Defence Act*, and not the Prime Minister or Minister of National Defence, who decides what part of the Canadian Forces is "necessary for the purpose of suppressing or preventing any actual riot or disturbance or any riot or disturbance that is considered likely to occur."

Current Defence Policy - Defence White Paper of 1987

The most recent Defence White Paper was presented in 1987, but significant changes in the international environment and in Canada's fiscal situation since then have led to a major review of defence policy. A more recent statement on defence is set out in Defence 90,[17] the annual national defence report for 1990 that was published on May 1, 1991 under the authority of the two Ministers. The report provides that Canadian security policy rests upon the following three major elements:[18]

1. defence and collective security,
2. arms control and disarmament, and
3. the peaceful resolution of disputes.

Policy Statement of September 17, 1991

In a further statement[19] made on September 17, 1991, the Minister of National Defence indicated a modification of defence policy, given the drastic changes that have occurred in the overall geostrategic context, the budgetary constraints and the renewed requirement for aid of the civil power and assistance to civil authorities. The Minister stated that this review of defence "scrupulously adheres to the priorities that have long been imposed upon our armed forces by our geography and history."[20] These priorities were:

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[17] Minister of Supply and Services Canada, 1991.

[18] *Ibid.*, p. 3.

[19] Statement by the Honourable Marcel Masse, Minister of National Defence, at the National Press Theatre, September 17, 1991.

[20] *Supra*, note 19, at p. 3.

1. Defence, sovereignty and civil responsibilities in Canada;

2. Collective defence arrangements through NATO,[21] including our continental defence partnership with the United States; and

3. International peace and security through stability and peacekeeping operations, arms control verification and humanitarian assistance.[22]

The Minister in his statement later outlined reductions of 9.5% in the Regular Force military strength and 3% in the civilian workforce of the Department, as well as the closing of the two Canadian bases in Germany, Baden-Soellingen and Lahr.[23] As for the Reserve Force, the Minister announced an increase in the establishment of the Primary Reserve from 29,000 to 40,000, and for the Supplementary Reserve from 15,000 to 25,000. In terms of specific impact on Aboriginal Peoples, the modified defence policy of September 17, 1991 is silent except to the extent that the Minister also announced an unspecified increase in the establishment for personnel in the Canadian Rangers, which should provide increased opportunities for Aboriginal Peoples in the North and on the coasts of Canada.

As for the Armed Forces of the future, the Minister stated that the Department "fully intends to retain, in particular:

- the means for controlling all movements within our territory, in our airspace, in our territorial waters and in the areas adjacent to them;

- the command, control and communication systems required to carry out national missions and those that we undertake as part of the Alliance; and

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[21] NATO is the acronym for the North Atlantic Treaty Organization, which provides unified military leadership in the common defence of 16 Western nations. The first 12 nations signed the North Atlantic Treaty forming NATO on April 4, 1949.

[22] *Ibid.*

[23] *Ibid.*, p. 5.

- the naval, land and air forces required to accomplish any mission deemed appropriate by the government."[24]

While the modified defence policy with the closure of the two major bases in Germany contemplates a much reduced presence in Europe, there does not appear to be any significant reduction in the roles and priorities that require military training and operations by the Canadian Forces in Canada and consequential interference with the exercise of aboriginal and treaty rights. Also, the continued commitment to collective defence arrangements such as NATO, plus continued or increased domestic opposition to intensive military training in the populated countries of Western Europe, will continue the political pressure on Canada to accommodate the large scale military training of foreign allies,[25] such as is now done at Goose Bay, Labrador, at Shilo, Manitoba and at Suffield, Alberta.

1992 Budget Developments

The 1992-93 federal budget was presented on February 25, 1992, by Mr. Mazankowski, the Minister of Finance. Total federal government programme spending for 1992-93 was projected in the budget at $119.4 billion, up from $114.0 billion in the current year. The 1992-93 budget would be about $1.05 billion less than expected, due to widespread programme cuts that Mr. Mazankowski said would trim $7.29 billion from total federal spending by the end of the 1996-97 fiscal year in which programme spending was forecast at $132.0 billion.

DND would bear the brunt of the reductions, losing $2.19 billion over the next five years, beginning with $258 million in 1992-93, which would leave it with some $12 billion. Defence spending would be cut by $2.2 billion over the 1992-93 to 1996-97 period. Stating that the world had changed a great deal since the defence policy statement of September 17, 1991 in that the Soviet Union had ceased to exist and the

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[24] *Ibid.*, p. 7.

[25] Such foreign allies conducting foreign military training or exercises include the United States, Britain, Germany, and the Netherlands.

conventional military threat in Europe had all but disappeared, Mr. Mazankowski announced that the planned pull-out from Lahr and Baden could be advanced and a stationed task force of 1,100 personnel would not be necessary. Furthermore, in the next two years, savings would be achieved in capital spending, research and development, public communications, administration, and through a rationalization of supply depots. Specifically, the CF-18 Forward Operating Location at Kuujjuaq, Quebec would not proceed at this time but the government would proceed with an alternative defence presence in Northern Quebec. The government would also review all land holdings in urban arcas currently held by DND to determine whether significant benefits could be effected through their rationalization or disposal.

While DND must over the coming months and years plan and implement the announced budget reductions, its effect on Aboriginal Peoples at this point, other than not proceeding with a base at Kuujjuaq for the CF-18 or the possible disposition of defence establishments on land created from reserve land, would appear to be minimal.

Canadian Defence Policy - April 1992

On April 28, 1992, the Minister of National Defence made public a 38-page booklet (44 pages in French) entitled "Canadian Defence Policy"[26] to elaborate a new framework for Canadian defence and to provide a fuller account of the policy announced on September 17, 1991, taking into consideration the impact of the 1992 Budget as discussed above. No changes in defence priorities or significant new policies were announced. As for foreign military training, continued opportunity for such training on Canadian territory would be made available on a cost recovery basis.[27] No direct mention of Aboriginal Peoples is made in the policy, although under the section

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[26] Department of National Defence, 1992.

[27] *Ibid.*, p. 9.

"Defence in the North,"[28] the conduct of military exercises in the North, and plans to expand the Canadian Rangers and to develop a military facility in northern Quebec, will undoubtedly have an impact.

Scope of Military Operations and Opposition by Aboriginal Peoples

DND has the administration and control of approximately 600,000 hectares of land[29] in Canada, and ranks second in the federal government in respect of land owned only after Environment Canada, which administers the many national parks in Canada. The Department also leases by formal lease and provincial reservation approximately 1,700,000 additional hectares of land.[30] The largest such area is the 1,175,306 hectare Primose Lake Air Weapons Range of Canadian Bases Forces Cold Lake, which is leased from the Provinces of Alberta and Saskatchewan; this weapons range has a total area more than twice the size of the province of Prince Edward Island which has an area of 566,000 hectares.

While many bases, stations, armories and other defence establishments are located in urban areas in Canada, the nature of military training and operations, such as land warfare training exercises and low-flying by the Canadian Forces and by the foreign forces of its military allies, dictate that such activities will occur primarily in non-residential and northern areas, where aboriginal and treaty rights exist and may well be exercised. Also, the nature of defence activities, for example the use of firearms and mechanized armoured vehicles and low-flying jet aircraft, is such that these activities

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[28] *Ibid.*, pp. 18-19.

[29] By comparison, there were 2,684,447.7 hectares (an area approximately half the size of Nova Scotia) of Indian reserve land as of December 31, 1989, as recorded by Indian and Northern Affairs Canada in the *Schedule of Indian Band, Reserves and Settlements Including - Membership and Population Location and Area in Hectares, December 1990*, at p. 179.

[30] Given that Canada is 9,970,610 square kilometers in area including inland waters, DND therefore has control of approximately 0.06%, and leases an additional 0.17%, of the total area of the country, as compared to 0.27% of the total area of the country in Indian reserve lands.

may be incompatible at times with the exercise of traditional aboriginal and treaty rights such as hunting, fishing, trapping and other aboriginal harvesting-type rights.

In addition to any representations through the political process or media, actual challenges to military activities and the use of military property by Aboriginal Peoples based on aboriginal title and rights will generally take one of two possible forms: recourse through the Canadian **legal system** by claims in Federal Court or other superior courts, generally against Her Majesty in Right of Canada, the Minister of National Defence and senior military authorities initiated by Aboriginal Peoples; or by **self-help** in the form of trespass or other disruption on defence establishments such as at Canadian Forces Base Goose Bay in relation to low-level flying in Labrador, or in the training area at Chilcotin, British Columbia, or road blocks or other demonstrations off defence establishments. In the latter form, provincial civil law enforcement authorities such as the R.C.M. Police would normally be called in to assist in resolution; as will be discussed in Chapter 3, self-help has led to arrests and *Criminal Code* charges in which defences of aboriginal title have been raised. Legal issues, including the fiduciary duty owed to groups of Aboriginal Peoples in the surrender or expropriation of land for military use, have been raised in the civil court proceedings commenced by Aboriginal Peoples and will also be discussed in Chapter 3.

Claims by Aboriginal Peoples or by any other person for damages may of course arise out of military training and operations.[31] Payment in respect of such claims for damages against the Crown and its servants, including requests that the Crown make *ex gratia* payments as compensation for losses or expenditures, but not including claims for damages arising out of contract, are handled under Chapter 4 of Part III of the Treasury Board Information and Administrative Management - Material, Services

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[31] As will be discussed in Chapter 3 of the thesis, a number of such claims were made by members of the Cold Lake First Nations Band for loss of trapping and hunting gear when the Provinces of Alberta and Saskatchewan agreed to lease land in 1953 for the Primose Lake Air Weapons Range and the Band members were excluded without consultation from the Range.

and Risk Management, entitled "Claims and *Ex Gratia* Payments."[32] Under paragraph 10 of this policy, an undertaking to pay a claim not exceeding $80,000, or any amount if the payment is *ex gratia*, may be made by DND if an opinion on liability is obtained from the Office of the Judge Advocate General. Claims not of an *ex gratia* nature and exceeding $80,000 must be referred to the Deputy Attorney General of Canada for a legal opinion.

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[32] The policy in this chapter was in force effective September 5, 1992 pursuant to Treasury Board Minutes 816967 and 816968, August 13, 1991) made under the authority of section 7 of the *Financial Adminstration Act*, R.S.C. 1985, c. F-11, and Order in Council PC 1991-8/1695 of September 5, 1991. The policy applies to all federal departments and departmental corporations named in Schedules I and II of the *Financial Adminstration Act* and cancelled a number of regulations and orders, including the *National Defence Claims Order, 1970*, C.R.C. 1978, c. 715, which had previously governed claims against the Crown in respect of defence activities.

Chapter 3 - Aboriginal Legal Challenges to Defence Activities

Introduction

As stated in Chapters 1 and 2, the infringement of aboriginal and treaty rights of Aboriginal Peoples has been raised in a number of legal proceedings, both civil and criminal, involving defence establishments, military operations and other defence activities in Canada. While some of these cases have been adjudicated, and their decisions and reasons for judgment can be discussed, others have not and only their pleadings and other background information can be examined. None of these cases have yet been considered by the Supreme Court of Canada. The following is a list, in chronological order of the dates on which the actions were commenced, of Aboriginal-defence related civil cases:

1. *Kruger et al.* v. *The Queen*[1] (hereinafter *Kruger*) - case commenced in 1979 in respect of expropriation of reserve land for emergency landing field for defence purposes during World War II and for use as municipal airport;

2. *Sarcee Band of Canada* v. *Canada*[2] (hereinafter *Sarcee*) - 1982 claim involving 940 acres[3] of reserve land surrendered and transferred in 1952 to DND for military use;

3. *Angeline Shawkence et al.* v. *Her Majesty The Queen*[4] (hereinafter *Stoney Point* as the land in question was formerly the reserve of the Stoney Point Band) - 1985 claim for land and compensation for reserve land expropriated from Stoney Point Band during World War II;

4. *The Cold Lake First Nations et al.* v. *Her Majesty in right of Canada*[5] (hereinafter *Cold Lake*) - 1989 claim for land and compensation for land leased

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1 (1985), 17 D.L.R. (4th) 591 (F.C.A.), leave to the Supreme Court of Canada refused 62 N.R. 103.

2 Federal Court Trial Division Action No. T-1627-82.

3 Inasmuch as the pleadings in the Sarcee case have consistently and extensively referred to various portions of the Sarcee Reserve No. 145 that have been proposed for surrender, surrendered or sold in terms of acres, metric equivalents will not be used in the review of the Sarcee case in this chapter.

4 Federal Court Trial Division Action No. T-702-85.

5 Federal Court Trial Division Action No. T-2026-89.

by provinces of Alberta and Saskatchewan to federal government as air weapons range;

5. *Chief Francis Laceese et al.* v. *Minister of National Defence and Minister of Environment* (hereinafter *Toosey Band* as the application was brought on behalf of members of the Toosey Band)[6]- application of *Environmental Assessment and Review Process Guidelines Order* (hereinafter *EARP*)[7] to military exercise in 1990 at Chilcotin training area in British Columbia; and

6. *Naskapi-Montagnais Innu Association* v. *Canada (Minister of National Defence)*[8] (hereinafter *NMIA*) - application of EARP in 1990 to low-level flying training operating out of Goose Bay, Labrador.

In addition to the above civil actions, criminal proceedings involving Aboriginal Peoples and defence establishments have also recently taken place in respect of protests at Canadian Forces Base Goose Bay, Labrador. Reported cases include *R.* v. *Ashini et al.*[9] in 1989 in which both the trial, and the acquittal of a mischief charge in Provincial Court based on a colour of right defence as to aboriginal title, were nullified on appeal for technical reasons, and the cases of *R.* v. *Roche et al.*[10] and *R.* v. *Penashue*[11] in which the Aboriginal accused were convicted in 1990 and 1991 respectively on similar mischief charges.

All of the above cases, except for two, were commenced after the landmark decision of the Supreme Court of Canada in 1984 in *Guerin* v. *The Queen*.[12] The only two

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[6] Federal Court Trial Division Action No. T-273-90. Addy J. in an unreported decision on January 19, 1990 dismissed the application.

[7] SOR 84/467, made pursuant to section 6 of the *Department of the Environment Act*, R.S.C. 1970, c. 14 (2nd Supp), now R.S.C. 1985, c. E-10.

[8] (1991), 5 C.E.L.R. (N.S.) 287 (F.C.T.D.).

[9] [1989] 2 C.N.L.R. 119 (Nfld. Prov. Ct.) and [1989] N.J. No. 227 (Nfld. C.A.).

[10] (1991), 90 Nfld. & P.E.I.R. and 280 A.P.R. 199 (Nfld. Prov. Ct).

[11] (1991), 90 Nfld. & P.E.I.R. and 280 A.P.R. 207 (Nfld. Prov. Ct.).

[12] (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, 20 E.T.R. 6, 36 R.P.R. 1, 55 N.R. 161.

Aboriginal-defence related recorded cases prior to the decision of that Court in *Guerin* are *Kruger*, which was commenced in 1979, and *Sarcee* in 1982, which was still commenced after the Federal Court Trial Division decision[13] in *Guerin*. In the case of *Kruger*, this was later decided by the Federal Court of Appeal on March 18, 1985 with the benefit of the 1984 Supreme Court of Canada decision in *Guerin*. While the decision in *Guerin* is central to a general understanding of the concept of fiduciary duty, as will be later presented in this thesis and discussed in detail in Chapter 5, it is not an Aboriginal-defence related case which will otherwise be analyzed in the present Chapter.

In examining the legal issues in the Aboriginal-defence related actions, these cases can be categorized as follows:

1. **Expropriation of Reserve Land for Defence Purposes** - *Kruger* and *Stoney Point*: The leading case of *Kruger* and that of *Stoney Point* both concern expropriation of reserve land for defence purposes during World War II, after unsuccessful negotiations for surrender, and the federal government responsibility, including the fiduciary duty, to the respective Aboriginal bands;

2. **Surrender of Reserve Land for Defence Purposes** - *Sarcee*: This case, on the other hand, is similar to *Guerin* in that a surrender of reserve land, and the surrounding negotiations, consultations, and fiduciary duty are in dispute;

3. **Access under a treaty to Crown Land used for military purposes** - *Cold Lake*: While this case also involves surrendered land, interpretations of the treaty and the applicable *Natural Resources Transfer Agreement* as to the access to such surrendered Crown land are the central issues;

4. **Application of EARP to Defence Activities** - *Toosey* and *NMIA*: Both cases concern the halt or review of defence activities in light of alleged violations of aboriginal rights and the application of *EARP* to the defence activities; and

5. **Criminal Proceedings and Defence Establishments** - The criminal

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[13] As will be discussed in more detail in Chapter 5, Collier J. of the Federal Court Trial Division found that an enforceable trust had been created upon surrender of reserve land to be leased, and that the trust had been subsequently breached by the Crown. His decision is reported at (1982), 10 E.T.R. 61.

prosecutions at Goose Bay concern the claim of aboriginal title in the context of colour of right defences to charges of mischief.

Expropriation of Reserve Land for Defence Purposes

Both the *Kruger* and *Stoney Point* expropriations occurred after unsuccessful negotiations for surrender of reserve land for defence purposes in World War II. The applicable provision in the *Indian Act*[14] of 1927 as to the Crown's historic responsibility to protect Indians in transactions with third parties in respect of reserve land was section 19, which read as follows:

> All reserves for Indians, or for any band of Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as they were held heretofore, but shall be subject to the provisions of this Part.

In lieu of surrender, jurisdiction to expropriate reserve lands and compensate was authorized by section 48 of the *Indian Act*, which provided in part:

> (1) No portion of any reserve shall be taken for the purpose of any railway, road, public work, or work designated for any public utility without the consent of the Governor in Council ...
>
> (2) In any such case compensation shall be made therefor to the Indians of the band....
>
> (4) The amount awarded in any case shall be paid to the Minister of Finance for the use of the band of Indians for whose benefit the reserve is held, and for the benefit of any Indian who has improvements taken or injured.

1. Kruger v. The Queen[15]

In *Kruger*, two portions of Penticton Band[16] reserve land, referred to as parcels "A" and "B" on the Penticton Indian Reserve No. 1 at the south end of the Okanagan Lake in

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[14] R.S.C. 1927, c. 98.

[15] *Supra*, note 1.

[16] As of December 31, 1989, Indian and Northern Affairs Canada recorded in the *Schedule of Indian Band, Reserves and Settlements Including - Membership and Population Location and Area in Hectares, December 1990*, that the Penticton Band had a band membership of 583 and a reserve population of 332 on three reserves, with 18,691.5 hectares (46,185 acres) of land.

British Columbia, were expropriated in 1940 and 1944 respectively under the authority of section 9 of the *Expropriation Act*[17] and subsection 48(1) of the *Indian Act, 1927*. Parcel "A" was for use as a municipal airport by the federal Department of Transport and parcel "B" was required by DND as an emergency landing field for the west coast defence system during the Second World War. Subsequently, because of an opinion of the Deputy Minister of Justice that Indian lands could not be expropriated, but only surrendered, the Indians were asked to surrender parcel "B" to the Crown and did so in 1946 on payment of $15,000. While only the parcel "B" land relates to national defence interest, the issues of expropriation of reserve land and fiduciary duty of government officials raised in *Kruger* are relevant to later discussions in this thesis.

This action was brought in Federal Court Trial Division in March 1979 by Morris Kruger, Chief of the Penticton Indian Band, and councillors of the Band, for damages for breach of trust and lost revenue, or, in the alternative, for damages for wrongful taking. The action was dismissed at trial[18] on July 9, 1981, *i.e.*, just six days after the Federal Court Trial Division found for the plaintiffs in *Guerin*, as will be discussed in detail in Chapter 5 as to the general fiduciary duty of the Crown in respect of the surrender of reserve land. While finding that officials had not committed a breach of trust in *Kruger*, the trial judge did state that the Crown stood as a fiduciary vis-a-vis the Indian Band, and no appeal was taken by either of the parties on this finding.

The appeal of *Kruger* to the Federal Court of Appeal was dismissed in a unanimous decision on March 18, 1985; each of the three justices, however, delivered a separate decision with somewhat different reasons. Both Heald and Urie JJ. considered the claim to be statute-barred, but only the former and not the latter found a breach of fiduciary duty by the Crown. The third justice, Stone J., found no breach of duty and did not address the question of the limitation period.

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[17] R.S.C. 1927, c. 64.

[18] *Kruger et al.* v. *The Queen* (1982), 125 D.L.R. (3d) 513 (F.C.T.D.).

In considering the decision of the Supreme Court of Canada in the *Guerin* case in the context of the *Kruger* appeal, Urie J. stated at p. 647 that the factual situation of *Guerin* in respect of the surrender of Indian lands to the Crown on certain terms was not the factual situation in the *Kruger* case. However, he was prepared to accept for purposes of the appeal that the principle propounded by Dickson C.J. in *Guerin* as to the creation of a fiduciary duty on the surrender of reserve land applied in *Kruger*. Urie J. then stated that:

> .... When the Crown expropriated reserve land, being Parcels "A" and "B", there would appear to have been created the same kind of fiduciary obligation, vis-a-vis the Indians, as would have been created if their lands had been surrendered. The precise obligation in this case was to ensure that the Indians were properly compensated for the loss of their lands as part of the obligation to deal with the land for the benefit of the Indians, [and] just as in the *Guerin* case, the obligation was to ensure that the terms of the lease were those agreed to by the Indians as part of the general obligation to them to ensure that the surrendered lands be dealt with for their use and benefit. How they ensured that lies within the Crown's discretion as a fiduciary and so long as the discretion is exercised honestly, prudently and for the benefit of the Indians there can be no breach of the duty.[19]

Urie J. subsequently considered three specific possible breaches of the fiduciary duty of the Crown. First, as to the alleged conflict between the two federal government departments, the Department of Mines and Resources, Indian Affairs Branch and the Department of Transport (acting for DND), he found at p. 648 that the Penticton Indian agent, his superior and others in Indian Affairs had argued strongly as to the proper compensation payable as rent but that "the transport officials also had a duty in the performance of their functions, not a direct duty to the Indians but a duty owed to the people of Canada as a whole, including the Indians, not to improvidently expend their moneys." According to Urie J., the fact that a decision was taken which unfortunately was not wholly in accord with the views of the Indians as to the worth of the land was not a breach of fiduciary duty when all the circumstances relating to the transaction were taken into account, nor that there was a conflict of interest to be resolved.

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[19] *Supra*, note 1, at p. 647.

The second alleged breach of fiduciary duty by the Crown concerned the knowledge of the officials of Indian Affairs as to the "peculiar value and importance" of the land. Urie J. commented on various correspondence of officials of Indian Affairs and the Department of Transport concerning the value and importance of the land parcels to the Penticton Band, stating:

> ... a fair reading of the record indicates that officials at all levels were well aware of their respective obligations and discharged them to the best of their abilities. Valid criticism might be directed to the inordinate length of time required to make payment of the compensation but I do not conceive that to be a breach of duty sufficient to invalidate the expropriation.[20]

The failure to disclose the opinion of the Deputy Minister of Justice that parcel "B" could only be surrendered and not expropriated was also alleged as a third breach of the fiduciary duty. In this respect Urie J. agreed with the trial judge that a *prima facie* case had not been made out that the existence of the opinion had not been communicated, and that this onus rested with those making the allegation. He also added that expropriation of the land pursuant to section 48 of the *Indian Act* was valid and that the surrender was both superfluous and a nullity.

In addition to the specific three attacks as to breach of the fiduciary duty, Urie J. also considered the appellants' basic criticism of the conduct of the Crown in its dealing with the reserve lands that by resorting to expropriation to obtain land for defence purposes and for a municipal airport the Indians were effectively deprived of their options to refuse to sell, or to negotiate suitable lease terms or sale prices. In summary, Urie J. asked the following question as to breach of the fiduciary duty:

> From these considerations and facts, the question which must be posed is, did the fact that the competing considerations were resolved in respect of both Parcels "A" and "B", with the concurrence of the Indians, on terms which clearly were compromises, not entirely satisfactory to either of the branches of the Crown, result in a breach of the Crown's fiduciary duty to the Indians entitling

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[20] *Ibid.*, p. 652.

them to the remedies sought in this action? ....[21]

He subsequently answers his question in the negative, commenting that if the submissions of the appellants were to prevail the only way that the Crown could successfully escape a charge of breach of fiduciary duty in such circumstances would have been to have acceded in full to the demands of the Indians or to have withdrawn from the transactions entirely, and the competing obligations on the Crown would not permit such a result.

This finding in *Kruger* is significant in the context of Aboriginal-defence related issues in that it appears to acknowledge that when the Crown has competing interests, i.e, in this case under its section 19 of the *Indian Act* responsibility and fiduciary duty to the Indian Band in question and its members, and its responsibility for national defence under the *Militia Act*[22] during World War II, the Court will defer to the Crown in its resolution of these conflicts, compensation issues aside, in the absence of any improper conduct by the Crown. There appears to be no test suggested by the Court that the Crown demonstrate, for example, that alternatives to a defence airport at Penticton were considered, or that the airport was absolutely essential to the war-effort. As will be discussed in Chapter 6 when fiduciary duty in the context of section 35 is examined in light of *R.* v. *Sparrow*,[23] this lack of justification placed on the Crown is probably no longer the law.

The second justice, Heald J., agreed at p. 597 with Urie J. that section 48 of the *Indian Act* permitted expropriation of lands on an Indian reserve and also considered that the remarks of Dickson C.J. as to the existence of a fiduciary duty in relation to surrendered Indian land could not be construed as to be authority for the proposition

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[21] *Ibid.*, p. 654.

[22] R.S. 1927, c. 132, as amended.

[23] *R.* v. *Sparrow* (1990), 70 D.L.R. (4th) 385, [1990] 1 S.C.R. 1075, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, [1990] 3 C.N.L.R. 160, 56 C.C.C. (3d) 263, 111 N.R. 241.

that the fiduciary relationship only arises where there is a surrender of Indian lands to the Crown. Heald J. found the fiduciary obligation to arise in *Kruger* on the facts as a consequence of the proposal to take Indian lands. Unlike his two brothers Urie and Stone JJ., however, he found on the facts in *Kruger* that the Crown had not discharged the onus cast upon it to show that an advantage had not been taken of the Indians in the transaction and that there was a breach of fiduciary duty in respect of the acquisition of both parcels "A" and "B". Although this finding differed from those of the other two justices, and he later found that the appellants' causes of action were statute-barred in any event, it is apparent by his comments that he was prepared to hold government officials to a very high standard of conduct in their dealings with the Penticton Band, as is now the law given the *Sparrow* decision.

Specifically, Heald J. found at pp. 607-8 in respect of parcel "A" that the federal departments were in conflict concerning the manner in which the Band should have been dealt with and that in respect of the fiduciary duty owed to the Indians the law was clear that "... one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside" and that "[e]quity fashioned the rule that no man may allow his duty to conflict with his interest."[24] Heald J. later concludes that the unmistakable inference to be drawn from the record was that the views of the Department of Transport prevailed over those of Indian Affairs and that despite the good and sufficient reasons by the former department for wanting the land, the Crown was not relieved of its fiduciary duty to the Indians.

Heald J. likewise finds at p. 622 in respect of parcel "B" pursued by DND that there was an apparent conflict of interest between two departments of the Government of Canada (really between the Department of Transport and DND on one side and Indian Affairs on the other). As evidence of the seeming indifference to the plight of the Indians,

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[24] These two quotations used by Heald J. were taken from pp. 618 and 619 of the text of D.W.M. Waters, *Law of Trusts in Canada (1974)* (Carswell: Toronto, 1974).

Heald J. refers to the initial valuation - only $50 per acre when $250 to $300 was a common price; ignoring the considered opinions of officials of the Department of Indian Affairs as to value; possession of the property being taken for some 18 months without paying the Indians anything on account of compensation; and by their rather leisurely approach to negotiations for compensation as compared to their great haste in taking possession and depriving the Indians of a livelihood. Heald J. also found that there had not been full disclosure of all relevant facts to the Indians and that they had been kept in the dark for very long periods of time.

In his judgment, Heald J. was also critical of the attitude of the Crown officials outside of the Indian Affairs Branch as not being concerned in any way with the welfare of the Indians and leaving protection of the Indian interests to the Indian Affairs Branch. Heald J. conceded that this may have been a defensible posture for the officials of other departments, given their own urgent priorities in wartime, but stated that the Governor in Council was not able to default in its fiduciary relationship to the Indians on the basis of other priorities and considerations. While concluding at p. 623 that the Crown had breached the fiduciary duty owed to the Indians, he added that he would have viewed the matter differently if "there was evidence in the record that careful consideration and due weight had been given to the pleas and representations by Indian Affairs on behalf of the Indians and, thereafter, an offer of settlement reflecting those representations had been made."

While Heald J. is in dissent in *Kruger* on the issue of breach of duty, his comments as to priorities and considerations between federal government departments should have even more weight in the context of decisions such as expropriation or other use of the land of Aboriginal Peoples for defence or other federal purposes in the present peace-time environment in Canada. Also, given the constitutional protection now afforded aboriginal and treaty rights under section 35 of the *Constitution Act, 1982*, the test for the infringement of such rights and the fiduciary duty owed to Aboriginal Peoples will probably not be just "some evidence of careful consideration and due weight being

given to the pleas and representations" made on behalf of Aboriginal Peoples, as will be discussed *infra* in Chapter 6. In addition, the comments of Heald J. appear to be limited in any event to the question of breach of responsibility in determining the value of compensation payable, and not on the actual question of expropriation of reserve land.

Stone J., in a fairly brief judgment, agreed with the disposition of Urie J. that there had not been a breach of fiduciary duty, stating at p. 658 that doctrine elaborated in *Guerin* was applicable in *Kruger* even though the facts were quite different. He also considered that the words of Dickson C.J. in *Guerin* that the obligation to the Indians did not "amount to a trust in the private law sense" did not mean that it would be inappropriate to have regard to the law governing trustees in considering whether the fiduciary duty was discharged by the Indian Affairs Branch.

The *Kruger* case was commented upon by Mr. John Hurley in his article entitled "The Crown's Fiduciary Duty and Indian Title: *Guerin* v. *The Queen*."[25] Mr. Hurley is critical of the judgment of Urie J. in that the latter appears to find that the Crown's fiduciary duty could be decided with reference to the conduct of one department, *i.e.*, Indian Affairs, and not of the entire federal government, and also that the government could resolve its competing obligations without becoming involved in a conflict of interest.[26] Mr. Hurley does appear, however, to support the approach of Heald J. that the fiduciary duty of the Crown can be fulfilled, in the case of expropriation of land, and a conflict of interest avoided by offering compensation, based on "careful consideration and due weight" to representations made by officials of Indian Affairs. This approach, according to Mr. Hurley, although phrased in somewhat subjective terms, was consistent, with the "good faith effort" test in American case law. This test was developed in *Three Affiliated*

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[25] (1984-85) 30 *McGill L.J.* 559-602.

[26] *Ibid.*, p. 601.

Tribes of Fort Berthold Reservation v. United States[27] and confirmed by the United States Supreme Court in *United States* v. *Sioux Nation of Indians.*[28] Under this test, in determining if Congress had satisfied the discharge of its trusteeship duties, attention would be paid to the historical record of Congress' conduct and to the adequacy of the consideration paid. Mr. Hurley considers that such a test may assist Canadian courts in deciding if the Crown has discharged its fiduciary duty in cases of expropriation of Indian land and, as will be discussed in Chapter 6 when the test for regulations of section 35 rights is reviewed, the Supreme Court of Canada has also endorsed the use of fair compensation to assess the justification of infringement of section 35 rights in the case of expropriation.

2. Angeline Shawkence et al. v. Her Majesty The Queen[29]

This is the *Stoney Point* case in which expropriation was also used to secure land at Ipperwash for defence purposes during World War II. It is a representative action brought on behalf of all present and former members of the Kettle and Stoney Point Bands, who had individual beneficial interests in the lands comprising the Stoney Point Reserve, now the Ipperwash Cadet Camp, on the shore of Lake Huron. Return of the land and damages are sought. The 907 hectare Stoney Point Reserve was expropriated in 1942 as "it [was] ... necessary to provide an advanced training centre in Military District No. 1,"[30] after the Band had rejected an offer of $50,000 in compensation for surrender. Some of the reserve homes and Stoney Point Indians were moved by Indian Affairs to the nearby Kettle Point[31] Reserve, effectively merging the two bands without their consent. No court decision has been given in this matter.

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[27] (1968), 390 F. 2d 686 (Ct. of Claims).

[28] (1980), 448 U.S. 371.

[29] *Supra*, note 4.

[30] PC 2913 dated April 14, 1942.

[31] The 1990 DIAND Schedule, *supra*, note 16, recorded that the Kettle Point Reserve, with Chippewas of Kettle and Stony Point, had a band membership of 1436 and a reserve population of 779, with 848.8 hectares (2087 acres) of land. A separate Stoney Point Band is not listed in the *Schedule*.

In the Statement of Claim filed on April 4, 1985, the plaintiffs alleged that the Minister of Mines and Resources, who had responsibility for Indian matters at that time, stood in a fiduciary relationship with respect to all Indian interests in and to the Stoney Point Indian Reserve, and pursuant to the Order in Council, *supra*, note 30, and to the *Indian Act*, was the agent of the individual members and of the Band itself. As such, the Minister was alleged to have failed to discharge the duties of a fiduciary or agent, and that the plaintiffs had consequently suffered damages for which the defendant was responsible in law. It was also alleged that the Minister improperly allocated the $50,000 payment among individuals with beneficial interests in the Stoney Point Indian Reserve, and in his fiduciary capacity failed to keep an even hand in dealing with the various claimants to the fund. As for the appropriation of the land during World War II for military purposes, the plaintiffs claimed that it was valid or effectual, if at all, only during the duration of the hostilities, and that the Minister of National Defence failed to reinstate the land and estates, and the Minister of Mines and Resources failed to discharge his duties as fiduciary, trustee and agent.

The plaintiffs also commented on the payment of $2.4 million in 1981 made by Order in Council[32] in the form of an *ex gratia* payment, which was to be held by Her Majesty in right of Canada for the use and benefit of the Kettle and Stoney Point Band "as compensation for that part of the lands ... that were appropriated by DND in 1942." The plaintiffs alleged that interests of the Kettle Point and Stoney Point Bands were separate and had been compromised by the payment. Information in the Order in Council is unclear as to the precise reasons for making the payment but the "whereas" clauses allude to the return of the land after the termination of the war if not required by the Department, the surrender and sale of some of the Stoney Point land to private interests, the later acquisition by the Department for military purposes, and also the potential of all the Stoney Point lands having been compromised for agricultural and commercial development due to the possible presence of unexploded munitions.

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[32] PC 1981-499 dated February 26, 1981.

After the Statement of Defence was filed on March 21, 1986, no further action occurred on the file until the Department of Justice filed a Notice of Motion on June 24, 1988 to dismiss the action for want of prosecution. This Motion was heard by Associate Senior Prothonotary P.A.K. Giles on October 12, 1988, who adjourned the application *sine die*, to be brought back on by the defendant on 5 clear days notice if arrangements were not made by December 1, 1988 for discovery or no application was made to fix a date within three months after the conclusion of examination for discovery. This was the last matter recorded on the file when reviewed on April 1, 1992 in Ottawa.

While no findings of fact have yet been made in *Stoney Point*, the legal issues can still at least be considered in light of *Kruger*. As to the existence of a fiduciary duty by the Crown to the Stoney Point Band or its members, or both,[33] which was denied by the Crown in the Statement of Defence, the decision of Dickson J. in *Guerin* as followed by Urie J. at p. 647 in *Kruger* would suggest that indeed such a duty would arise upon expropriation of the Stoney Point reserve land "to ensure that the Indians were properly compensated for the loss of their lands as part of the obligation to deal with the land for the benefit of the Indians ... "

Was this fiduciary duty breached by the Crown in *Stoney Point*? While evidentiary considerations are critical to this question, the issues will be the protection of the Indian interests by officials of Indian Affairs and by the Crown, the adequacy of the compensation paid as authorized by the Governor in Council, and the special way in which it was paid to individual Indians when the Stoney Point Reserve disappeared. The test as to the first issue as given by Stone J. in *Kruger* at p. 623 would be evidence in the record that careful consideration and due weight had been given to "the pleas and representations" by Indian Affairs on behalf of the Stoney Point Indians, and that

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[33] In *Kruger* v. *The Queen*, there are many statements such as at p. 644 of "fiduciary duty to the Penticton Band" and at p. 648 of "duty to the Indians." While not distinguishing between the Band and "the Indians", it would appear nevertheless that the latter words are used by the Court in a collective sense.

an offer of settlement had been made reflecting those representations. The adequacy of compensation and distribution of payment would be questions of fact.

In addition to the presence of a fiduciary duty in the consideration of compensation for any reserve land expropriated, there is also the separate but related issue of the existing aboriginal rights of the Stoney Point Band to live on their traditional lands. By operation of the expropriation, these rights were infringed, but not extinguished, inasmuch as the 1942 Order in Council provided for the return of the lands in question to the Stoney Point Indians once the war was over and the lands were no longer required by DND, and a reasonable price could be reached by mutual agreement. Would the infringement of these rights also contain a fiduciary component, such as making available suitable alternative reserve lands to the Stoney Point Band if expropriation went ahead, or even first compelling the Department to show that locations besides Ipperwash had also been considered for defence purposes and had been found to be unsuitable? While neither the Supreme Court nor any other superior court has addressed this question, I will consider it once I have analyzed the justification test in Chapter 6 as the test has been set out by the Supreme Court of Canada in the *Sparrow* case.

While no trial date has been set in the *Stoney Point* case, separate representations on the political level have made on behalf of the plaintiff parties. Most recently on March 13, 1992, following submissions to the Standing Committee on Aboriginal Affairs and consideration of "the issue of Stoney Point Reserve and its possible return to the aboriginal people from which it was appropriate (sic) under the *War Measures Act* during World War II," the Committee recommended the following to the House of Commons:

> That the government rectify a serious injustice done to the Stoney Point First Nation almost fifty years ago by returning the land at Stoney Point to its aboriginal inhabitants and their descendants from whom the land was seized

under the *War Measures Act* (Order-in-Council) P.C. 2913, April 14, 1942).[34]

In accordance with the provisions of Standing Order No. 109, the Government must now table a comprehensive response to the report within 150 days.

Surrender of Reserve Land for Defence Purposes

1. Sarcee Band of Canada v. Canada[35]

Sarcee is a major Aboriginal-defence related case in which the issues are similar to those in *Guerin*, i.e., the existence and breach of fiduciary duty surrounding the surrender of two parcels of reserve land for military use - the larger leased parcel of 11,000 acres being called the "range" and the smaller area of 1055 acres the "barracks land." However, unlike the *Kruger* and *Stoney Point* cases, and also the *Guerin* case as will be discussed in Chapter 5, with relatively brief periods of time leading to the actual acquisition of the reserve lands in question by DND, the history of the Department's involvement in the contested Sarcee lands dates back to well before World War I.

This case was commenced by a Notice of Motion filed on March 4, 1982 on behalf of the Sarcee Band[36] with Her Majesty in Right of Canada, the Minister of Indian Affairs and Northern Development, and the Minister of National Defence as defendants. In the Notice of Motion, the plaintiffs sought to restrain the defendants from interfering with the access of the plaintiffs through Sarcee Barracks. A Statement of Claim was also filed on March 7, 1982.

From the various Statements of Claim and Defence, including hopefully the final pleadings, the Second Further Amended Statements of Claim and Defence filed in

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[34] Minutes of Proceedings and Evidence of the Standing Committee on Aboriginal Affairs. Third Session of the Thirty-fourth Parliament, 1991-92. February 26, 1992. Issue No. 14, at p. 3.

[35] *Supra*, note 2.

[36] The 1990 DIAND Schedule, *supra*, note 16, recorded that the Sarcee Band, know as Sarcee 145, had a band membership of 950 and a reserve population of 743, with 27,304.9 hectares (11,409 acres) of land.

October 1991 by both parties, it is apparent that a number of conditional and absolute surrenders, and subsequent leases of the range of 11,000 acres, and sale of the barracks land of 1055 acres in 1952, were made by the Sarcee Band. Such surrenders occurred after discussions with officials of Indian Affairs, and began as far back as 1911 in the case of a lease of reserve land for militia training. Since 1952, relying on the surrenders of land and lease of the range, and sale of the barracks land, DND has invested heavily in the development of the barracks land and the net replacement value as of June 1, 1989 of all works and buildings situated on the land was $214 million.[37]

Factual and legal issues involved in the complaint of the plaintiffs can be taken from the various pleadings filed by the parties since 1982 and include:

- the responsibilities of Her Majesty as an express or implied trustee of the reserve land and preserving such property for the full benefit of the Band,

- the avoidance of any beneficial interest accruing to Her Majesty as a result of the transactions and ensuring that the full benefit of any use of the land was maintained for the Band,

- full disclosure to the Band of all information with respect to the proposed transaction including the advantages and disadvantages and beneficial and adverse impact of the proposed transaction,

- provision of independent legal and consultative resources to the Band to assist its Members in evaluating and reviewing a proposed transaction,

- avoidance of any coercion, persuasion, inducement (fraudulent or otherwise) or partially at any time which would tend to influence Band Members in favour of any particular outcome of the proceeding for approval, and

- fiduciary duty and breach of this duty by the Crown.

By reason of breaches of duty of the defendants, the plaintiffs alleged that they had suffered various losses and sought relief in the form of the return of all reserve land leased and sold by the Band, damages, and restoration of the land to its original condition before use by the Crown.

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[37] Information taken from Statements of Claim and Defence.

The *Sarcee* court action proceeded through the normal demands for particulars and documents until March 22, 1985 when a 36-page out-of-court settlement was reached by the parties and filed with the Court with respect to paragraph 5(b) of the Statement of Claim, i.e., the management, control and use of the 11,800 acre range. The main terms of the "Sarcee Training Area Settlement Agreement" included the payment by the Department of $11.5 million to the Capital Account of the Sarcee Band maintained by the Minister of Indian Affairs, payment by the Department of the reasonable costs of negotiation of the plaintiffs to settle the claims out of court with respect to the 11,800 acres, exclusive use and occupation by the Department of the range as divided into two portions, for purposes as set out in the agreement, and payment of rent for the land. The 11,800 acres were divided into two parcels for purposes of the agreement - one of 8,000 acres with a lease of 20 years under article 5.03 for military training with some restrictions on the use of explosives during training, and a parcel of 3,800 acres in which the Department was responsible under article 7 for carrying out clearance and rehabilitation, with rent payable on any area not so cleared. On July 2, 1985, Pinard J. dismissed that portion of the Statement of Claim dealing with subparagraph 5b of the Statement of Claim.

During the years[38] following the agreement in 1985 with respect to the Range, amended, further amended and second further amended Statements of Claim and Defence were filed, and a number of motions filed and heard. One of the above contested motions concerned a request by the plaintiffs to amend their Statement of Claim to conform to the terminology used in *Guerin* in providing for breach of fiduciary duty. This request was granted by Reed J. on May 19, 1989.[39]

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[38] While a review of the court file for the Sarcee Action No. T-1627-82 shows approximately 20 interlocutory decisions by various justices of the Federal Court Trial Division and also the Appeal Division as the case has wound its slow and tortuous journey through the court system, there have in fact been no substantive judicial pronouncements on the fiduciary or other duties owed by the Crown and its officials to the Sarcee Band in respect of its reserve land.

[39] [1989] F.C.J. No. 445.

Although a trial was scheduled to begin in November 1991, the proceedings were adjourned *sine die* on November 27, 1991 with the view to settlement of all issues by the parties. Subsequently, on March 30, 1992, a referendum was held by the Sarcee Band and a Settlement Agreement[40] of some 82 pages dated November 1, 1991 was approved by the Band. This is a complicated Agreement with a number of leases between the different parties, with different terms for various portions of land. All land, however, would be returned no later than 2050 and the Department would be required to clear the land of all explosives.

While an out of court settlement in the *Sarcee* case will provide some substantive financial measure of redress to the grievances of the Sarcee Band in respect of the reserve lands surrendered and then leased or sold for use by the Department over the years, the terms of such a settlement do not provide any clear findings as to the scope of the fiduciary duty owed to the members of the Sarcee Band by the Crown officials, both from Indian Affairs and National Defence, and as to what may have amounted to a breach of the duty. In comparison to the situation in *Guerin* which will be discussed in Chapter 5 in which the oral terms for a lease agreed to by the Band were not followed by Crown officials, a Court in a situation as in *Sarcee* could impose a higher standard on Crown officials, even if all terms of leases and sales were agreed to by the Band, by considering factors such as:

1. The availability and provision of independent legal advice to the Band for each transaction;

2. The presentation of alternatives to the leasing and sale arrangements made to DND; and

3. The disclosure of all information between officials of Indian Affairs and military representatives to the Band.

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[40] Parties to the Agreement were the Tsuu T'ina Nation, 13913 Canada Ltd (a corporation incorporated under the laws of Canada, wholly owned and controlled by the Tsuu T'ina Nation), DND and the Department of Indian Affairs and Northern Development (hereinafter DIAND).

Access under a Treaty to Crown Land used for Defence Activities

The Cold Lake First Nations et al. v. Her Majesty in right of Canada[41]

The plaintiffs, the Cold Lake First Nations, also known as the Cold Lake Band,[42] and Band members, commenced this action on September 28, 1989, seeking damages for loss of access to land which became the Primose Lake Air Weapons Range, used primarily by military jet training aircraft at Canadian Forces Base Cold Lake. The Range of approximately 4500 square miles had been created from land leased to the federal Crown by the Provinces of Alberta and Saskatchewan in 1953, and was closed to the Band and its members on April 1, 1954.

The Band had signed Treaty 6[43] with the Crown on September 9, 1876 in which traditional lands were surrendered with a promise of continued hunting and fishing throughout the surrendered lands. Allegations in the Statements of Claim include a lack of consultation with members of the Band in respect of the leases given to the Federal Government for initial periods of 20 years; being forced to abandon trapping and hunting equipment, and other possessions at their camps on the Range without an opportunity to return to their camps and recover their possessions; no offer of alternative areas for hunting and trapping; inadequate compensation for loss of their rights; and extension of the leases, again without Band consultation in 1974 after being told that they could return to the land at the end of the initial leases. Breaches of fiduciary duty as to consultation, compensation and safeguarding of treaty rights were also alleged.

Relief sought by the plaintiffs includes declarations of breach of the fiduciary and trust

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[41] *Supra*, note 5.

[42] The 1990 DIAND Schedule, *supra*, note 16, recorded that the Cold Lake First Nations Band, with three reserves, had a band membership of 1,492 and a reserve population of 769, with 18,723.0 hectares (11,409 acres) of land.

[43] Treaty No. 6 is unique in Canadian Aboriginal relations in that it contains a "Medicine Chest" clause. The interpretation of this clause was the legal issue in *R.* v. *Johnson* (1966), 56 D.L.R. (2d) 749 (F.C.A.).

obligations and that the Indian interest in the traditional lands of the plaintiffs as set out in Treaty No. 6 as recognized and affirmed in the *Constitution Act, 1982* continued and had not been extinguished; a declaration that the plaintiffs had the right to return to their traditional lands on a temporary basis while the leases remained in effect, and had a right to return on a permanent basis after the leases come to an end; and damages of approximately $30 million.

A Statement of Defence has been filed by the Federal Government and an order also made on December 20, 1990 that an examination *de bene esse* be held for a witness who was seriously ill. An examination of the Federal Court file in Ottawa on March 7, 1992 showed no further activity.

Unlike the previous cases of *Kruger*, *Stoney Point* and *Sarcee* in which the expropriation of reserve land, or lease of surrendered reserve land, for defence purposes was the underlying factual event giving rise to the actions, there was no such event directly affecting reserve land in the *Cold Lake* case. Instead, the lease of Crown land by the two provinces to the federal government for use as a Range resulted in denial of access by the Cold Lake Band members to an area of non-reserve land traditionally used for trapping, hunting and fishing. A number of legal issues emerge in this action, such as the requirement for consultation with the Band, the adequacy of compensation and the circumstances in the distribution of its payment, the existence of a right to hunt, trap, etc. under Treaty No. 6 in the Range, and the effect of the *Natural Resources Transfer Agreement*. Specifically as to the fiduciary duty owed to the Band, could denial of access to the Range for aboriginal harvesting purposes be justified in light of the access which the Federal Government permitted the province of Alberta to grant for timber, oil, gas and tar sands development?

Application of EARP to Defence Applications

1. Chief Francis Laceese et al. (Toosey Band) v. Minister of National Defence and Minister of Environment[44]

In the *Toosey Band*[45] case, the plaintiffs challenged the use by the Canadian Forces of lot 7741, known as the Canadian Forces Camp Chilcotin Training Area and located approximately 65 kilometres to the west of Williams Lake, British Columbia. In the Notice of Motion dated January 15, 1990, the plaintiffs sought a halt to planned military exercises and compliance with the *EARP*. In addition to the legal proceedings commenced by representatives of the Toosey Band and pursued in the Federal Court Trial Division, self help was concurrently used on January 7, 1990 and several days thereafter in the form of blockage of the public road leading to lot 7741 by a barricade of cars and trucks manned by Chief Laceese and other members of the Toosey Band.

The specific military exercise complained about, Exercise Nordic Warrior, was to take place from January 19 to 25, 1990, and would involve approximately 350 vehicles and 1600 soldiers. Captain Barry Southern, the Operations Officer at Canadian Forces Base, indicated in his affidavit of January 16, 1990 that $220,950 in costs had already been incurred in preparation for the execution of the exercise and that cancellation of the exercise would reduce the ability of the Canadian Forces to fulfil Canada's NATO obligation. Ms Donna Kydd in her affidavit of January 12, 1990 included as an attachment the "Environmental Impact Assessment on Flying Activities In Labrador and Quebec" of July 1989, prepared by the federal government, to show that DND had acknowledged and recognized the applicability of the *EARP*.

The Notice of Motion was made returnable on January 19th. After considering the affidavit evidence furnished, without cross-examination, Addy J. of the Federal Court

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[44] *Supra*, note 6.

[45] The 1990 DIAND Schedule, *supra*, note 16, recorded that the Toosey Band, with four reserves, had a band membership of 174 and a reserve population of 86, with 2,582.5 hectares (6380 acres) of land.

Trial Division dismissed the motion with costs on January 19, 1990, providing oral reasons at that time. On January 29, 1990, Addy J. provided a written summary of his reasons for dismissing the motion, at the request of the parties.

In his written reasons, Addy J. found that DND had used lot 7741 fairly constantly for 30 years for military exercises, with clear title to lot 7741 having been granted by provincial Order in Council[46] in 1924 by the Province of British Columbia to His Majesty the King in Right of the Dominion of Canada as represented by DND. Addy J. also found that considerable evidence had been presented by DND that ample consideration had been given to the possible impact on the environment, but that the evidence of the applicants as to damage was tenuous at the least, and without facts, figures or statistics of any kind. While a DND assessment resulted in the finding that there would indeed be some effect on the environment, the effect would be minimal, and no evidence was presented to contradict the respondent that proper studies had not been conducted nor that the conclusion of the respondent that damage would be minimal was not a reasonable one.

In the affidavit of Chief Laceese, it was stated that the conduct of the military exercise was a matter of great concern to the members of his Band due to the environmental impact of those exercises. Chief Laceese made mention of the effect of military activities on animals, and the importance of the provincially-registered trap line in lot 7741 for the use of Band members. With regard to the trap line, Addy J. found that the applicants had established a *de facto* interest in the land sufficient to maintain the application. However, he expressed doubt as to whether there was any such interest in the land which could be sustained, notwithstanding the purported grant of trap line rights, inasmuch as clear title in lot 7741 had been granted by the province to DND and the uncontradicted evidence that consent to trap had not been given by DND.

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[46] Order in Council No. 421, April 9, 1924, gave effect to a prior agreement between the Attorney General of British Columbia and the Minister of Militia and Defence for the Dominion.

In concluding, Addy J. found that there was no title nor semblance of title which would sustain any claim for *mandamus* based on any legal claim to the lands as such. He did leave open the possibility that the applicants could have status, based on *de facto* use of lot 7741 over many years and what appeared to be legal title to certain adjacent lands and to the surrounding lands because of their trap line rights, to institute legal proceedings against DND for failure to comply with the environmental guidelines in issue. As for arguing on other evidence that the applicants had such a legal right and wished to assert their claims, the proper way according to Addy J. would be by means of an action to allow evidence to be tested on both sides by pre-trial procedures and oral evidence at the hearing. Addy J. also stated, in dismissing the motion, that even if there had been some foundation for granting the relief sought, which was not the case, he would have refrained from doing so on the eve of the first day of the military exercise in the absence of convincing evidence of something catastrophic, or at least very serious and irreparable damage to the environment.

On my review of the Federal Court Trial Division record on May 15, 1992, neither a Notice of Appeal nor a Statement of Claim had been filed by the applicants. However, protests to military exercises at the Camp continue and ten Chilcotin natives were found guilty on June 9, 1992 of criminal contempt for ignoring an injunction not to block access to the military training ground.[47] Skipp J. of the B.C. Supreme Court said he had no choice but to find the 10 Toosey and Carrier band members guilty of criminal contempt and impose one-year suspended sentences.

2. Naskapi-Montagnais Innu Association (NMIA) v. Canada (Minister of National Defence)[48]

This proceeding was commenced by Notice of Motion filed on February 26, 1990. As in the *Toosey* case, *NMIA* sought to have the *EARP* guidelines applied to defence

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[47] Unreported decision of Skipp J. of B.C.S.C. on June 9, 1992. Details published by CP News on that date.

[48] *Supra*, note 8.

activities. Specifically, *NMIA* sought that all tactical low-level flying training and practice bombing in Labrador and Quebec be prohibited and that the Minister of National Defence not take any irrevocable steps in the pursuit, solicitation or the formation of any agreement with NATO for the establishment of the NATO Tactical Fighter Weapons Centre, until a public review was complete and the Minister had met his responsibilities under the *EARP*.

Reed J. of the Federal Court Trial Division considered the relief sought by the applicant, and the affidavits submitted and argument of counsel, and rendered her decision on April 12, 1990. Reed J. referred in her judgment to the Exchange of Notes signed in 1979 with the United Kingdom as illustrative of the relationship between Canada and the other countries with air forces at Goose Bay. She found that the signing of an Exchange of Notes was essentially the making of an international treaty, which was the exercise of a prerogative power by the Governor-General in Council, not by a "department, board or agency of the Government of Canada" within the meaning of the *EARP* guidelines. However, Reed J. found that one must look at the decisions and actions which have to be taken by the relevant government departments to implement the treaties which were entered into, and that the *EARP* guidelines did indeed attach to those decisions and activities.

As for application of *EARP* to activities which predate the existence of the Order, Reed J. examined the text of the Order and found that it clearly contemplated projects to be proposed for development and not ones which predated it. Hence, the possible establishment of a NATO Training Centre at Goose Bay would have been a new initiative or proposal for purposes of *EARP*, but not so for the ongoing low-level flying activities. As to whether or not referral of examination of the ongoing low-level flying by the Minister of National Defence to the Minister of Environment was voluntary as such under *EARP* and thus did not prevent proceeding with the flying activities before completion of an environmental assessment, Reed J. first referred to recent case law on *EARP*, including the decision of the Federal Court of Appeal in the leading case of

Friends of the Oldman River Society v. *Canada (Minister of Transport)*,[49] as to the mandatory nature of application of the provisions of *EARP*. As to the requirement not to proceed with a project under review until the referral process and review had been completed, Reed J. considered the textual provisions in sections 3, 6, 10, 12, 13, 18, 20 and 33 of EARP, and found that the Order could not bear that interpretation.[50] Having concluded that relief in the form of either *certiorari* and *mandamus* could not be given to stop low-level flying before completion of the *EARP* review process, Reed J. then outlined other reasons based on the discretionary nature of the orders as to why relief could be afforded.

As to issuing a stop order respecting the establishment of a new NATO Training Centre, a completely new initiative, Reed J. found that the *EARP* procedures should not be interpreted as imposing a mandatory "stop" order after a project had been referred for review. The Minister of National Defence in any event had made it clear that no decision would be made to proceed with the new Training Centre[51] until the report of the Review Panel[52] was received.

As for the claim of aboriginal title by the applicant, which was considered the foundation of the present application, Reed J. simply commented that this claim could not be resolved in the context of these proceedings, but "must be resolved in the

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[49] [1990] 2 F.C. 18, 5 C.E.L.R. (N.S.) 1, 68 D.L.R. (4th) 375, 108 N.R. 241, 33 F.T.R. 160 (note) (C.A.), now upheld by (1992), 88 D.L.R. (4th) 1 (S.C.C.).

[50] *Supra*, note 8, at pp. 308-9.

[51] Following the decision of Reed J. on April 12, 1990 in *NMIA*, the NATO defence ministers at a meeting in Brussels in late May of that year announced the cancellation of plans for the $500 million NATO flight training centre which had been considered for either Goose Bay, Labrador or Konya, Turkey and for which DND had lobbied for Canada during the preceding five years.

[52] The Review Panel subsequently reported in May 1991 that there were 30 major deficiencies in the 1100-page *Environmental Impact Assessment on Flying Activities In Labrador and Quebec* of July 1989, prepared by the federal government. The Department advised that it would take 18 months to 2 years to obtain the additional requested information.

ordinary way, by court proceedings directed to that purpose, if necessary" and that "[t]hose issues are not relevant to the present application."[53]

A Notice of Appeal[54] was filed by counsel for NMIA, Mr. Olthuis. on May 9, 1990 and the Federal Registry Office subsequently advised on July 26, 1990 that it would cost approximately $10,000 to reproduce the numerous documents of the parties for the Appeal Book. The Appeal Court file indicates in a later letter from Mr. Olthuis to the Registry Office, with a copy to Mr. Greg Pensashue, President of the NMIA, that the former was awaiting further instructions from his client, and that the Court Registry Office should take no further steps until hearing from him. No appellant's factum had been filed and no other action had taken place on the file when reviewed almost two years later on March 13, 1992.

Toosey and NMIA Comment

From a consideration of both the *Toosey* and *NMIA* cases, it is apparent that the *EARP* Order may be a legal weapon of limited value for forcing the actual halt of an ongoing or about to be commenced defence activity where there is no evidence of overwhelming or very serious damage to the exercise of the rights of Aboriginal Peoples as seen in an environmental context. Subsequent to the decision of Reed J. in *Toosey*, the Supreme Court of Canada dismissed the appeal[55] on January 23, 1992 from the decision of the Federal Court of Appeal in the *Oldman* case considered by Reed J. The Supreme Court of Canada thus affirmed the mandatory application of the EARP procedures to federal departments, such as DND, which initiate projects with environmental impact on Aboriginal Peoples. While that is so, the *Oldman* decision does not appear to overturn or otherwise qualify the other aspect of the decision of Reed J. in *NMIA* related to EARP, i.e., while the guidelines require that an

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[53] *Supra*, note 8, at p. 310.

[54] Federal Court Appeal Division Action No. A-385-90.

[55] *Supra*, note 49. The full Court considered the *Oldman* appeal, with only Stevenson J. dissenting in the decision to dismiss the appeal.

environmental assessment be performed by the initiating department, the project need not be halted, at least from a strictly legal point of view, during the conduct of the assessment.

Fiduciary Obligations in the Aboriginal Defence-Related Civil Actions

An extensive review of fiduciary obligations surrounding the expropriation of reserve land for purposes of national defence and for a municipal airport during World War II was made by the Federal Court of Appeal in *Kruger* with the benefit of the decision of *Guerin* by the Supreme Court of Canada. While *Guerin* was concerned with the surrender of reserve land, in that case for a lease for a golf course, it is apparent from *Kruger* that the fiduciary obligation will not be limited only to such surrenders. In *Kruger*, however, two justices found that no breach of fiduciary obligation had occurred, with the third justice dissenting on that point.

Breach of fiduciary duty was also alleged in the cases of the Sarcee Band (surrender of land case now settled), the Stoney Point Band (expropriation of land) and the Cold Lake First Nations (denial of access to Crown land). No findings of the Federal Court Trial Division have yet been made as to breach of fiduciary duty in the latter two cases, and may well not be made if the cases are not prosecuted by the respective plaintiffs or if settlements are reached. In the other two cases of *Toosey* and *NMIA* involving application for the cessation of military operations, no breaches of fiduciary obligation have been alleged.

Criminal Proceedings and Defence Establishments

As noted in the introduction to this Chapter, mischief charges have been laid against individual Innu who entered the air base at Canadian Forces Base Goose Bay. In *R.* v. *Ashini*[56] on April 18, 1989, Igloliorte P.C.J. acquitted the four accused[57] on mischief

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[56] *Supra*, note 9.

[57] The four accused were Daniel Ashini, Elizabeth Penashue, Penote Benedict Michel and Peter Penashue.

charges of wilfully interfering on or about September 15, 1988 with the lawful operation of property, to wit, the Canadian Forces Base Goose Bay. The acquittals were based on a colour of right defence that:

> 1. The Innu people had not given away any of their rights to the land to Canada, and that this was an honest belief; and
>
> 2. The concept of land as property was foreign to the Innu people and one must not presume that a "reasonable" belief is founded on English and hence Canadian law standards.

Igloliorte P.C.J. referred in his judgment to case law that the Crown had presented, including *Hamlet of Baker Lake et al.* v. *Minister of Indian Affairs and Northern Development et al.*[58] and *Calder et al.* v. *Attorney General of British Columbia*[59] which he considered only emphasized the concept of land as property from an English law viewpoint. The four accused, however, demonstrated in the opinion of the Court that their belief in owner's rights was unshaken by the present occupation. As for the legal reasoning based on the premise that somehow the Crown acquired magically by its own declaration title to the fee, Igloliorte P.C.J. considered that it was time that this premise based on 17th century reasoning be questioned in the light of 21st century reality.

The decision of Igloliorte P.C.J. was appealed by the Crown to the Newfoundland Court of Appeal, which rendered its judgment on October 19, 1989. The decision of Goodridge C.J.N, Gushue, Mahoney and O'Neill J.J.A. concurring, on technical grounds[60] and without a consideration of the merits, was that the trial and the acquittals were nullities. Marshall J.A. dissented on the finding of the majority that the trial and the acquittals were nullities, and also did not consider the merits of the acquittal at trial.

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[58] (1980), 107 D.L.R. (3d) 513 (F.C.T.D.).

[59] (1973), 34 D.L.R. (3rd) 145, [1973] S.C.R. 313, [1973] 4 W.W.R. 1.

[60] The majority found that the trial court lacked jurisdiction to try jointly the four persons charged upon separate informations.

Following the forced entry of a large group onto the runways of the air base later on September 26, 1989, mischief charges under the *Criminal Code* for interfering with the operations at the air base were again laid and LeBlanc P.C.J. on April 10, 1990 convicted six accused in the case reported as *R.* v. *Roche et al.*[61] and also one accused, Peter Penashue, on April 10, 1991 in the case of *R.* v. *Penashue*[62] relating to the earlier protest on September 15, 1988 in which his acquittal had been nullified. In the *Roche* case, Mrs. Penashue during her direct examination was found to be reading from a prepared text and was advised that this was not permissible; this subsequently led to a decision by each of the accused to request that defence counsel withdraw and that each accused would not be calling any further evidence.[63] While the accused made further unsworn statements during summation, LeBlanc P.C.J. indicates that the decision of the accused not to call further sworn evidence was fatal to proof of either a colour of right defence, or a defence of legal justification or excuse.[64] In commenting on the four criteria asserted by Professor Brian Slattery in his article "Understanding Aboriginal Rights,"[65] LeBlanc P.C.J. stated that the Court had before it no evidence as to the Innu people being members of an organized group or society during early occupation nor sufficient evidence of possession of the land claimed.

With the hindsight of the decision of the Court in *Roche,* the separate trial of Peter Penashue proceeded in 1991 and the accused gave evidence of historical occupation of the Innu of certain lands, including the Goose Bay airport, and of his belief that he and his people own that land. LeBlanc P.C.J. stated that issues raised by the defence

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[61] *Supra*, note 10. The accused in this case were James Roche, Sebastian Nuna, Alexander Andrew, Lila Andrew, Patrick Riche and Joseph Gabrielle.

[62] *Supra*, note 11.

[63] *Supra*, note 10, at p. 202.

[64] *Ibid.*, p. 204.

[65] (1987), 66 Can. Bar Rev. 727 at 756. The four criteria being that the parties: 1. constitute an organized group of native people; 2. possess the lands claimed; 3. have possessed the lands for a substantial period; and 4. the lands must form part of the Indian territories.

included:

1. No proof beyond a reasonable doubt;

2. That the acts of the accused were protected under the *de minimus non curat lex* doctrine;

3. That the acts of the accused were protected under the *Canadian Charter of Rights and Freedom*[66] as being acceptable freedom of expression; and

4. Colour of right on the part of the accused.[67]

In these issues a number of Aboriginal-national defence related matters were raised. In considering the conflict between the claim of aboriginal title to the base by the Innu and the documentation[68] presented by the Crown to show that the military activity at the base was "lawful" within the meaning of section 430(1)(c), the judge first found at p. 210 that the purported documentation confirmed the right of the Government of Canada to operate the air base on the lands and was *prima facie* proof that the air base was operating "lawfully" in September, 1988. Later, when considering the colour of right defence, the judge stated at p. 214 that using a subjective test, even if the accused felt he and his people owned the land, that it was clear "he also knew by fences, signs, a barricade, etc., that he was not authorized or permitted to go inside the fence and to do so would likely mean he was committing a breach of the law," and thus the accused did not honestly believe that he was doing something unlawful when he entered the base and could not claim a colour of right defence. As to the honesty of the belief of a colour of right, LeBlanc P.C.J. also considered the fact that the accused and others were confronted on the ramp by the R.C.M. Police with the prospect of arrest, and they nevertheless continued to walk towards the runway of the

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[66] Part 1 of the *Constitution Act, 1982*, enacted by the *Canada Act 1982 (U.K.)*, c. 11.

[67] *Supra*, note 11, at p. 210.

[68] Documentation included the *Goose Bay Air Base Act, 1945*, S.N. 1945, No. 1 and an agreement and lease between the Government of Newfoundland and the Government of Canada dated September 1, 1941 relating to certain lands, including the land upon which the accused entered.

air base, which had been operating there for a lengthy period of time on a continuous basis; also the accused was not there to take possession of the land and exercise any aboriginal right that he might have, but rather was involved in a protest.

In distinguishing between the accused's defence of colour of right and the argument that he had unextinguished aboriginal title in the land, LeBlanc P.C.J. acknowledged at p. 215 that the latter as a legal justification or excuse was not being argued. He then proceeded briefly to consider some of the leading case law on aboriginal title, and the extinguishment of such title and other aboriginal rights as in *Sparrow*[69] and stated at p. 216 that the *Goose Bay Air Base Act*[70] would have to be considered as to whether or not it had extinguished aboriginal title to the air base. While stating that it was not necessary to decide the sufficiency of this *Act* to extinguish aboriginal title, LeBlanc P.C.J. concluded that the Innu appeared to have aboriginal title, but that it could not constitute a legal justification or excuse for the actions of the accused and others on September 15, 1988. He further stated that no one can breach the criminal law even to protest a civil wrong committed against them, as only legal means could be used to protest such acts.

Extinguishment of Innu Aboriginal Title in the Goose Bay Air Base

As considered above by LeBlanc P.C.J. in both *R.* v. *Roche* and *R.* v. *Penashue*, does the *Goose Bay Air Base Act* have the legal effect of extinguishing the Innu aboriginal title, assuming such exists, in the Goose Bay air base. The leading case on the extinguishment of aboriginal rights is that of *Sparrow* in which the Court referred to its own decision in 1973 in *Calder*.[71] Separate judgments were delivered in *Calder* by Judson and Hall JJ. who disagreed on the issue of what was necessary for

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[69] *Supra*, note 23.

[70] The long title of this *Act* is "An Act to confirm an Agreement made between the Government of Newfoundland and the Government of Canada relating to the establishment of an air base in Labrador and to authorize the execution of a lease under the said Agreement."

[71] *Supra*, note 59.

extinguishment of aboriginal title. Judson J.'s view at pp. 159-60 (D.L.R.) was that a series of statutes could evince a unity of intention to exercise a sovereignty inconsistent with any conflicting aboriginal title of the Nishgas. Hall J., on the other hand, stated at p. 210 that "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent [the Crown] and that intention must be clear and plain," which he found was not the case in *Calder*.

The difference between Judson J. and Hall J. was fortunately resolved, to some degree, by the unanimous decision in *Sparrow*[72] in which the Court adopted the view of Hall J., stating at p. 401 (D.L.R.) that the "test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right." As noted, however, by McEachern C.J.B.C. in *Delgamuukw* v. *The Queen in Right of British Columbia*,[73] in commenting on the decision in *Sparrow* as to the test for extinguishment at pp. 469-70, the Supreme Court of Canada did not include express statutory language as a part of its test and, at p. 473, that the Crown through its officers need not specifically address the question of aboriginal rights if "they clearly and plainly intended to create a legal regime from which [it] is necessary to infer that aboriginal interests were in fact extinguished." Subsequently, McEachern C.J.B.C. in his judgment at pp. 473-8 finds that aboriginal rights of jurisdiction and ownership were extinguished.

Given the above judgments and pronouncements on extinguishment, what is the result for the Goose Bay air base? First, as noted by Professor David W. Elliott in his

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[72] In *Sparrow* the Court found at p. 401 that neither the *Fisheries Act* nor its detailed regulations demonstrated a clear and plain intention to extinguish the Musqueam Indian right to fish for food and ceremonial purposes.

[73] (1991), 79 D.L.R. (4th) 185 (B.C.S.C.). McEachern C.J.B.C. commenced the trial in the *Delgamuukw* case on May 11, 1987 as C.J., B.C.S.C., and delivered the judgment on March 8, 1991 as C.J.B.C.

chapter[74] on aboriginal title, authorities differ as to whether or not the *Royal Proclamation of 1763*[75] as a source of aboriginal title extended to Labrador. However, while the judgments in *Calder* differed concerning the application of the *Royal Proclamation* to land in British Columbia, the test as to extinguishment seems in any event to be independent of whether or not the claim of aboriginal title is proclamation- or occupancy-based in the common law.

The *Goose Bay Air Base Act* is of course silent on the extinguishment of aboriginal title or aboriginal rights of members of the Innu Nation. In the absence of express statutory language, can a clear and plain intention to extinguish aboriginal title be inferred from the language of the *Act*? An examination of the sections[76] of the *Act* dealing with jurisdiction and control shows an unequivocal intention that the lessee, the Government of Canada, has exclusive jurisdiction to manage and control the air base, except for some noted exceptions such as a reservation of mining and mineral rights (article 1) and access to the base to be provided to Newfoundland authorized officers (article 8). Fee simple in the Goose Bay air base, however, was not transferred to the Government of Canada by the *Goose Bay Air Base Act*, and there only appears to be a "clear and plain intention" that no other inconsistent rights, such as those of the Innu, could be exercised during the specific period of the lease between the two governments. The aboriginal title to the Goose Bay air base would thus appear to be unextinguished, but without a right of enforcement until expiration of the lease.

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[74] Chapter 3 of *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, B.W. Morse (ed.), (Carleton University Press: Ottawa, 1989) at p. 55.

[75] Issued by George III on October 7, 1763 and reproduced as R.S.C. 1985, Appendices, No. 1.

[76] Provisions dealing with jurisdiction or control would include section 7 (title to lands leased), section 8 (reversion of lands leased), article 1(1) of Schedule A (description of land and uses by Government of Canada), article 2 (Government of Canada rights to control air base), article 3 (control of air base under Royal Canadian Air Force) and article 4 (right to erect buildings).

Chapter 4 - Modern Day Treaties and Provision for Defence Matters

Introduction

As discussed in Chapter 3, significant challenges to the presence of certain defence establishments have been made by questioning the legal validity of the expropriation and surrender of reserve land for defence purposes, e.g., in *Kruger*[1] in British Columbia, in *Stoney Point*[2] in Ontario, and *Sarcee*[3] in Alberta. In addition to the issues of expropriation, surrender and compensation in these three cases, claims of interference with the actual exercise of aboriginal rights have arisen in *Toosey*[4] in British Columbia and in *NMIA*[5] at Goose Bay; claims of aboriginal title have also been made in the mischief prosecutions at Goose Bay. While the claim in *Cold Lake*[6] involves questions of compensation as in *Kruger*, *Stoney Point* and *Sarcee*, a separate issue in the former case is the access provided under Treaty No. 6 as modified by the *Natural Resources Transfer Agreements* with Alberta and Saskatchewan. While this is a question of access by Aboriginal Peoples to land on a defence establishment, this present Chapter will now consider, on the other hand, the issue of access under the modern comprehensive land claims by units and other elements of the Canadian Forces for training and operations on the land of Aboriginal Peoples.

Brief Historical Background of Treaties in Canada

Representatives of the British government in the colonies in Canada before Confederation entered into some 9 major pre-confederation peace and friendship

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1 *Kruger et al.* v. *The Queen* (1985), 17 D.L.R. (4th) 591 (F.C.A.).

2 *Angeline Shawkence et al.* v. *Her Majesty The Queen.* Federal Court Trial Division Action No. T-702-85.

3 *Sarcee Band of Canada* v. *Canada.* Federal Court Trial Division Action No. T-1627-82.

4 *Chief Francis Laceese et al.* v. *Minister of National Defence and Minister of Environment.* Federal Court Trial Division Action No. T-273-90.

5 *Naskapi-Montagnais Innu Association (NMIA)* v. *Canada (Minister of National Defence)* (1991), 5 C.E.L.R. (N.S.) 287 (F.C.T.D.).

6 *Cold Lake First Nations et al.* v. *Her Majesty in right of Canada.* Federal Court Trial Division Action No. T-2026-89.

treaties in the Maritimes, 31 other major pre-confederation treaties in Upper Canada and the Province of Canada, and 14 pre-confederation treaties on Vancouver Island.[7] After 1867, the Government of Canada entered into some 13 major post-confederation treaties, including the so-called "numbered" treaties.[8] The last post-confederation treaty in Canada being the Williams Treaty, signed in Ontario in October 1923 with members of the Chippewa Nation, and in November 1923 with the Mississaugas. With the exception of the peace and friendship treaties, and the Vancouver Island treaties,[9] the other treaties involved some surrender of Indian land and the establishment of reserve lands, either by keeping that portion of the Indian land that was not surrendered as a reserve or reserves, or by surrendering all land and getting some land back as reserve land.[10] Such reserve land would be for the exclusive occupation of the Indian signatories and descendants, and rights of access to the surrendered lands for hunting, fishing and other harvesting purposes would be affirmed.

In addition to the above treaties recognized by the Federal Government, other significant agreements have been entered into with Aboriginal Peoples affecting their rights which have unfortunately only been reluctantly recognized as treaties by the Government after court action. For example, the document signed on September 5, 1760 by the Hurons and General James Murray, who at that time was Governor of the

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7 "Canada Indian Treaties." National Atlas of Canada 5th Edition. Energy, Mines and Resources Canada, 1991.

8 *Ibid.*

9 While the 14 treaties entered into on Vancouver Island between the various tribes, and James Douglas acting for the Hudson Bay Company, have been recognized as treaties within the meaning of section 88 of the *Indian Act*, the actual provision for the use of the "village sites and enclosed fields" by the peoples of the respective tribes, for example, in the Sooke Treaty of 1850 and Sanitch Treaty of 1852, appear to be much less encumbered by restrictions as reserve land, as compared, for example, to the Robinson Huron Treaty of 1850 which provides that the bands may not "sell, lease, or otherwise dispose of any portion of their Reservations without the consent of the Superintendent-General of Indian Affairs."

10 This statement as to reserve establishment is somewhat simplified, inasmuch as each reserve possesses a unique history and form of creation with distinct legal consequences.

city and district of Quebec,[11] and a brigadier-general in the British Army, certified that the Hurons were "allowed the free exercise of their religion, their customs, and liberty of trading with the English." In the case of *R.* v. *Sioui*[12] involving charges in Quebec of cutting down trees, camping and making fires contrary to regulations made under the *Parks Act*[13] of that province, the Supreme Court of Canada considered the legal effect of the document signed by General Murray, which the Crown contended was not a treaty within the meaning of section 88 of the *Indian Act*[14], arguing that he had lacked the capacity to sign a treaty on behalf of Great Britain. The Court found that the document was in law a treaty and had continuing legal effect.

White Paper of 1969

In 1969 the federal government issued its ill-fated White Paper[15] on Indian Policy with the view to eliminate the special status of Indians through the repeal of the *Indian Act* and termination of the unique tenure of reserve lands so as to promote equality with other Canadians. As for the importance and role of treaties with Indians, the White Paper provided:

> The terms and effects of the treaties between the Indian people and the Government are widely misunderstood. A plain reading of the words used in the treaties reveals the limited and minimal promises which were included in them. As a result of the treaties, some Indians were given an initial cash payment and were promised land reserved for their exclusive use, annuities, protection of hunting, fishing and trapping privileges subject (in most cases) to regulation, a school or teachers in most instances, and, in one treaty only, a medicine chest. There were some other minor considerations such as the annual provision of twine and ammunition.
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[11] Only a year earlier, the British had defeated the French during the battle of the Plains of Abraham and had taken control of the city of Quebec and the surrounding area.

[12] (1990), 109 N.R. 22, 70 D.L.R. (4th) 427 (S.C.C.).

[13] R.S.Q. 1977, c. P-9.

[14] R.S.C. 1985, c. I-5.

[15] *Statement of the Government of Canada on Indian Policy*, released on June 25, 1969.

> The significance of the treaties in meeting the economic, educational, health and welfare needs of the Indian people has always been limited and will continue to decline. The services that have been provided go far beyond what could have been foreseen by those who signed the treaties.
>
> The Government and the Indian people must reach a common understanding of the future role of the treaties. Some provisions will be found to have been discharged; others will have continuing importance. Many of the provisions and practices of another century may be considered irrelevant in the light of a rapidly changing society, and still others may be ended by mutual agreement. Finally, once Indian lands are securely within Indian control, the anomaly of treaties between groups within society and the government of that society will require that these treaties be reviewed to see how they can be equitably ended.

As for Aboriginal claims to land and other grievances, the White Paper then stated:

> Other grievances have been asserted in more general terms. It is possible that some of these can be verified by appropriate research and may be susceptible of specific remedies. Others relate to aboriginal claims to land. These are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to Indians as members of the Canadian community. This is the policy that Government is proposing for discussion....

Based on the above policy statement in 1969, one would have imagined a very limited role for any future use of treaties or like instruments in regards to land with Aboriginal Peoples in Canada. However, the proposed policy of the government was found unacceptable to the status Indian population[16] and was officially shelved in 1971 as being unworkable without Indian co-operation and acceptance. Some aspects of the White Paper were nevertheless implemented, such as an Indian Economic Development, and an Indian Claims Commission to investigate claims relating to treaties and the administration of money and land under the *Indian Act*. Provincial governments were also encouraged by the Federal Government to offer their programmes and services to status Indians both on and off reserves.

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[16] See, for example, the critical comments on the 1969 White Paper of Waubageshig. ed., in *The Only Good Indian* (Toronto: New Press, 1970) at pp. 5-40.

While the Indian Claims Commission could examine and recommend action to the government in respect of treaty and some reserve matters, it had no mandate in respect of claims of aboriginal title. The position of the government with respect to these aboriginal claims, which it considered to be so general and undefined to think of as specific claims capable of remedy, changed dramatically, however, with the decision in January 1973 of the Supreme Court of Canada in *Calder et al.* v. *Attorney General of British Columbia*[17] (hereinafter *Calder*).

In *Calder* the Nishga people of northwestern British Columbia sought a declaration that they had aboriginal title to certain lands, and that this title had not been extinguished. Their claim was based on the time immemorial occupation and use of the land by their ancestors. The case was appealed to the Supreme Court of Canada from a judgment of the Court of Appeal of British Columbia dismissing an appeal from a judgment that had dismissed the action of the Nishgas. In a court of seven, Hall J. and two others found at p. 200 (D.L.R.) that the Nishgas had existing aboriginal title derived from original land occupancy, the use of which did not depend on treaty, executive order or legislative enactment. Hall J. found that this title had been neither surrendered by treaty nor extinguished by legislation or executive order.

Judson J. and two others, on the other hand, found at pp. 159-60 that, whatever aboriginal title the Nishgas had held, it had been terminated by the pre-confederation orders and enactments which showed a unity of intention to exercise sovereignty inconsistent with any conflicting interest, including aboriginal title. While the views of neither Hall J. nor Judson J. represent clear majorities in the Court of seven, the appeal was nevertheless dismissed as the majority of Pigeon J., Judson, Martland and Ritchie JJ. concurring, found that the Court, in the absence of a fiat of the Lieutenant-Governor of the Province, had no jurisdiction to grant a declaration invalidating the title to land vesting in the Crown in right of the Province of British Columbia.

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[17] [1973] S.C.R. 313, (1973), 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1.

While the decisions of Hall and Judson JJ. differ as to the test for extinguishment of aboriginal title, the existence of aboriginal title, unsupported by treaty, executive order or legislative enactment, was clearly recognized for the first time by six of seven justices of the highest court in the land. A policy statement regarding Indian lands was subsequently announced by the Honourable Jean Chrétien, then Minister of Indian Affairs and Northern Development on August 8, 1973, with provision for the resolution of claims of aboriginal title in certain areas of Canada where land had not been surrendered under a treaty.[18] The policy sought to "signify the Government's recognition and acceptance of its continuing responsibility under the *British North America Act*[19] for Indians and lands reserved for Indians."[20] Three categories of Aboriginal claims were distinguished in the policy: again, claims as were provided under the 1969 White Paper for breaches of existing treaties in Ontario, the prairie provinces and parts of British Columbia, and also breaches under the *Indian Act* across Canada - so-called specific claims; a new policy for other claims variously described at p. 3 of the statement on the basis of "Indian title," "aboriginal title," "original title," "native title" or "usufructuary rights" - so-called "comprehensive claims"; and claims "of a different character" in Quebec and the Maritimes.[21] While claims of aboriginal title had been received from the rest of British Columbia, northern Quebec, the Yukon and the Northwest Territories, where treaties had not been signed, the Minister later advised in his policy at p. 6 that it was inappropriate for the Federal Government to make any further statement concerning claims from Quebec, given that native claims in Quebec

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[18] Indian land was not surrendered by treaty in either Quebec or the Maritimes, but the Government considered that claims in these areas were "of a different character" (p. 7 of policy) and were not to be handled *per se* as comprehensive claims.

[19] 30 & 31 Victoria, c. 3 (now know as the *Constitution Act, 1867*).

[20] Statement on Claims of Indian and Inuit People made on August 8, 1973 by the Honourable Jean Chrétien, then Minister of Indian Affairs and Northern Development, in undated DIAND Communiqué, p. 2.

[21] There is no detailed federal policy on the third category, and claims in these areas have not progressed.

were then before the provincial courts.[22]

Later in 1973, the comprehensive claims policy was expanded, however, to include northern Quebec. This was a result of legal proceedings being instituted by the Cree and Inuit of Quebec following the start of construction of the James Bay Hydroelectric Project in 1971, for the purpose of securing an injunction against work proceeding further until aboriginal interests had been addressed. An interim injunction was granted at trial on November 15, 1973 by Malouf J. in *Kanatewat et al.* v. *James Bay Development Corporation et al.*,[23] finding that the Indians and Inuit had occupancy-based rights that were cognizable at common law. The interim injunction, however, was overturned a week later on November 22, 1973 mainly on procedural grounds by the Quebec Court of Appeal, and this latter decision[24] was upheld by the Supreme Court of Canada on December 23, 1973.[25] The Quebec Court of Appeal reversed the decision of Malouf J. on November 21, 1974.[26]

The Constitution Act, 1982 and Comprehensive Land Claim Agreements

As for the constitutional protection of rights acquired under comprehensive land claim agreements, subsection 35(1) of the *Constitution Act, 1982* in respect of aboriginal and treaty rights provides that:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Section 35 has been amended[27] by the addition of two subsections, (3) and (4), of

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[22] For a brief history of the resolution of land claims, see Chapter 10 "The Resolution of Land Claims" in *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, B.W. Morse (ed.) (Carleton University Press: Ottawa, 1989).

[23] [1974] R.P. 38 (CS).

[24] (1974-75), 8 C.N.L.C. 414 (Que. C.A.).

[25] (1974), 41 D.L.R. (3d) 1.

[26] [1975] C.A. 167.

[27] *Constitutional Amendment Proclamation*, 1983, SI/84-102, June 21, 1984.

which (3) in regard to land claim agreements provides as follows:

> For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Also, paragraph (b) of section 25 of the *Canadian Charter of Rights and Freedoms*[28] has been amended[29] in respect of land claims and the section now provides:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms acquired that now exist by way of land claims or may be so acquired.

Accordingly, rights acquired under comprehensive land claim agreements would have constitutional status by virtue of section 35(3), and protection from the *Charter of Rights* under section 25(b). While that is so, it is also reasonably certain from the decision of the Supreme Court of Canada in *R.* v. *Sparrow*,[30] given by Dickson C.J.C. and La Forest J., which considered the aboriginal right of fishing for food and ceremonial purposes, that aboriginal rights are not absolute and can be regulated by the government provided such regulations are in keeping with section 35. *Quaere* if treaty rights, including those acquired by way of land claim agreements, will not be afforded additional protection under section 35 given the contractual nature of those rights?

Brief Overview of Comprehensive Land Claims

An Office of Indian Claims Commission was proposed in the 1969 White Paper. Lloyd Barber was appointed to the position of Commissioner in late 1969 by Order in Council.[31] As reported by Mr. Barber in his report submitted in March 1977 to the

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[28] Part 1 of the *Constitution Act, 1982*, enacted by the *Canada Act 1982 (U.K.)*, c. 11.

[29] *Constitutional Amendment Proclamation*, 1983, SI/84-102, June 21, 1984.

[30] (1990), 70 D.L.R. (4th) 385 at 403.

[31] PC 1969-2405 dated December 19, 1969.

Governor General in Council, this appointment took place when opposition to the White Paper was strong and growing, and the Commission adopted "an informal, responsive and consultative mode in attempting to help the Government and the Indians achieve a better understanding of the matters in question and work towards a mutually agreeable mechanism for their resolution."[32]

In order to implement the claims process, the Office of Claims Negotiation[33] (later called the Office of Native Claims in 1974) was established in 1970-71 and located within DIAND. This office was responsible for negotiating any compensation that related to the settlement of a comprehensive or specific claims. The comprehensive land claims policy was reviewed in 1981 and again in 1986, resulting in a revised policy[34] on December 18, 1986 and a new implementation plan[35] published by DIAND. Under the new policy, the negotiation of comprehensive land claims proceed through the following stages - preliminary negotiations, framework agreements, agreements-in-principle, final initialled agreements, and final settlements with implementing legislation. Also, in stating at pp. 11-12 of the new policy that the Government of Canada was prepared to address a range of issues within the framework of this policy, it was also prepared to consider alternatives to the extinguishment of aboriginal title, provided "certainty in respect of lands and resources [was] ... established." The Government again revised the policy in 1990, following the crisis at Kanesatake and Kahnawake, to remove the limit of only six comprehensive claims being negotiated at once. The policy for specific claims was reviewed only in 1981-2.

Comprehensive land claims now negotiated and implemented by legislation are as

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[32] "Commissioner on Indian Claims - A Report: Statements and Submissions." Minister of Supply and Services, 1977, at p. 1.

[33] The first Executive Director was Mr. Phil Girard.

[34] "Comprehensive Land Claims Policy." DIAND, 1986.

[35] "Guidelines -Comprehensive Land Claims Implementation Plans." DIAND, publication undated.

follows:

1. The *James Bay and Northern Quebec Agreement*[36] (JBNQA) of 1975, with the following parties: the Government of Quebec,[37] the Société de la Baie James, the Société de développement de la Baie James, the Commission hydroélectrique de Québec, the Grand Council of the Crees, the Northern Québec Inuit Association, and the Government of Canada;

2. The *Northeastern Quebec Agreement*[38] (NEQA) signed on January 31, 1978 with the Naskapi Indians of Schefferville and all the parties to JBNQA, as an amendment to the original *James Bay and Northern Quebec Agreement*;[39] and

3. The *Inuvialuit Final Agreement*[40] (IFA) of 1984 between the Committee for Original Peoples' Entitlement (COPE), representing the Inuvialuit of the Inuvialuit Settlement Region, and the Government of Canada (the Western Arctic Claim).

There are the following seven other comprehensive land claim agreements[41] (from west to east) in various stages of approval, ratification and implementation, plus the special case of British Columbia claims:

1. **Council for Yukon Indians (CYI) Claim**: Negotiations with the CYI are being

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[36] Given effect by the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32, which was proclaimed in force October 31, 1977, by SI/77-223.

[37] Quebec legislation to ratify and implement the JBNQA includes the *Loi approuvant la Convention de la Baie James et du Nord québécois, 1977*, L.R.Q. c. C-67, *Loi concernant le régime des terres dans les territoires de la Baie James et du Nouveau-Québec, 1978*, L.Q. c. 93, and several others as listed in Appendix I of the article by Wendy Moss "Implementation of the James Bay and Northern Quebec Agreement," Chapter 11 of "Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada," *supra*, note 22.

[38] Given effect for Canada by Order in Council PC 1978-502 of February 24, 1978 and for Quebec by the *Loi approuvant la Convention du Nord-Est Québécois*, L.Q. 1978, c. 98. Order in Council PC 1978-503, also on February 24, 1978, gave effect and declared the NEQA to be Complementary Agreement No. 1 to the JBNQA.

[39] In the 1990 annual report for the James Bay and Northern Quebec, and the Northeastern Quebec Agreement (Minister of Supply and Services Canada, 1991) at p. 7, the populations of Cree, Inuit and Naskapi affected in 1990 by the agreements are given as 10,801, 6,551 and 537 respectively.

[40] Given effect by the *Western Arctic (Inuvialuit) Claims Settlement Act*, S.C. 1984, c. 24, which was proclaimed in force July 25, 1984 by SI/84-165.

[41] Information provided in letter of March 13, 1992 from Dr. John L. Hall, acting Claims Co-ordinator, Program Development and Implementation, Comprehensive Claims Branch, Northern Affairs Branch, DIAND.

undertaken in two parts - the negotiation of an umbrella agreement with the CYI, and individual final agreements with each of the 14 Yukon First Nations. The umbrella final agreement as well as a model self-government agreement were ratified by the CYI on December 7, 1991. During the last year, negotiations have been completed with four of the individual First Nations (Vuntut Gwich'in, Nacho N'y'ak Dun [Mayo], Champagne-Aishihik, and Teslin). Negotiations of four or five more First Nation final agreements may begin by early summer 1992.

2. **Dene/Métis Claim**: A final agreement reached with the Dene/Métis on April 9, 1990 was rejected by them that July. At the request of some of the regional elements of this claim, separate negotiations began with the Gwich'in and the Sahtu based on the Dene/Métis agreement.

3. **Gwich'in and Sahtu Claims**: A final comprehensive land claim agreement was reached with the Gwich'in on July 13, 1991, including a framework self-government agreement, and the Gwich'in ratified this settlement in September 1991, voting 94% in favour. Representatives of the Gwich'in Tribal Council, the Government of the Northwest Territories and the Federal Government formally signed the agreement, and an accompanying implementation plan, on April 22, 1992 at Fort McPherson, NWT. Under the agreement, the 2,200 Gwich'in people in Aklavik, Inuvik, Fort McPherson and Arctic Red River will receive title to 8,622 square miles (22,331 square kilometres) in the Northwest Territories and 600 square miles (1,554 square kilometres) in the Yukon, with payment of $75 million (1990 dollars) over 15 years, a share of resource royalties and a 15-year subsidy of property taxes on certain Gwich'in municipal lands.[42]

Settlement legislation must now be passed by Parliament and the Gwich'in claim will then become the fourth comprehensive land claim agreement in force. Overlapping areas between the signed but unimplemented Gwich'in agreement and the implemented Inuvialuit Final Agreement have been considered recently in *The Inuvialuit Regional Corporation, the Inuvialuit Game Council and Knute Hansen* v. *Her Majesty the Queen and the Minister of Indian Affairs and Northern Development, and the Gwich'in Tribal Council* (Intervenor).[43] Reed J., in the application for a writ of prohibition, or other relief in the nature thereof to prevent ratification of the Gwich'in agreement, denied relief on March 2, 1992 on the ground that any order was premature as the Minister at that time had yet to place the Gwich'in agreement before Cabinet for discussion, it was not known if Cabinet would approve the agreement, with or without conditions, and there was no obligation to submit the agreement to Parliament before the dispute as the overlapping lands was resolved.

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[42] "Gwich'in Comprehensive Land Claim Finalized." DIAND Communiqué 1-9213, April 22, 1992.

[43] (1992), 53 F.T.R. 1.

Negotiations began in November, 1991 in the Sahtu claim and DIAND officials hope to conclude this agreement by the end of 1992. Negotiations, however, with the Deh Cho, North Slave and South Slave, are all stalled.

4. **Tungavik Federation of Nunavut (TFN Claim)**: This is the claim of the Inuit of the Eastern Arctic. A Final Agreement was initialled on December, 15, 1991. A vote was held on May 4, 1992 in the Northwest Territories, approving the western boundary line to separate Nunavut from the rest of the Northwest Territories by 54%, with voting in the Eastern Arctic running nine-to-one in favour, but three-to-one against in the west on the N.W.T;[44] the boundary line had been recommended by former N.W.T. commissioner John Parker who was appointed by the Federal Government to determine a fair boundary. The Inuit are expected to vote on ratification of the Agreement in Fall 1992. See the seminal article by John Merritt and Terry Fenge entitled "The Nunavut Land Claims Settlement: Emerging Issues in Law and Public Administration"[45] for both a history of negotiating comprehensive land claims and also a discussion of legal issues and public administration surrounding the TFN agreement.

5. **Conseil des Atikamekw et des Montagnais (CAM) Claim**: This claim covers most of the eastern north shore of the Saint Lawrence River in Quebec. A Framework Agreement was signed with these claimants in September 1988, and DIAND officials hope to reach an agreement-in-principle in 1992.

6. **Labrador Inuit Association Claim**: This claim was submitted in 1977 and accepted for negotiation by Canada in 1978, and by Newfoundland and Labrador in 1980. A framework agreement was signed on November 30, 1990 which provides that an agreement-in-principle should be reached within four years of the date of signing.

7. **Innu Nation Claim**: Negotiations with the Innu Nation in Labrador (formerly known as the Naskapi Montagnais Innu Association) began in July 1991 following the approval in May of the Framework Agreement.

British Columbia Claims

One B.C. First Nation, the Nisga'a, are presently negotiating a settlement with the provincial and federal governments. A framework agreement was signed on March 29,

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[44] "N.W.T. Split Wins Approval by Narrow 54% Majority." *The Ottawa Citizen* (May 5, 1992) A3.

[45] (1991) 15 *Queen's L.J.* 255-277. In this area, Mr. Merritt and Mr. Fenge, along with Randy Ames and Peter Jull, have also written "Nunavut - Political Choices and Manifest Destiny," Canadian Arctic Resources Committee: Ottawa, 1989.

1991. In July, 1991, the tripartite (Canada, B.C. and First Nations) British Columbia Claims Task Force submitted its recommendations on a fair and effective process for settling comprehensive claims in the province.[46] The governments of both Canada and of B.C. subsequently announced their acceptance of all 19 recommendations.

Agreements Now Implemented and their Possible Impact on National Defence

1. James Bay and Northern Quebec Agreement, and Northeastern Quebec Agreement

The *James Bay and Northern Quebec Agreement* (JBNQA) was the first of the modern comprehensive land agreements with Aboriginal Peoples in Canada. There are no specific provisions in this agreement as to access to land or use of land by the Canadian Forces in the execution of military exercises or movements for purposes of training and operations. Given that the land involved is strictly within the geographical boundaries of Quebec, and Category I land for the exclusive use of the Aboriginal Peoples was only allocated in the amount of 8,450 square kilometers to the Inuit and 5,610 square kilometers to the Cree, it is not surprising that special mention of defence matters is not found in the JBNQA.

As to the rights in general of the federal and provincial Crowns, article 2.13 in Section 2 (Principal Provisions) of the (JBNQA) (article 2.11 equivalent in the Northeastern Quebec Agreement (NEQA)) provides as follows:

> The rights of the Crown in right of Canada in respect to Federal properties and installations in the Territory and the rights of the Crown in right of Quebec in respect to provincial properties and installations in the Territory, which are now or hereafter owned by the Crown or used for the purposes of the Federal or Provincial Government, as the case may be, shall not be affected by the Agreement, except as otherwise specifically provided for herein.

Under section 5 (Land Regime), article 5.1.8 in the (JBNQA) (article 5.1.7 equivalent in the NEQA) provides in respect of expropriation by Canada:

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[46] "The Report of the British Columbia Claims Task Force." June 28, 1991.

> Notwithstanding the *Expropriation Act* of Canada, no Category 1A lands may be expropriated by Her Majesty in Right of Canada without the prior consent of the Governor in Council.[47]
>
> Subject to the foregoing, nothing in the Agreement shall be interpreted in any way as limiting the power of Canada to expropriate for public purposes.

As for access to Category III lands, article 5.3.1 of the JBNQA (article 5.3.1 equivalent in NEQA) provides:

> General access to Category III lands will be in accordance with Provincial legislation and regulations concerning public lands.

Accordingly, the general provisions in sections 257 and 260 of the *National Defence Act*[48] as to manoeuvres and compensation would still apply to lands under these Agreements. These sections state as follows:

> 257(1) For the purposes of training the Canadian Forces, the Minister may authorize the execution of military exercises or movements, referred to in this section as "manoeuvres," over and on such parts of Canada during such periods as are specified.
>
> (2) Notice of manoeuvres shall, by appropriate publication, be given to the inhabitants of any area concerned.
>
> (3) Units and other elements of the Canadian Forces may execute manoeuvres on and pass over such areas as are specified under subsection (1), stop or control all traffic thereover whether by water, land or air, draw water from such sources as are available, and do all things reasonably necessary for the execution of the manoeuvres.
>
> (4) Any person who wilfully obstructs or interferes with manoeuvres authorized under this section and any animal, vehicle, vessel or aircraft under the person's control may be forcibly removed by any constable or by any officer, or by any non-commissioned member on the order of any officer.
>
> (5) No action lies by reason only of the execution of manoeuvres authorized under this section.

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[47] This provision appears to be equivalent to that in subsection 35(1) of the *Indian Act* in requiring the consent of the Governor in Council for the expropriation of reserve lands.

[48] R.S.C. 1985, c. N-5, as amended.

260. Any person who suffers loss, damage or injury by reason of the exercise of any of the powers conferred by section 257 shall be compensated from the Consolidated Revenue Fund.

While section 257 provides the Minister with the necessary authority to conduct manoeuvres for purposes of training over specified parts of Canada, apparently without the consent of the owner or occupants of the land in question, the political reality in Canada and military necessity for the exercise of this authority is such that consent for the use of property by the Canadian Forces has always been routinely sought in modern times before the use of non-government lands. While that is so, what is the effect of the constitutional protection of rights acquired by way of land claims agreements under section 35(3) of the *Constitution Act, 1982* on the statutory authority provided by section 257 for the conduct of manoeuvres on the land of Aboriginal Peoples without consent? Would section 257 be considered inoperative under section 52(1) of the *Constitution Act, 1982* in respect of land protected by way of treaty or modern land claim agreement, in some or in all circumstances of manoeuvres on such land? These issues will be discussed after the concept of fiduciary duty is first examined in the *Guerin* case in Chapter 5 and in the *Sparrow* decision in Chapter 6.

2. Inuvialuit Final Agreement

The *Western Arctic Claim* or *Inuvialuit Final Agreement* (IFA) provides the Inuvialuit with fee simple to approximately 91,000 square kilometres in the Western Arctic, and of this, title in surface and subsurface rights in approximately 13,000 square kilometres. The Inuvialuit will receive $152 million in a series of payments that began in 1984 and will end in 1997.[49] One time payments for economic and social development of $17.5 million were also made.

Section 7 of the IFA is entitled "Inuvialuit and Crown Land" and in part sets out the lands to which the Inuvialuit are entitled in fee simple absolute. Subsections 7. (13) to

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[49] "Western Arctic (Inuvialuit) Claim Implementation Annual Review 1989-90." Indian and Northern Affairs Canada, 1990, at p 3.

(21) are entitled "General Access to and Across Inuvialuit Land." As for government access to Inuvialuit lands, the applicable subsections are as follows:

> 7. (16) Agents or employees of government shall have the right to enter on and cross Inuvialuit lands for legitimate government purposes relating to the management of their programs or enforcement of their laws, and such access, where applicable, shall be in accordance with appropriate laws or approved procedures.
>
> 7. (17) Without restricting the generality of subsection (16) and without limiting the authority to enter on lands given to the Department of National Defence by the *National Defence Act*, access to Inuvialuit lands for military exercises conducted by the Department of National Defence shall take place on the conclusion of arrangements with the Inuvialuit relating to contact persons, areas, timing and appropriate compensation. Agreement by the Inuvialuit shall not be unreasonably withheld.

Although not making reference to any specific section of the *National Defence Act* for the authority of DND to enter on lands, the authority for such action is provided by section 257 of that Act as discussed above. Clearly, however, the IFA contemplates entry by the Canadian Forces on Inuvialuit lands to be normally only after negotiations between the Inuvialuit and the military, and suitable arrangements are made.

As part of the arrangements between the Inuvialuit and the military, there is mention in subsection 7. (17) of "appropriate compensation" as one of the terms, along with "contact persons, areas [and] timings." However, negotiators for the parties must have been aware of section 257 of the *National Defence Act* given the reference to authority "to enter on land" in subsection 7. (17), and that compensation for damage incurred during manoeuvres under section 257 is available under section 260. The words "appropriate compensation" would therefore appear to be somewhat ambiguous in 7. (17), *i.e.*, do they mean only compensation for some physical loss or injury caused as result of the exercise, or do they mean some form of flat user fee or per diem for actual occupation of Inuvialuit lands during an exercise? While this remains unclear in the IFA, other draft land claim agreements as subsequently discussed in this Chapter appear to have resolved this ambiguity.

Other Final Agreements Not Yet Implemented

1. Umbrella Final Agreement with the Council for Yukon Indians

Access to Settlement Land is generally provided in Chapter 6 of the agreement. Government access is provided specifically in article 6.4, with military access addressed in article 6.5. These two articles provide in part:

> 6.4.1 Government, its agents and contractors shall have a right of access to enter, cross and stay on Undeveloped Settlement Land and use natural resources incidental to such access to deliver, manage and maintain Government programs and projects, including but not limited to the necessary alterations of land and watercourses by earthmoving equipment for routine and emergency maintenance of transportation corridors....
>
> 6.4.4 Any Person exercising a right of access pursuant to 6.4.1 ... shall be liable only for significant damage to Settlement Land and any improvements on Settlement Land caused by the exercise of such right of access. Significant damage does not include necessary alteration of Settlement Land or watercourses required to maintain transportation corridors referred to in 6.4.1....
>
> 6.5.0 Military Access
>
> 6.51 In addition to the right of access provided by 6.4.1, DND has a right of access to Undeveloped Settlement Land for military manoeuvres with the consent of the affected Yukon First Nation with respect to contact persons, areas, timing, environmental protection, protection of Wildlife and habitat, land use rent, and compensation for damage caused to Settlement Land and improvements and personal property thereon, or, failing consent, with an order of the Surface Rights Board as to terms and conditions with respect to such matters.
>
> 6.5.2 Nothing in 6.5.1 shall be construed to limit the authority of DND to enter, cross, stay on or use Undeveloped Settlement Land in accordance with the *National Defence Act*.
>
> 6.5.3 Government shall give reasonable advance notice of military exercises or operations to inhabitants of any area to be affected.

The paragraphs in section 6.5 of the *Umbrella Final Agreement* with the Council for Yukon Indians are much more clear, but perhaps less favourable to DND, than the equivalent ones, subsections 7. (16) and (17), of the IFA as to compensation by the

Department. The former agreement specifically provides for "land use rent" and also for "compensation for damage" to Settlement Land, improvements and personal property on the land. The latter agreement, on the other hand, leaves the question of the nature of compensation open, while only implying some level beyond that of only damage to personal and real property.

2. Gwich'in Agreement

Chiefs and Headmen representing the Gwich'in (also known as the Loucheux) originally signed Treaty No. 11 at Arctic Red River on July 26, 1921, and at Fort McPherson on July 28 of that year. The preamble to the *Gwich'in Agreement* notes that the Gwich'in and Canada have unresolved differences with respect to the interpretation of aboriginal and treaty rights and that the agreement has been negotiated to give effect to certain rights of the Gwich'in in "this modern treaty."

Chapter 20 of the agreement addresses "Access" to Gwich'in lands which are defined in article 20.1.1 to mean:

> [S]ettlement lands and parcels of Gwich'in municipal lands which are larger than four hectares (approximately 10 acres) and which are not developed Gwich'in municipal lands as defined in 22.4.1.

Government Access is governed by the following articles:

> 20.3.1 Agents, employees, contractors of government, and members of the Canadian Armed Forces shall have the right to enter, cross and stay on Gwich'in lands and waters overlying such lands and to use natural resources incidental to such access to deliver and manage government programmes and services, to carry out inspections pursuant to law, and to enforce laws. Government shall give prior notice of such access to the Gwich'in Tribal Council when, in the opinion of government, it is reasonable to do so.
>
> 20.3.2 If government requires the continuous use or occupancy of Gwich'in lands for more than 2 years, such use or occupancy shall be on terms negotiated between government and the Gwich'in Tribal Council. Failing agreement on the terms, the matter shall be referred to arbitration pursuant to the provisions of chapter 6 [of the *Gwich'in Agreement*].

20.3.3 (a) In addition to access provided by 20.3.1, DND and the Canadian Armed Forces may have access to Gwich'in lands and waters overlying such lands for military manoeuvres after the negotiation of an agreement with respect to contact persons, areas, timing, land use rent, compensation for damages caused to lands or property, and any other matter. If an agreement is not reached, the parties may refer the matter of the terms of the agreement to arbitration pursuant to the provisions of chapter 6.

(b) Nothing in (a) is intended to limit the authority of the Minister of National Defence pursuant to s. 257 of the *National Defence Act*.

20.3.4 Government shall give reasonable advance notice of military exercises or operations to local inhabitants of any area to be affected in the settlement area.

The provisions of the *Gwich'in Agreement* as to military access are similar to those as noted in the *Umbrella Final Agreement* for Yukon Indians, i.e., both land use rent and compensation for damages are terms of an agreement for access, and arbitration is provided for if agreement cannot be reached. As for the granting of right of entry orders to Settlement Lands, whether or not the amount of compensation has been determined, and for attaching terms and conditions to such access, Chapter 8 of the *Gwich'in Agreement* provides for such powers to be exercised by the "Surface Rights Board."

3. Tungavuk Federation of Nunavut Agreement

Negotiators recently initialled an interim Tungavuk Federation of Nunavut (TFN) Final Agreement providing for the creation of a new territory called Nunavut, after resolving several final issues in late 1991 in the land claim settlement.[50] The accord must now be considered by the communities of Inuit people in the Eastern Arctic in a ratification plebiscite scheduled for the Fall 1992 and, if approved, then implemented by appropriate legislation.

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[50] "Resolution of Outstanding Issues Opens Way to Final Agreement on TFN Claim and Creation of Nunavut Territory." Indian and Northern Affairs Communiqué, 1-911115, Ottawa, December 15, 1991.

Article 21 of the unratified TFN final agreement provides for "Entry and Access" to Inuit Settlement Lands. Part 5 of this article deals with government access and states as follows:

> 21.5.1 Agents, employees and contractors of Government and members of the Canadian Forces and members of the R.C.M.P. shall have the right, in accordance with this Article, to enter, to cross and to remain on Inuit Owned Lands and water on Inuit Owned Lands to carry out legitimate government purposes relating to the lawful delivery and management of their programs and enforcement of laws.
>
> 21.5.2 Should Government, the Canadian Forces or the R.C.M.P. require continuing use or occupancy of Inuit Owned Lands for more than two years, including use for unmanned facilities, the DIO [Designated Inuit Organization] may require Government to obtain an interest in the land....
>
> 21.5.5 In a case where more than insignificant damage may be caused to the land, or where there may be more than insignificant interference with Inuit use and quiet enjoyment of the land, Government shall consult the DIO and seek its agreement regarding the procedures for exercising government access under Sections 21.5.1 and 21.5.3. Where agreement cannot be achieved, the matter shall be referred to the Arbitration Board for the determination of such procedures pursuant to Article 38. Activities identified in Schedule 21-4 shall not be subject to the requirements of this Section....
>
> 21.5.10 The Department of National Defence (DND) shall have no greater rights to conduct military manoeuvres, including exercises and movements, on Inuit Owned Lands than it has with respect to other non-public lands under generally applicable legislation. For greater certainty, this section shall prevail over Sections 21.5.11 and 21.5.12.
>
> 21.5.11 The Minister of National Defence may authorize access to Inuit Owned Lands and water on Inuit Owned Lands for the execution of manoeuvres by the Canadian Forces pursuant to Section 257 of the *National Defence Act* and with the exception of Section 21.5.10 nothing in this Article applies to or affects such access authorized by the Minister of National Defence.
>
> 21.5.12 Other than access for those manoeuvres referred to in Section 21.5.11, access onto and across Inuit Owned Lands and water on Inuit Owned Lands for each manoeuvre shall only occur after the negotiation and conclusion of an agreement with the DIO dealing with contact persons, consultation mechanisms and timing thereof and compensation for damages, which agreement may be amended from time to time. Land use fees shall not be charged.

21.5.13 Reasonable advance notice, in Inuktitut, of military manoeuvres shall be given by DND to the inhabitants of any area affected.

Sections 21.5.10 to .13 of the TFN Agreement establish a clear framework for military manoeuvres on Inuit Owned Land, and are also more favourable to DND in providing expressly that land use fees shall not be charged, unlike the IFA which leaves the issue somewhat open, and the Yukon and Gwich'in agreements which, on the other hand, provide for such fees.

Conclusion

As noted in this Chapter, the signing and implementation of modern land claim agreements have raised for DND the legal issues of access to settlement lands, and the compensation payable for such access in addition to any actual damages to real or personal property on the land of Aboriginal Peoples secured under the land claim agreements. While the question of compensation for the use of land during exercises is somewhat unclear in some agreements, work is underway by the Department to negotiate co-operation agreements to address such concerns to the mutual satisfaction of the parties.[51]

Rights under land claim agreements as treaty rights for purposes of section 35 now have constitutional protection, and their effect on the exercise of power under section 257 of the *National Defence Act* to conduct manoeuvres on these lands must be examined. After the origin of the concept of fiduciary duty in aboriginal matters is discussed in Chapter 5 in respect of the *Guerin* case and other aboriginal cases prior to *Sparrow*, and I examine in Chapter 6 the fiduciary duty content of the justification test as developed in *Sparrow*, I will consider how the fiduciary duty concept may affect defence matters.

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[51] I have been advised by staff at National Defence Headquarters of the negotiation of one such agreement but the details and parties must remain confidential until the agreement is fully approved.

Chapter 5 - The Pre-Sparrow Concept of Fiduciary Duty

Introduction

As discussed in Chapter 3, a number of challenges have recently been made to defence activities and defence establishments by different groups of Aboriginal Peoples. Also, as noted in Chapter 4, the implementation of the modern comprehensive land claim agreements has raised new issues in respect of defence access to the large areas of land in northern Canada controlled by the Aboriginal parties to these agreements, and compensation for such access. Inasmuch as the fiduciary obligation between the Crown and Aboriginal Peoples is now an essential element in any government policy that impacts on Aboriginal Peoples in Canada, including policy in DND in respect of military exercises on the land of groups of Aboriginal Peoples, particularly in northern Canada, this Chapter will review the development of the fiduciary duty concept. In this review, I first very briefly discuss the origin of fiduciary duty in English law and the compensation in equity for breach of this duty, and then consider in detail its recognition in the case of *Guerin* v. *The Queen*[1] and in subsequent leading decisions in Canada. At the end of the Chapter, I will also very briefly review the application of the fiduciary duty concept to Aboriginal Peoples in other jurisdictions. In the next chapter of this dissertation, the fiduciary duty in the context of section 35 of the *Constitution Act, 1982*[2] in the decision in *R.* v. *Sparrow*[3] will be examined.

A Brief Review of the Fiduciary Duty Concept before Guerin

The English Romford Market case of *Keech* v. *Sandford*,[4] involving the renewal of a lease by the trustee of an infant for himself and not for the infant or *cestui que use*,

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1 (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, 20 E.T.R. 3, 36 R.P.R. 1, 55 N.R. 161.

2 Enacted by the *Canada Act, 1982 (U.K.)* c. 11, Schedule B.

3 [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, [1990] 3 C.N.L.R. 160, 56 C.C.C. (3d) 263, 111 N.R. 241.

4 (1726), 2 Eq. Cas. Abr. 741, 25 E.R. 223.

after the lessor refused to renew to the infant, is considered for practical purposes to be the modern origin of the concept of fiduciary obligation, some 250 years ago. While it was a general rule of law that a trustee on renewal of a lease must hold it on trust for the beneficiary, this rule did not apply when the trustee had attempted to obtain a renewal and had failed. However, the Lord Chancellor, Lord King, considered the renewed lease to be a trust for the infant, even though there was no evidence of fraud, and ordered assignment of the lease to the infant and an accounting of profits as equitable remedies, stating as follows at pp. 223-4:

> I must consider this as a trust for the infant; for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to the *cestui que use*; though I do not say there is a fraud in this case, yet he should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that the rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestui que use*.

An historical development of the fiduciary duty has recently been provided by the Right Honourable Sir Robert E. Megarry, in the first Chapter of *Fiduciary Duties*.[5] While Sir Megarry provides a detailed review of English case law, including the Romford Market case, he also addresses some leading Canadian cases, including the Supreme Court of Canada decisions in *Canadian Aero Service Ltd.* v. *O'Malley*,[6] which was decided in 1973 before *Guerin*, and the case of *LAC Minerals Ltd.* v. *International Corona Resources Ltd.*[7] concerning a joint mining venture, decided after *Guerin* in 1989. Interestingly, Sir Megarry, however, makes no reference in his work to the *Guerin* decision in the Supreme Court of Canada or in the application of fiduciary duty arising in the relationship between Aboriginal Peoples and the Crown.

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[5] Special Lectures of the Law Society of Upper Canada 1990. De Boo: Toronto, 1991, at pp. 1-14.

[6] (1973), 40 D.L.R. (3rd) 371, [1974] S.C.R. 392.

[7] (1989), 61 D.L.R. (4th) 14, [1989] 2 S.C.R. 574.

In *Fiduciary Duties*,[8] Mr. Peter D. Maddaugh also provides a chapter on the "Definition of Fiduciary Duty" in which he reviews primarily Canadian case law, but also some Commonwealth cases. In his introduction, he provides a non-exhaustive list of situations in which fiduciary relationships arise, but also makes no mention of Aboriginal Peoples and the Crown. He indicates that the end result of the fiduciary principle to those who are brought within its ambit is to impose a high standard of morality - particularly in financial matters - and that this is to be applauded. However, he indicates two concerns, first, one of overkill in that the duty may curtail legitimate transactions and thereby frustrate free enterprise and, second, uncertainty, in the difficulty of ascertaining who exactly constitutes a fiduciary.[9]

In his examination of the definition of fiduciary duty, Mr. Maddaugh also includes an analysis of *LAC Minerals*, a case which I will discuss *infra* in this Chapter. In commenting in general terms on the established categories of fiduciaries, he stated that despite hundreds of years of litigation on the subject, it is not at all clear as to who is a fiduciary.[10] Later Mr. Maddaugh stated, however, that the following themes have clearly emerged:

> 1. One person is usually entrusted with **property** which belongs in the eyes of equity to another.
>
> 2. One party holds an office or is placed in a **position** where he is able to avail himself of opportunities which would otherwise not be open to him.
>
> 3. A varying degree of trust or confidence is reposed by one party in another, which produces a measure of reliance or **dependency** or **vulnerability** on the one side and a corresponding ability to influence on the other (emphasis added).[11]

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[8] *Supra*, note 5, at pp. 15-32.

[9] The basic question, however, in Crown-Aboriginal dealings is whether or not the duty is present and, if so, what is the exact scope of the duty, in any given fact and law situation.

[10] *Supra*, note 5, at p. 16.

[11] *Ibid.*, pp. 18-9.

While Mr. Maddaugh appears to focus on the concept of fiduciary duty in the commercial context, his formulation is similar to the often quoted comments of Professor Weinrib in his 1975 article on the essential concept of the fiduciary obligation in the following terms:

> [A fiduciary obligation arises where] there is 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. The fiduciary obligation is the law's blunt tool for the control of this discretion.[12]

The 1990 Special Lectures is an excellent authoritative reference book of some 336 pages in this complex area of law, authored by Sir Megarry, Mr. Maddaugh and some 17 other individuals. Any number of aspects of fiduciary duty, such as origin of the duty, scope of the duty, standard of conduct and remedy for breach could warrant separate in depth examination in a dissertation. Outside of those fiduciary duty cases in which concerns of Aboriginal Peoples have been raised, I will consider the issues in the three other leading cases decided by the Supreme Court of Canada which have considered fiduciary duty, *Canaero* as a pre-*Guerin* case which I will now discuss, and the cases of *LAC Minerals* and *Frame* v. *Smith*.[13] *LAC Minerals* and *Frame* were both decided in the Supreme Court of Canada post-*Guerin* and will be considered in the latter part of this Chapter.

Canadian Aero Service Ltd. v. O'Malley [14]

In the *Canaero* case, there was a project to map Guyana from the air, and the president and vice-president of the plaintiff company negotiating a contract for this project resigned and created a new company which concluded a contract to do the mapping work. While the plaintiff failed in the lower courts to recover damages against its two former company officers, it succeeded in the Supreme Court of Canada.

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[12] Weinrib, E. "The Fiduciary Obligation." (1975) 25 *Univ. of Toronto L.J.* 1 at 4.

[13] [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81.

[14] *Supra*, note 6.

The judgment of the Court was delivered by Laskin J. (as he then was) who found that the two defendants were senior officers in *Canaero* and hence stood in a fiduciary relationship to the company, which at least survived their resignations from it. In such a relationship, Laskin J. stated that the duty on a person at least went so far as that a director or senior officer is "precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company."[15]

While Laskin J. did not set out a general test for the imposition of a fiduciary obligation on company officers such as the defendants in *Canaero*, he did state at p. 391 that the general standards of loyalty, good faith, and the avoidance of any conflict between duty and self-interest must be tested in each case by many factors. These factors included the position or office held, the nature of the corporate opportunity, its ripeness, its specificity and the relation to it of the person concerned, the amount of knowledge possessed, and the circumstances in which it was obtained.

For loss of the $2.3 million contract to the defendants, damages were fixed by the trial judge at $125,000 in the event of a successful appeal. Laskin J. did not interfere with this quantum, stating that it could be viewed as an accounting of profits or, what amounts to the same thing, as based on unjust enrichment, and that Canaero was "entitled to compel the faithless fiduciaries to answer for their default according to their gain."[16]

Notwithstanding that *Canaero* involves purely commercial private interests, unlike the relationship of Aboriginal Peoples and the Crown in which a public dimension is also

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[15] *Ibid.*, p. 382.

[16] *Ibid.*, p. 392.

present in the relationship, it is important to note that the Court was not prepared to set out a precise test in this area. Likewise, in the *Guerin* case that will be discussed *infra*, the finding of a fiduciary duty in the Aboriginal-Crown relationship was limited to the precise facts of the case and was interpreted strictly by later courts.

Guerin v. The Queen

1. History of Case in the Lower Courts

The clearest statement in Canadian case law as to the fiduciary obligation of the Crown to Aboriginal Peoples, although some uncertainty still exists as to the application of the concept, is found in the decision of the Supreme Court of Canada in *Guerin* in 1984. In this case, fiduciary duty was considered in relation to the disposal of Aboriginal land surrendered under the authority of the *Indian Act*.[17] Specifically, the Court had to consider the surrender by the Musqueam Indian Band[18] of 162 acres of land in the City of Vancouver in 1957, made pursuant to sections 37 to 41 of the *Indian Act*, to the federal Crown for lease to the Shaughessy Heights Golf Club of Vancouver. Discussions had occurred between representatives of the Musqueam Band and Indian Affairs officials during negotiations as to the surrender of the lease and terms of the proposed lease for the golf course. The trial judge in *Guerin* found as a matter of fact that the lease subsequently agreed upon between the Crown and the golf club contained significant terms that the band members were either not consulted upon or as to which they had been informed that they had no choice. The Crown did not disagree with the findings of fact made by the trial judge in the Federal Court Trial Division, Collier J., but simply stated that on those facts no cause of action was made out.

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[17] R.S.C. 1952, c. 149.

[18] As of December 31, 1989, Indian and Northern Affairs Canada recorded in the *Schedule of Indian Band, Reserves and Settlements Including - Membership and Population Location and Area in Hectares, December 1990*, at p. 147, that the Musqueam Band had a band membership of 775 and a reserve population of 420 on three reserves, with 254.2 hectares (628 acres) of land.

Collier J. held that a trust was created on surrender of the land and that the terms of the trust were oral, namely that the Crown was to enter into a lease for a total term of 75 years, the first term to be for 15 years at a rent of $29,000, the remaining terms to be negotiated. Additional oral terms included that there would not be a15% limit on rent increases and that all improvements on the expiration of the lease would revert to the Crown. Collier J. found that the Crown breached this trust by negotiating a lease with a 15% maximum increase limit, and giving the Golf Club the right to terminate the lease at the end of any of the 15-year terms upon giving six months notice, and the right to remove all improvements. The federal Crown was held liable by the trial judge and the Musqueam Band was entitled to recover damages assessed at $10 million for breach of the terms of the trust.

In commenting on the *Guerin* case, William R. McMurtry and Alan Pratt in their 1986 article "Indians and the Fiduciary Concept, Self-Government and the Constitution"[19] state:

> .... There is no question that the factual background to the case is of a type to elicit strong indignation on behalf of the Indian plaintiffs. One way or the other, once the trial judge had made his factual findings, the plaintiffs had to succeed....

As will be subsequently discussed, the plaintiffs did indeed ultimately succeed, but only after appeal to the Supreme Court of Canada.

A Crown appeal of the decision of Collier J. was allowed by the Federal Court of Appeal [20] on December 10, 1982, i.e., after the enactment of the *Constitution Act, 1982.* However, as the action was commenced prior to April 17, 1982 and concerned the actions of Crown servants well before 1982, it did not involve a consideration of section 35 in Part II of the *Constitution Act, 1982.* The decision of the Court, setting aside the

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[19] [1986] 3 C.N.L.R. 19 at 20.

[20] (1983), 143 D.L.R. (3d) 416, [1983] 2 F.C. 656, [1983] 2 W.W.R. 686, 13 E.T.R. 245, 45 N.R. 181 (F.C.A).

decision of the trial judge and dismissing the action, was delivered by Le Dain J.A., and concurred in by Heald and Culliton JJ.A. The trial judge was found to have erred in concluding that a trust on oral terms was created by the surrender of land. The provisions in Sections 39 and 40 of the *Indian Act* on the substantive and procedural requirements for the surrender of reserve land were considered by the Court and found at p. 452 to presuppose that any surrender and conditions would be in writing. The oral terms as such found by the trial judge were not approved by the Band, were not contained in the surrender document and were not assented to by the Governor in Council.

While Indian title in reserve land was treated under the *Indian Act* as a right of possession vested in the Band and as such was a property interest, no true trust, however, was found to have been created under section 18 of the *Act*. This section provided that reserve lands are held by Her Majesty "for the use and benefit" of Indian bands, and that subject to the Act, and 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.

The discretion possessed by the Governor in Council in determining what is for the use and benefit of the band was found at p. 470 by the Federal Court of Appeal to be a trust in the higher sense, or a political trust, which was not justiciable, as opposed to a true trust or lower trust which imposed equitable obligations.

2. General Nature of the Fiduciary Duty as recognized in the Supreme Court of Canada

The case was appealed to the Supreme Court of Canada and a decision rendered on November 1, 1984. The Supreme Court unanimously allowed the appeal but separate judgments were written by three justices in the case; Dickson J. (as he then was), Wilson J. and Estey J. each provided a different view on the obligation of the federal Crown to the Indian band. Laskin C.J. did not participate in the judgment due to illness, thus leaving a panel of eight.

In respect of the obligations of the Crown concerning the disposal of surrendered Indian land, Dickson J., speaking for Beetz, Chouinard and Lamer JJ. (now C.J.), in the leading judgment in the case but not one reflecting a majority of the court of eight, stated 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. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. 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.[21]

As to the possibility of a trust on the same facts, Dickson J. stated that:

> The Crown's fiduciary obligation to the Indians is therefore not a trust. To say as much is not to deny that the obligation is trust-like in character. As would be the case with a trust, the Crown must hold surrendered land for the use and benefit of the surrendering band. The obligation is thus subject to principles very similar to those which govern the law of trusts concerning, for example, the measure of damages for breach. The fiduciary relationship between the Crown and Indians also bears a certain resemblance to agency, since the obligation can be characterized as a duty to act on behalf of the Indian bands who have surrendered lands, by negotiating for the sale or lease of the land to third parties. But just as the Crown is not a trustee for the Indians, neither is it their agent; not only does the Crown's authority to act on the band's behalf lack a basis in contract, but the band is not a party to the ultimate sale or lease, as it would be if it were the Crown's principal. I repeat, the fiduciary obligation which is owed to the Indians by the Crown is *sui generis*. Given the unique character both of the Indians' interest in land and of their historical relationship with the Crown, the fact that this is so should occasion no surprise.[22]

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[21] *Supra*, note 1, at p. 334.

[22] *Ibid.*, pp. 342-3.

In summary, Dickson J., with three other justices concurring, found a fiduciary duty to exist in common law and discounted the possibility of a trust relationship between the Crown and the Musqueam Band that had surrendered the land.

Wilson J., with whom two other justices concurred, also found that the Crown had a fiduciary obligation to Indian bands with respect to the uses to which reserve land may be put. She further held that the Crown did not hold the reserve land under section 18 of the *Indian Act* generally "in trust" for the band because the band's interest was limited by the nature of Indian title, stating in part:

> While I am in agreement that s. 18 does not *per se* create a fiduciary obligation in the Crown with respect to Indian reserves, I believe that it recognizes the existence of such an obligation. The obligation has its roots in the aboriginal title of Canada's Indians as discussed in *Calder et al.* v. *A.-G. B.C.*....
>
> I think that when s. 18 mandates that reserves be held by the Crown for the use and benefit of the bands for which they are set apart, this is more than just an administrative direction to the Crown. I think it is the acknowledgment of a historic reality, namely, that Indian bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it. This is not to say that the Crown either historically or by s. 18 holds the land in trust for the bands. The bands do not have the fee in the lands; their interest is a limited one. But it is an interest which cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree. I believe that in this sense the Crown has a fiduciary obligation to the Indian bands with respect to the uses to which reserve land may be put and that s. 18 is a statutory acknowledgement of that obligation. It is my view, therefore, that while the Crown does not hold reserve land under s. 18 of the Act in trust for the bands because the bands' interests are limited by the nature of Indian title, it does hold the lands subject to a fiduciary obligation to protect and preserve the bands' interests from invasion or destruction.[23]

Subsequently in her judgment in considering the effect of the surrender of the land, Wilson J. stated that section 18 presented "no barrier to a finding that the Crown

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[23] *Ibid.*, pp. 356-7.

became a full-blown trustee by virtue of the surrender" and that the fiduciary duty which existed at large under section 18 to hold the land in the reserve for the use and benefit of the Band crystallized upon the surrender into an express trust of specific land for a specific purpose. Also in dealing with the issue of the surrender of the land to the Crown, Wilson J. at p. 361 agreed with the finding of the trial judge that the Crown had "acted in breach of trust when it barrelled ahead with a lease on terms which, according to the learned trial judge, were wholly unacceptable to its *cestui que trust*."

A separate opinion was given by Estey J. in which he found the common law principles of agency, not those of fiduciary duty, applied to the facts, stating that:

> The fact that the agent is prescribed by statute in no way detracts in law from the legal capacity of the agent to act as such. The further consideration that the principal (the Indian band as holder of the personal interest in the land) is constrained by statute to act through the agency of the Crown, in no way reduces the rights of the instructing principal to call upon the agent to account for the performance of the mandate.[24]

The judgment of Estey J. describing the relationship between the Crown and Indians as one of agency has not been followed by later courts and has been criticized by Professor Richard Bartlett who states that:

> .... Such a characterization of the role of the Crown requires a flight of fantasy far removed from the historic dispossession of Indian traditional lands and the establishment and subsequent alienation of Indian reserves by the Crown. An agent is ordinarily understood as subject to instructions from the principal. The Crown historically exercised total control over the management and disposition of reserve lands.[25]

Professor Darlene Johnston also comments on the agency relationship put forward by Estey J., stating that no other member of the Court in *Guerin* found the agency analysis persuasive and that it was unlikely that it would be employed in subsequent elaboration

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[24] *Ibid.*, p. 348.

[25] "You Can't Trust The Crown: The Fiduciary Obligation of the Crown to the Indians: *Guerin* v. *The Queen*." (1984-85) *49 Sask L. Rev.* 367 at 372.

of the fiduciary duty.[26] The agency concept has indeed not been relied upon by subsequent courts to understand the Aboriginal-Crown relationship.

3. Origin of the Fiduciary Duty

Accordingly, as noted above, the majority opinions of seven of the eight justices in *Guerin* establish that a fiduciary duty or obligation is owed in certain circumstances to Indians and presumably other aboriginal peoples in like factual and legal situations in Canada. As for the origin of a fiduciary duty in Canada to Indians in this country, Dickson J. in *Guerin* considered the North American history of Indian or aboriginal title with reference to the leading American cases in this area, including, the decisions of Chief Justice Marshall of the United States Supreme Court in *Johnson and Graham's Lessee* v. *M'Intosh*[27] and *Worcester* v. *State of Georgia*[28], and also the decisions of the Supreme Court of Canada and the Privy Council in the leading Canadian case of *St. Catherine's Milling & Lumber Co.* v. *The Queen*.[29] The origin and history of the federal trust responsibility towards Indians in the United States, and also a detailed review of the *Guerin* decision, is provided by Professor Johnston in her article.[30]

The origin of the fiduciary duty according to the judgment of Dickson J. in *Guerin* may be summarized as follows: firstly, Indians by virtue of their time immemorial occupation, prior to contact with contact with Europeans, have a legal right to occupy and possess certain lands, the ultimate title to which is now in the Crown; secondly, Indians have a *sui generis* or unique interest in the land which is personal and which cannot be transferred to a grantee but only surrendered to the Crown under section 38 of the *Indian Act* if reserve land, or otherwise surrendered by treaty; thirdly, a discretion is

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[26] "A Theory of Crown Trust Towards Aboriginal Peoples." (1986) 18 *Ottawa L. Rev.* 307 at 314.

[27] (1823), 21 U.S. (8 Wheat.) 543.

[28] (1832), 31 U.S. (6 Pet.) 515.

[29] (1888), 14 App. Cas 46, affirming (1887), 13 S.C.R. 577.

[30] *Supra*, note 26.

conferred upon the Crown in dealing with land surrendered by an Indian band; and lastly, this discretion gives rise to a fiduciary obligation which takes hold to regulate the manner in which the Crown may exercise its discretion in dealing with the land on the Indians' behalf. In summary, the source of the fiduciary duty to Indians in respect of land would appear to be based on two factors: first, the *sui generis* nature of Indian title, and second, the historic powers and responsibility assumed by the Crown for Indians.[31] Although this duty appears to be common law in origin with its connection to Indian title, the further proposition that the duty is related to the inalienability of the land, based historically on the *Royal Proclamation of 1763*[32] and the surrender requirement under section 38 of the *Indian Act*,[33] relates the duty to both prerogative and statutory authority.

In finding that the duty of the Crown was fiduciary in nature, Dickson J. relied in part at p. 340 upon a statement of general principle of Professor Ernest Weinrib that "the hallmark of a fiduciary relationship is that the relative legal positions are such that one party is at the mercy of the other's discretion."[34] His Lordship then went on to state:

> I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[35]

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[31] This is the proposition advanced by the Supreme Court of Canada in *R.* v. Sparrow, *supra*, note 3, at 408 as the *ratio* of *Guerin*.

[32] The operative section in the Royal Proclamation as to inalienability provides: "And We do hereby forbid, on Pain of our Displeasure, all our loving subjects from making any Purchase or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and licence for the Purpose first obtained."

[33] Subsection 37(1) of the *Indian Act* provides: "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 whose use and benefit in common the reserve was set apart."

[34] "The Fiduciary Obligation." (1975) 25 *Univ. of Toronto L.J.* 1 at 7.

[35] *Supra*, note 1, at p. 341. The uncertainty caused by this statement made by Dickson J. is commented upon specifically by McMurtry and Pratt, *supra*, note 19, at pp. 30-1. The

As to the precise nature of the fiduciary duty found in *Guerin*, can it be characterized simply as an aboriginal common law right that can provide equitable compensation for breach, or a right under the *Royal Proclamation* of October 7, 1763, or a statutory law right under the *Indian Act*, or some other right or freedom acknowledged in section 35 of the *Constitution Act, 1982*? The judgments and dicta in *Guerin* unfortunately do not give clear guidance on this point but appear to indicate a common law duty. I will return to the issue of the origin of the fiduciary duty in the discussion on *Sparrow* in Chapter 6.

Professor Johnston also comments on the *sui generis* nature of the fiduciary obligation owed to the Indians and submits that the American federal-Indian trust responsibility doctrine is a body of jurisprudence which should be assistance in defining the obligation.[36] Professor Johnston subsequently reviews American case law and government policy in some detail, and states that the "existence of a unique fiduciary relationship between the United States and its Indian peoples has long been acknowledged by the legislative, executive and judicial branches of that government."[37] While *Guerin* only recognized the existence of a fiduciary duty to deal with surrendered land for the benefit of the Indians, Professor Johnston asserts that trust responsibility has attached to a wide range of tribal property under American cases and that this expansive approach should be of persuasive value to Canadian courts in their task of defining what constitutes Indian property.[38]

Subsequent to the comments of Professor Johnston, Ms Maureen Donohue in her

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authors state that the case establishes that in an agency type of surrender to a third party, the Crown's discretion is confined by the instructions of the band but that Dickson J. "by reverting to the first principles of the creation of fiduciary obligations, suggests the possible existence of fiduciary obligations of a very different nature than those involved in the surrender of the Musqueam reserve..."

[36] *Supra*, note 26, at p. 317.

[37] *Ibid.*, p. 328.

[38] *Ibid.*, p. 330.

recent article "Aboriginal Land Rights in Canada: A Historical Perspective on the Fiduciary Relationship,"[39] in which she reviews aboriginal land rights in both Canada and the United States, articulates a very clear theoretical view on the origin of the fiduciary relationship. She states that the relationship arises directly from the separation of ownership or title to the land in the sovereign, as distinct from the right of use and occupancy by the band or tribe. This segregation of ownership and occupation rights gives rise to the fiduciary relationship between the sovereign and the Aboriginal Peoples, and the courts are now in the process of resolving the parameters of this relationship and the duties that it implies.

4. Scope of the Fiduciary Duty

The *Guerin* case is specifically concerned with the fiduciary duty of the Crown in respect of land surrendered conditionally by an Indian band pursuant to section 38 of the *Indian Act* for leasing to a third party and the revenue that should have accrued for the use and benefit of the band based on the terms of the surrender given by the band to Crown officials. Dicta in Dickson J.'s judgment does suggest the duty would apply to both Indian lands and also to non-Indian or other aboriginal land. He specifically stated at pp. 336-7 that:

> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases....

In respect of surrenders of Indian land or tribal lands, does the duty arise before the surrender; does the duty arise if the surrender is absolute and not conditional for purposes of leasing as in *Guerin*; and does the duty continue for some time after a surrender until a disposition of the property to a third party occurs? Also, does *Guerin* extend this fiduciary duty generally to other areas of federal Crown responsibility, for example, other obligations under the *Indian Act* in regulating the many aspects of

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[39] (1990) 15 *American Indian L. Rev.* 369 at 371. While published in 1990, the article makes no reference to the *Sparrow* case.

Indian life not relating to land, and under treaties and comprehensive land settlements? At least based on the decision in *Guerin*, it is not clear if the fiduciary duty will arise in these non-surrender or non-land type situations.[40]

Recent decisions in the Federal Court Trial Division have unfortunately shown that the fiduciary duty may have a rather limited scope. Dubé J. in *Lower Kootenay Indian Band* v. *Her Majesty the Queen*[41] noted that it is only upon surrender of reserve lands that a fiduciary obligation arises to regulate the manner in which the Crown exercises its discretion in dealing with the Indian land. In reaching this conclusion, Dubé J. relied on the position adopted by Addy J. in *Apsassin* v. *Canada*,[42] wherein he refused to find a fiduciary obligation with respect to reserve lands prior to surrender. Both these cases will be discussed later in this dissertation.

On the question of scope of the fiduciary duty, Professor Bartlett in a later article in 1989 entitled "The Fiduciary Obligation of the Crown to the Indians"[43] states that the Court in *Guerin* left the question of the accountability of the Crown with respect to unsurrendered reserve land undecided and that the "quirk in *Guerin* is the inexplicable significance Dickson J. accorded to surrender." As will be discussed in the next Chapter, the Supreme Court of Canada has now very satisfactorily resolved this "quirk" in *Sparrow*.

Subsequent to *Guerin* but prior to the *Sparrow* decision, the Supreme Court of Canada also briefly reviewed its decision in *Guerin* in obiter in *Canadian Pacific Ltd.* v. *Paul et*

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[40] D. Paul Emond in his "Case Comment: *Guerin* v. *R.*" (1986) 20 *E.T.R.* 61, states at p. 73 that there is no logical reason why the duty could not be extended to non-land dealings between the government and the native people.

[41] (1991), 42 F.T.R. 241.

[42] [1988] 3 F.C. 20 (F.C.T.D.).

[43] (1989) 53 *Saskatchewan L.J.* 301 at 324.

al.[44] This latter case involved the question of Indian interest in land on a reserve used as a railway right of way. The Court upheld an appeal from a decision of the New Brunswick Court of Appeal[45] which had allowed an appeal from the judgment of Dickson J. in the Court of Queen's Bench[46] granting an injunction to the appellant (Canadian Pacific Ltd.) to restrain the members of the Woodstock Indian Reserve Band from obstructing the railway line. The Supreme Court of Canada stated that in *Guerin* it had "... recognized that the Crown has a fiduciary obligation to the Indians with respect to the lands it holds for them."[47] While this statement is deliberately somewhat general, it does show that the Court may also have favoured in 1988, and as will be confirmed in the next Chapter in the discussion of *Sparrow*, a reconsideration of the scope of the fiduciary duty and its extension to matters beyond the surrender of reserve lands.

5. Standard of the Crown under the Fiduciary Duty - What will be a Breach of this Duty?

As to the breach of the fiduciary duty in *Guerin*, Dickson J. stated:

> ... The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.
>
> While the existence of the fiduciary obligation which the Crown owes to the Indians is dependent on the nature of the surrender process, the standard of conduct which the obligation imports is both more general and more exacting than the terms of any particular surrender. In the present case the relevant aspect of the required standard of conduct is defined by a principle analogous to that which underlies the doctrine of promissory or equitable estoppel. 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....[48]

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[44] (1989) 53 D.L.R. (4th) 487, [1988] 2 S.C.R. 654.

[45] (1984), 2 D.L.R. (4th) 22, 50 N.B.R. (2d) 126, 131 A.P.R. 126, [1984] 3 C.N.L.R 42.

[46] (1981), 34 N.B.R (2d) 382, 85 A.P.R. 382, [1981] 4 C.N.L.R 39.

[47] *Supra*, note 44, 15, at p. 504.

[48] *Supra*, note 1, at p. 344.

While providing only general guidelines as to the standard of the Crown and its officials in dealings with Indians, the concepts of unconscionability and loyalty in fiduciary relationships are well known and should be of assistance in this area.

6. Remedy for Breach of the Fiduciary Duty

A general statement as to the remedy for the breach of the fiduciary duty owed by the Crown to the Band is provided by Dickson J. in *Guerin*.[49] He stated that in obtaining without consultation a much less valuable lease than that promised, the Crown breached the fiduciary obligation it owed to the Band, and it must make good the loss suffered in consequence. As to the precise quantum of damages or compensation, Dickson J. stated that such is to be determined by analogy with the principles of trust law, and agreed with the judge at trial as to his award of damages based on the relevant evidence. In trust law, of course, the measure of damages is not generally affected by considerations of foreseeability or remoteness as in tort, and this aspect will be discussed in more detail in the case of *Frame* v. *Smith*.

While finding the Crown liable for breach of trust, the trial judge considered that the plaintiffs were entitled to be placed in the same position so far as possible as if there had been no breach of the trust, proceeding on the basis that the Band would not have agreed to the terms of the lease signed and that the golf club would not have agreed to a lease on the terms found by the judge to be the terms of the trust. The trial judge used the possibility that the Band could have leased the land at some point on a 99-year leasehold basis on extremely favourable terms. Although unable to set out a precise rationale or approach, mathematical or otherwise, and after examining various models of assessment, he awarded damages of $10,000,000, setting out eight factors and contingencies, which he did not consider exhaustive. These included when the land would have been developed if the lease had not been consummated, the increase

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[49] *Ibid.*

in land values and renewal of the lease.[50]

As for exemplary or punitive damages, these were considered by Collier J. and denied, having found that the actions of officials of Indian Affairs could not be classified as oppressive, arbitrary or high-handed, and they thought that they had the right to negotiate the final terms of the lease. Collier J. had already found against any allegation of dishonesty, moral fraud, or deliberate, malicious concealment. In supplementary reasons given on August 10, 1981, Collier J. also considered entitlement to interest, denying prejudgment but finding in favour of postjudgment interest.[51] The *Guerin* case as to the appropriate remedy for breach of fiduciary duty was recently considered on November 21, 1991 by the Supreme Court of Canada in *Canson Enterprises Ltd and Fealty Enterprises* v. *Boughton & Company et al.*,[52] which I will discuss in Chapter 7.

In addition to damages for breach of fiduciary duty, other remedies, depending on the circumstances, would be available in Federal Court under the *Federal Court Act*[53] in proceedings against the Crown. While the Trial Division has exclusive original jurisdiction under section 18 to grant injunctions, writs of certiorari, prohibition, mandamus, quo warranto, or declaratory relief against federal boards, commissions, or other tribunals, the Court cannot grant an injunction against the Crown.[54] This prohibition on injunctive relief against the Crown cannot be avoided in the opinion of Paul Lordon by seeking such relief against a Minister of the Crown, unless he or she

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[50] [1982] 2 F.C. 385 at 443 (T.D.).

[51] (1982), 127 D.L.R. (3d) 170 at 174.

[52] (1992), 85 D.L.R. (4th) 129 (S.C.C.).

[53] R.S.C. 1985, c. F-7, as amended by *An Act to amend the Federal Court Act, the Crown Liability Act, the Supreme Court Act and other Acts in consequence thereof*, S.C. 1990, c. 8, ss. 13-14, 27.

[54] See Chapter 6 in Paul Lordon's recent text *Crown Law* (Butterworths: Toronto, 1991), as to proceedings by and against the Federal Crown.

has acted beyond the scope of lawful authority.[55]

A declaration of rights between the Crown and a subject could of course be sought as a remedy to avoid a breach of fiduciary duty in advance of proposed government action, such as a military manoeuvre on Aboriginal land authorized by the Minister of National Defence. Interlocutory relief now appears to be available against the Crown in the appropriate circumstances, although such relief was not available at common law.[56] The use of mandamus or a mandatory order against a Minister, for example, for the return of surrendered land, to expropriate land for transfer for use of Aboriginal Peoples, or to perform some other positive action after a breach of fiduciary duty where financial compensation was not considered appropriate and just, appears to generally be unavailable unless the Minister is acting as a "persona designata" or "agent of the legislature," and not as a servant of the Crown.[57]

Cases Involving Fiduciary Duty and Aboriginal Matters After Guerin but pre-Sparrow

1. Kruger et al. v. The Queen[58]

A year after the decision of the Supreme Court of Canada in *Guerin*, the Federal Court of Appeal decided the case of *Kruger et al.* v. *The Queen* on March 18, 1985 and considered the concept of fiduciary duty in the expropriation of reserve land. Inasmuch as *Kruger* concerned the expropriation of reserve land for defence purposes, this case has already been discussed in detail in Chapter 3. In terms of application of the fiduciary duty concept as developed in *Guerin*, the three justices of the Federal Court of Appeal considered that the duty was fully applicable in the circumstances, but only one justice, Heald J.A. found a breach of the duty. Two justices, Urie and Heald JJ.A.,

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[55] *Ibid.*, p. 177.

[56] *Ibid.*, p. 178.

[57] *Ibid.*, pp. 178-9.

[58] (1985) 17 D.L.R. (4th) 591 (F.C.A.).

also found the action to be statute barred due to the limitation period of 20 years for real property under the Statute of Limitations[59] in British Columbia.

2. Re Boyer and The Queen et al.[60]

A year after *Kruger*, in *Re Boyer* the Federal Court of Appeal considered an appeal from the decision of Collier J. who had dismissed an application brought by the chief and other members of the Batchewana Indian Band[61] for a declaration that a lease of reserve land entered into between Her Majesty and an Ontario corporation, purportedly under the authority of the *Indian Act*[62] was void and of no effect. The facts in this case are succinctly stated in the headnote as follows:

> A member of an Indian band, in lawful possession of a piece of land located on the band's reserve, wished to develop it. For this purpose he intended to lease it to a corporation in which he and his wife owned all the shares. The band council gave its permission in principle to the project in 1980. In 1982 the member applied to the Minister of Indian Affairs and Northern Development for a lease of the land to the corporation. The lease was prepared and sent to the band council for comment. The council disputed the Minister's authority to enter the lease without its consent. A second lease was thereupon prepared, with the same results. The Minister then caused the lease to be executed. The plaintiff, the chief of the band, on behalf of himself and all band members, brought an action for a declaration that the lease was void. The action was dismissed at trial.

The appeal was dismissed by the Court of Appeal on March 26, 1986 and separate judgments were written by Marceau J.A. (Heald J.A. concurring) and by MacGuigan J.A. The issue as to the lease of the land with or without the consent of the Band required an analysis of section 58 of the *Indian Act* and the decision of the Supreme Court of Canada in *Guerin* was cited as to the fiduciary duty owed by the Crown to the

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[59] R.S.B.C. 1936, c. 159.

[60] (1986), 26 D.L.R. (4th) 284 (F.C.A.) (hereinafter *Re Boyer*). The judgment of Collier J. of the Trial Division is summarized at 31 A.C.W.S. (2d) 474.

[61] The 1990 DIAND Schedule, *supra*, note 18, recorded that the Batchewana Band had a band membership of 1,206 and a reserve population of 432 on three reserves near Sault Ste Marie, with 2,224.2 hectares (5496 acres) of land.

[62] R.S.C. 1970, c. I-6.

Band. Subsection 58(3) was found to be the operative provision and it provides as follows:

> The Minister may lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered.

Marceau J.A. found that the Minister had power under subsection 58(3) to execute the lease. However, when acting under this authority, the Minister had no fiduciary duty to the Band inasmuch as once Indian land is allotted to an Indian the right to use and benefit from the land is a right of the occupant and not a right of the Band. Marceau J.A. compared this situation to that under subsection 58(1) which provided for the consent of the Band when uncultivated or unused land was to be leased.

MacGuigan J.A. agreed with the disposition of Marceau J.A. and also with his reasons, and added comments of a supplementary nature.

3. Apsassin v. Canada (DIAND)[63]

In *Apsassin*[64] v. *Canada* in 1987, Addy J. in the Federal Court Trial Division was required to apply the fiduciary duty found by the Supreme Court of Canada in *Guerin* to the effect of surrenders in the 1940s of mineral rights and reserve land on Indian Reserve No. 172, set aside under Treaty No. 8 signed in 1900 for the Fort Saint John Band (originally know as the Beaver Band), and also to other alleged acts of negligence and breach of fiduciary duty dating back to 1916. In dismissing all claims of the Band alleged to be acts or omissions which constituted negligence and breaches of the Crown's fiduciary obligations, and giving a strict and narrow

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[63] [1988] 3 F.C. 20 (T.D.).

[64] The plaintiffs in the action included the Doig River Indian Band, the Blueberry River Indian Band and all present descendants of the Beaver Band of Indians. The 1990 DIAND Schedule, *supra*, note 18, recorded that the Doig River Indian Band had a band membership of 172 and a reserve population of 93 on two reserves in northeastern B.C. with 1,347.6 hectares (3330 acres) of land. The Blueberry River Indian Band had a band membership of 211 and a reserve population of 126 on two reserves in northeastern B.C. with 1,148.5 hectares (2838 acres) of land.

interpretation of the application of the fiduciary duty, Addy J. found as follows in a lengthy decision of some 121 pages on November 4, 1987 that:

1. There was no special fiduciary relationship of duty owed by the Crown with respect to reserve lands previous to surrender nor after the surrendered lands had been transferred;
2. When advice is sought or proffered, there exists a duty on the Crown to take reasonable care, and the reasonableness of that duty will vary according to the degree of awareness or sophistication on the part of the Indians;
3. A true fiduciary relationship existed following the surrender of the land in 1945 and the Crown exercised the same high degree of prudence and care as in the case of a true trust;
4. In the transfer of land in 1948 to the Director under the *Veterans' Land Act*,[65] the Crown had not established that a full and fair price had been obtained, thus breaching the fiduciary duty, but this claim was statute barred as having been commenced beyond the ultimate limitation period of 30 years under section 8 of the *Limitations Act*;[66] and
5. In obtaining replacement reserves without mineral rights for the Band in 1948, there was no evidence that the Crown undertook to do so, nor did it have a duty to do so.

These findings show a very strict application by Addy J. of the fiduciary duty concept elaborated in *Guerin*. However, as will be discussed in Chapter 6 in respect of the *Sparrow* case and fiduciary duty as part of the justification test under section 35 of the *Constitution Act, 1982*, the fiduciary duty owed by the Crown to Aboriginal Peoples now appears to have a much wider application than that found by Addy J. in *Apsassin*.

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[65] S.C. 1942-43, c. 33, as amended.

[66] S.B.C. 1975, c. 37.

A Notice of Appeal from the decision of Addy J. was filed by counsel[67] on behalf of the Plaintiffs on November 26, 1987,[68] contending that Addy J. had erred in a number of findings, particularly as to his restricted notion of the Crown's fiduciary duty towards Indians. A cross-appeal was also filed by the Crown on December 7, 1987, alleging that Addy J. had erred in finding that there had been a breach of fiduciary duty with respect to the sale price of the land. After preparation of the Appeal Book and filing of the Appellants' Memorandum of Fact and Law, the appeal was set down on March 20, 1992 for hearing in Vancouver on October 26, 1992.[69] Given that no other land surrender cases have been successfully litigated using the *Guerin* principles, this appeal will be very important to follow.

4. Desjarlais v. The Minister of Indian Affairs and Northern Development[70]

The Sandy Bay Indian Band[71] and other plaintiffs alleged in this application that the Minister was in breach of fiduciary duty for failing to make available public funds for improvements to reserve housing and new construction. An application for funds had been made in one fiscal year but a contract for construction could not be tendered in time. Based on discussions at a meeting held between band and DIAND officials, the band officials understood that the application could be made in the next year as the funds would lapse. On application in the next fiscal year, however, the Band was advised that all funds had been allotted to other Bands.

Strayer J., while dismissing the application on February 2, 1988 on the basis that the

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[67] Counsel for the appellants includes Leslie J. Pinder and Thomas R. Berger of the law firm of Mandell, Pinder in Vancouver.

[68] Federal Court of Appeal Action No. A-1240-87.

[69] The Respondent's Memorandum of Fact and Law had not yet been forwarded to the Ottawa office of the Federal Court of Appeal when I examined the appeal file there on May 8, 1992.

[70] [1988] 2 C.N.L.R. 62 (F.C.T.D.).

[71] The 1990 DIAND Schedule, *supra*, note 18, recorded that the Sandy Bay Band had a band membership of 2,913 and a reserve population of 2,051 on one reserve west of Lake Manitoba, with 6,659.6 hectares (16,455 acres) of land.

plaintiffs had failed to demonstrate that irreparable harm would be caused if the mandatory injunction sought for payment of money into court was not made, considered the concept of fiduciary duty that was recognized in *Guerin*. However, Strayer J. did not have to find that a fiduciary duty existed on the facts and law in *Desjarlais*, inasmuch as this was a complex question which could not be dealt with on an interlocutory motion. He did state that the defendant arguably had the kind of discretionary power in the allocation of funds which gave rise to a fiduciary duty, and also that the defendant had an obligation to act for the benefit of the plaintiffs under section 61(1) of the *Indian Act*, which provides that "Indian moneys shall be expended for the benefit in common of the Indians or Bands for whose use and benefit in common the moneys are received or held, ..." as in the obligation in respect of surrendered land under subsection 18(1) in *Guerin*.

Subsequently on April 19, 1988, the Senior Prothonotary on consent of the parties dismissed the action without costs to either party.

5. Sterritt et al. v. The Queen et al.[72]

This was another *Guerin*-type claim alleging breach of fiduciary duty in respect of the surrender in 1948 by the Gitanmaax Band[73] of reserve land which was later sold as lots. The Crown made an application to strike the statement of claim on the ground that no reasonable cause of action was disclosed inasmuch as the action was statute barred after 30 years under the *Limitation Act*, R.S.B.C. 1979, c. 236. Dubé J. in the Federal Court Trial Division gave judgment on the application on February 17, 1989 and, citing the decision of Addy J. two years earlier in *Apsassin*, struck out the statement of claim as written as being statute barred, but gave permission for a new claim as causes of action could also arise as to individual lots on the surrendered land

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[72] [1989] 3 C.N.L.R. 198 (F.C.T.D.).

[73] The 1990 DIAND Schedule, *supra*, note 18, recorded that the Gitanmaax Band had a band membership of 1,337 and a reserve population of 523 on five reserves near the junction of the Skeena and Bulkley Rivers in British Columbia, with 2,384 hectares (5891 acres) of land.

that were sold by the Crown within the 30-year limitation period. As in the *Apsassin* decision, Dubé J. in the instant case is recognizing potential causes of action based on breach of fiduciary duty subsequent to the actual formal surrender by the Band and also a duty owed to individuals.

Counsel for the Plaintiffs filed a Notice of Appeal on March 16, 1989 and also a Notice of Motion seeking time to extend for filing an appeal if the decision of Dubé was found to be an interlocutory decision and not a final judgment. On April 25, 1989, McBain J. of the Federal Court Trial Division granted time for filing an appeal. The last file action recorded on the Ottawa Federal Court file when reviewed on May 8, 1992 was the filing of a Further Amend Statement of Claim on July 23, 1991, and the sending of this Claim to the Deputy Attorney General of Canada on August 2, 1991.

Other Cases Involving Fiduciary Duty Considered by the Supreme Court of Canada After Guerin but pre-Sparrow

Subsequent to *Guerin* but before *Sparrow*, the Supreme Court of Canada considered the meaning of a fiduciary relationship in *Frame* v. *Smith*,[74] decided on September 17, 1987, and in *LAC Minerals Ltd.* v. *International Corona Resources Ltd.*,[75] decided on August 11, 1989. Inasmuch as both cases have reviewed the general meaning of the concept of fiduciary duty in Canadian law before the seminal decision on section 35 in the *Constitution Act, 1982* in the *Sparrow*[76] case, and fiduciary duty in the context of that section, I will examine both of the former cases.

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[74] [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81.

[75] *Supra*, note 7.

[76] Since the decision of the Supreme Court of Canada in *Sparrow*, fiduciary duty has also been examined by the Court in its decision of November 21, 1991 in *Canson Enterprises Ltd. and Fealty Enterprises et al.* v. *Boughton & Company et al.*, *supra*, note 50, and in *Norberg* v. *Wynrib*, [1992] 2 S.C.R. 226, allowing an appeal from (1990), 66 D.L.R. (4th) 553, 44 B.C.L.R. (2d) 47, [1990] 4 W.W.R. 193 (C.A.).

1. Frame v. Smith

In the case of *Frame* v. *Smith*, the appellant non-custodial parent in a dispute as to access, which had been denied notwithstanding court orders specifying such, alleged that he had incurred considerable expense and suffered severe emotional and psychic distress because of the conduct of the respondent, his former wife, in frustrating access. The appellant sought general damages of $1,000,000, punitive damages of $500,000 and special damages of $25,000 from the respondent flowing from the wrongful interference which he had with his children. Inasmuch as the children at the time of the application were by then over fifteen years of age, and his relationship with them had been completely destroyed by the denial of access by his former wife, the appellant did not seek the enforcement of further access through the Court.

An application to strike his statement of claim as not disclosing a cause of action was made in the Supreme Court of Ontario by the respondent, and was granted by Boland J. The appeal from this decision was dismissed by the Ontario Court of Appeal by Blair J.A. who endorsed on the record that the Court was unable to distinguish the claim from that which was dismissed in *Schrenk* v. *Schrenk*.[77] The majority judgment of Dickson C.J., Beetz, McIntyre, Lamer and La Forest JJ. was delivered by La Forest J., who found that no tort action in relation to denial of access existed separate from the remedies available under the comprehensive scheme provided under the *Family Law Reform Act*.[78] The majority also found that a breach of the statutorily authorized order could not give rise to a fiduciary relationship on which a cause of action could be grounded.

In dissent, Wilson J. agreed with the majority that the facts as pleaded in the statement of claim, if proved, could not give rise to a cause of action based on the torts of conspiracy, intentional infliction of mental suffering, and unlawful interference with

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[77] (1981), 32 O.R. (2d) 122, aff'd (1982), 36 (O.R.) (2d) 480 (C.A.).

[78] R.S.O. 1980, c. 152, as amended.

another's relationship, or on a right at common law of access to children. However, as to a cause of action based on breach of a fiduciary duty, Wilson J. held that the facts did give rise to such an action. After reviewing some of the comments made in the legal literature as to the reluctance in common law to affirm the existence and content of a general fiduciary duty, she stated:

> ... Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have 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 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.
>
> Very little need be said about the first characteristic except this, that 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....
>
> With respect to the second characteristic it is, of course, the fact that the power or discretion may be used to affect the beneficiary in a damaging way that makes the imposition of a fiduciary duty necessary. Indeed, fiduciary duties are frequently imposed on those who are capable of affecting not only the legal interests of the beneficiary but also the beneficiary's vital non-legal or "practical" interests. For example, it is generally conceded that a director is in a fiduciary relationship to the corporation. But the corporation's interest which is protected by the fiduciary duty is not confined to an interest in the property of the corporation but extends to non-legal, practical interests in the financial well-being of the corporation and perhaps to even more intangible practical interests such as the corporation's public image and reputation. Another example is found in cases of undue influence where a fiduciary uses a power over the beneficiary to obtain money at the expense of the beneficiary. The beneficiary's interest in such a case is a pecuniary interest....
>
> The third characteristic of relationships in which a fiduciary duty has been imposed is the element of vulnerability. This vulnerability arises from the inability

> of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power. Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm's length: see, for example, *Jirna Ltd.* v. *Mister Donut of Canada Ltd.* (1971), 22 D.L.R. (3d) 639 (Ont. C.A.), aff'd [1975] 1 S.C.R. 2. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, i.e., any "vulnerability" could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely damages, are adequate in such a case.[79]

Wilson J. then referred to the three-fold formulation of the principle underlying fiduciary obligation recently adopted by the Australian High Court in deciding whether a sole distributor of a product has fiduciary obligations, stating:

> ... In *Hospital Products Ltd.* v. *United States Surgical Corp.* (1984), 55 A.L.R. 417, Gibbs C.J. at p. 432, considered the following test "not inappropriate in the circumstances":
>
> > ... there were two matters of importance in deciding when the court will recognize the existence of the relevant fiduciary duty. First, if one person is obliged, or undertakes, to act in relation to a particular matter in the interests of another and is entrusted with the power to affect those interests in a legal or practical sense, the situation is ... analogous to a trust. Secondly, ... the reason for the principle lies in the special vulnerability of those whose interests are entrusted to the power of another to the abuse of that power.
>
> Mason J. in the same case stated (at p. 454) that the critical feature in these relationships is that:
>
> > ... the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by

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[79] *Supra*, note 74, at pp. 136-8.

the fiduciary of his position.[80]

A similar formulation of this principle of fiduciary duty in the Canadian case of *H. L. Misener and Son Ltd.* v. *Misener*[81] was then considered by Wilson J., quoting from the decision of Macdonald J.A. at p. 440 in *Misener*:

> The reason such persons [directors] are subjected to the fiduciary relationship apparently is because they have a leeway for the exercise of discretion in dealing with third parties which can affect the legal position of their principals....

Wilson J. then applied the above principles of the fiduciary duty to the relationship between the custodial parent and the non-custodial parent and found that the three underlying characteristics of relationships in which fiduciary duties were imposed were present in the relationship under review, stating in part:

> ... The custodial parent has been placed as a result of the court's order in a position of power and authority over the children with the potential to prejudicially affect and indeed utterly destroy their relationship with their non-custodial parent through improper exercise of the power. There can be no doubt also that the requisite vulnerability is present and that in practical terms there is little that the non-custodial parent can do to restrain the custodial parent's improper exercise of authority or to obtain redress for it....[82]

As to the specific non-legal and substantial interest protected by a fiduciary duty in the custody-access situation, Wilson J. stated as follows:

> ... practical interests are protected by the imposition of fiduciary duties in appropriate cases. It cannot be denied that the non-custodial parent's interest in his or her child is as worthy of protection as some interests commonly protected by a fiduciary duty. For example, just as a corporation has a substantial interest in its relationship to corporate opportunities and customers that is worthy of protection ... it can be said that a non-custodial parent has a substantial interest in his or her relationship with his or her child that is worthy of protection. However, one salient distinction between the non-custodial parent-child relationship and the corporation-customer relationship is that the former involves

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[80] *Ibid.*, p. 138.

[81] (1977), 77 D.L.R. (3d) 428 (N.S.C.A.).

[82] *Supra*, note 74, at p. 140.

> a substantial non-economic interest of the parent while the latter normally involves a substantial economic interest of the corporation. But I believe that this distinction should not be determinative. The non-custodial parent's interest in the relationship with his or her child is without doubt of tremendous importance to him or her. To deny relief because of the nature of the interest involved, to afford protection to material interests but not to human and personal interests would, it seems to me, be arbitrary in the extreme. In contract law equity recognizes interests beyond the purely economic when, instead of awarding damages in the market value of real estate against a vendor who has wrongfully refused to close, it grants specific performance. Other non-economic interests should also be capable of protection in equity through the imposition of a fiduciary duty. I would hold, therefore, that the appellant's interest in a continuing relationship with his or her child is capable of protection by the imposition of such a duty.[83]

Wilson J. then examined the question of extending the fiduciary principle within the field of family law, and stated in part that when considering breaches of equitable duty and awarding equitable remedies the court has a wide scope for the exercise of discretion which does not exist in respect of common law causes of action. In the context of breach of fiduciary duty this discretion would also allow the court to deny relief to an aggrieved party or grant relief on certain terms if that party's conduct disabled him or her from full relief. As for such relief being denied or ousted by the availability of specific statutory remedies, Wilson J. considered at p. 147 that "it would take clear and compelling statutory language to oust equity's broad interest jurisdiction to give equitable relief in appropriate circumstances." The cause of action for breach of fiduciary duty was considered by Wilson J. to be founded by reference to policies reflected in statute and standards fixed by statute, and not directly upon the breach of a statute.[84]

In considering the remedies available for breach of fiduciary duty in the custody-access

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[83] *Ibid.*, pp. 142-3.

[84] While Wilson J. is not specific as to which statutes would be relevant in founding the fiduciary duty arising from the access dispute, the applicable statutes in the dispute were the *Family Law Reform Act*, R.S.O. 1980, c. 152 and the *Children's Law Reform Act*, R.S.O. 1980, c. 68.

situation, the comments of Wilson J. are also salient in the general consideration of the principle of fiduciary duty. She stated that the imposition of a constructive trust and the accounting of profits are the normal available remedies, but that neither remedy would be applicable here.[85] Instead, Wilson J. advocated equitable compensation as an available remedy to restore to the plaintiff what has been lost through the defendant's breach or the value of what has been lost. In the case at hand, the appellant would be able to recover not only his out-of-pocket expenses incurred throughout the campaign to destroy his relationship with his children but also a realistic sum for his pain and suffering which in this case would include compensation for the severe depression he suffered as a result of the respondents' conduct. In concluding, Wilson J. found that the appeal should be allowed and the action proceed to trial.

2. LAC Minerals Ltd. v. International Corona Resources Ltd.[86]

In *LAC Minerals*, the Supreme Court of Canada on August 11, 1989 dismissed an appeal by the appellant and defendant, LAC Minerals Ltd. (hereinafter LAC), from a judgment on October 2, 1987 of the Ontario Court of Appeal,[87] which dismissed an appeal from a judgment at trial[88] in the Ontario Supreme Court of Holland J. in favour of the respondent and plaintiff, International Corona Resources Ltd. (hereinafter Corona). Corona owned mining rights on certain land in northern Ontario and was approached by LAC with the view to entering possibly either a joint venture or partnership. Corona disclosed the results of its exploratory drilling to LAC and it was clear that an adjacent property, the Williams property, would likely contain valuable mineral bearing deposits. Corona sought to acquire rights to the Williams property, but was unsuccessful. LAC, however, did succeed in acquiring rights, and developed the gold mine on its own account.

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[85] *Supra*, note 74, at pp. 148-9.

[86] *Supra*, note 7.

[87] (1987), 44 D.L.R. (4th) 592, (1987) 62 O.R. (2d) 1.

[88] (1986), 25 D.L.R. (4th) 504, 53 O.R. (2d) 737.

At trial, Holland J. concluded that the two parties, LAC and Corona, had not concluded a binding contract in a joint mining venture but found LAC liable under two other possible heads of liability, namely breach of confidence and breach of fiduciary duty. Holland J. decided that the appropriate remedy for the breach of fiduciary duty was the return of the disputed property to Corona but allowed LAC's claim for a lien for the cost of improvements, and the amounts paid for the property excluding royalty payments. The actual amount spent by LAC on developing the property was discounted to take into account the fact that Corona, if it had not been deprived of the Williams property, would have expended less to develop the property. Both parties were given the option of undertaking a reference to determine the amount LAC had spent to develop the Williams property. Upon payment by Corona to LAC of these amounts, LAC was ordered to transfer the property to Corona. A reference was also ordered to determine the amount of the profits obtained by LAC from the Williams property and these profits were to be paid to Corona with interest. Damages were assessed on the principles applicable to breach of fiduciary duty in the event that, on appeal, a court should decide that damages were the appropriate remedy.

The appeal by LAC to the Court of Appeal was dismissed principally on the ground that, in view of the industry practice, there was a fiduciary duty between Corona and LAC, of which the latter was in breach.

On further appeal to the Supreme Court of Canada, dismissing the appeal of the defendant and the cross-appeal of the plaintiff, a majority of the Court of five found that the defendant LAC was in breach of a duty not to use the confidential information conveyed by Corona, and that the appropriate remedy was not damages but the imposition of a constructive trust upon LAC. Four judgments were delivered in the five person court, with McIntyre J. concurring in Sopinka's opinion. All five members of the Court agreed that LAC had improperly utilized information obtained from Corona in deciding to acquire the Williams property for its own exclusive benefit and was subject to a court remedy. Three of the justices, Sopinka J., with McIntyre J. concurring, and

Lamer J., found that there was no fiduciary relationship between the parties; La Forest and Wilson JJ. dissented on the issue of the establishment of a fiduciary duty, finding that there was such a relationship with accompanying obligation not to misuse the confidential information. As to the appropriate remedy in the circumstances, Sopinka J., with McIntyre J. concurring, dissenting in part, found that the proper remedy was damages and would have allowed LAC to keep the mine. The other three members agreed on the question of remedy that the mine should be restored to Corona with reimbursement for certain expenses incurred by LAC.

While the commercial relationship between LAC and Corona is a matter of private law, quite unlike that which has been found in *Guerin* and the other aboriginal cases in this Chapter, the comments of the Court in this case provide additional guidance on when a fiduciary relationship will be found to exist.

In finding that both the trial judge and the Court of Appeal erred in finding that a fiduciary relationship existed between LAC and Corona, Sopinka J. does not, however, set out a theory as to the nature of a fiduciary relationship or the principles contained in such a theory. He does refer with approval to the comments of Wilson J. in *Frame* v. *Smith* as to the following three general characteristics of relationships in which fiduciary obligations have been imposed:

1. The fiduciary has an **obligation** to exercise some discretion or power;

2. The fiduciary can **unilaterally exercise** that power or discretion so as to affect the beneficiary's legal or practical interests; and

3. The beneficiary is peculiarly **vulnerable** to or at the mercy of the fiduciary holding the discretion or power (emphasis added).[89]

Sopinka J. added that it was possible for a fiduciary relationship to be found even though not all of these characteristics were present, and also that the presence of

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[89] *Supra*, note 7, at pp. 62-3.

these ingredients would not invariably identify the existence of a fiduciary relationship.[90] He considered the one feature, however, which was indispensable to the existence of the relationship, and which was most relevant in this case, to be that of dependency or vulnerability, citing with approval the statement of Dawson J. in *Hospital Products Ltd.* v. *U.S. Surgical Corp.*[91] that:

> There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other.[92]

To this statement, however, Sopinka J. added the following two caveats:

> ... First, 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....
>
> Second, applying the same principle, the fact that confidential information is obtained and misused cannot itself create a fiduciary obligation. No doubt one of the possible incidents of a fiduciary relationship is the exchange of confidential information and restrictions on its use. Where, however, the essence of the complaint is misuse of confidential information, the appropriate cause of action in favour of the party aggrieved is breach of confidence and not breach of fiduciary duty.[93]

In finding that the lower courts erred on the issue of a fiduciary relationship between LAC and Corona, Sopinka J. stated at p. 64 that insufficient weight was given to the essential ingredient of dependency or vulnerability, and too much weight to other factors such as that:

> (a) the state of the negotiations attracted the principle in *United Dominions Corporation Ltd.* v. *Brian Pty. Ltd. and Others*;[94]

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[90] *Ibid.*, p. 63.

[91] (1984), 55 A.L.R. 417 at 488.

[92] *Supra*, note 7, p. 63.

[93] *Ibid.*, pp. 63-4.

[94] (1985), 59 A.L.J.R. 676. In the *United Dominions* case, three principal parties were involved in a joint purchase in which land was purchased with money provided by the joint venture and was to be developed for a hotel and shopping centre. The percentage

(b) LAC had sought out Corona;

(c) the geochemical program constituted an embarkation on a joint venture;

(d) Corona had divulged confidential information to LAC;

(e) a practice in the mining industry supported the existence of a fiduciary relationship; and

(f) the parties were negotiating towards a common object.

Sopinka J. then proceeded to consider the application of each of the above factors to the situation in *LAC Minerals*. However, in matters of fiduciary relationship with Aboriginal Peoples under the *Indian Act* and treaties, most of the above factors would generally have little or no application, with the essential concern still remaining the dependency or vulnerability of Aboriginal Peoples in treatment and dealings with the Crown and its servants. In the current and anticipated negotiations of self-government agreements (SGAs) between the various groups of Aboriginal Peoples and provincial and federal governments, it would be unlikely that some or perhaps even any of the above factors would have practical application.

After his consideration of the above six factors, Sopinka J. concluded at p. 68 that the vital ingredient of vulnerability was lacking in the relationship between LAC and Corona, and could not be replaced by any of the six factors. On this issue he referred to the Court of Appeal comments at pp. 640-41 that implied "a kind of physical or psychological dependency here which attracted fiduciary duty," such as would be found between a parent and child, or priest and penitent. Sopinka J. then stated that

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participation of each joint venturer had been set and substantial amounts of money had been contributed by the parties. The enforcement of a collateralisation clause in the mortgage held by one party resulted in the loss of the investment of one of the other two parties. The High Court of Australia found in the circumstances that the parties had embarked on a joint venture, which the Court found to be a partnership, having clearly passed beyond the stage of mere negotiations even before a draft agreement was signed. Sopinka J. found that the parties in *LAC*, however, had not advanced beyond the stage of negotiations for the principle in *United Dominions* to be applicable.

such dependency did not exist in *LAC Minerals*, and added:

> ... While it is perhaps possible to have a dependency of this sort between corporations, that cannot be so when, as here, we are dealing with experienced mining promoters who have ready access to geologists, engineers and lawyers. The fact that they were anxious to make a deal with a senior mining company surely cannot attract the special protection of equity. If confidential information was disclosed and misused, there is a remedy which falls short of classifying the relationship as fiduciary....[95]

Sopinka J. then proceeds in his judgment to consider the alternate action for breach of confidence.

In the context of the ongoing and future negotiations of SGAs, involving lawyers and other staff of the Crown on one hand, and lawyers and other staff of Aboriginal Peoples, on a national, regional, provincial, First Nation, or other basis, or even with an individual *Indian Act* Band, who could also be anxious as was Corona to make a deal, would or could a fiduciary relationship arise under the formulation given by Sopinka J. to which equity would give protection? The answer to this question is of course a definite "yes." However, the incidence of application of the fiduciary duty may well be much less in any such future relations based on SGAs if the vulnerability of the rights at the hands of the Crown are diminished. While that is so, the continued relevance of treaty obligations and Crown discretion under the *Indian Act*, will provide ample opportunity for the consideration of fiduciary duty.

Unlike Sopinka J., and also Lamer and McIntyre JJ., Wilson J. in a brief judgment agreed with the lower courts that a fiduciary relationship did exist between the parties, stating in part:

> It is my view that, while no ongoing fiduciary relationship arose between the parties by virtue only of their arm's length negotiations towards a mutually beneficial commercial contract for the development of the mine, a fiduciary duty arose in LAC when Corona made available to LAC its confidential information concerning the Williams property, thereby placing itself in a position of

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[95] *Supra*, note 7, at p. 68.

> vulnerability to LAC's misuse of that information. At that point LAC came under a duty not to use that information for its own exclusive benefit. LAC breached that fiduciary duty by acquiring the Williams property for itself.
>
> It is, in other words, my view of the law that there are certain relationships which are almost *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. On the other hand, there are relationships which are not in their essence fiduciary, such as the relationship brought into being by the parties in the present case by virtue of their arm's length negotiations towards a joint venture agreement, but this does not preclude a fiduciary duty from arising out of specific conduct engaged in by them or either of them within the confines of the relationship. This, in my view, is what happened here when Corona disclosed to LAC confidential information concerning the Williams property. LAC became at that point subject to a fiduciary duty with respect to that information not to use it for its own use or benefit.[96]

Accordingly, the difference between the judgments of Sopinka and Wilson on the fundamental issue of existence of a fiduciary relationship appears to be based on their assessment of the dependency or vulnerability of Corona that was created in the discussion which was to lead to a joint mining venture.

As to a breach of a duty not to use confidential information, Wilson J. also agreed with the lower courts that such a breach had occurred and dismissed the appeal. Given the two causes of action, one in common law for using confidential information concerning the Williams property, and one in equity based on the existence of a fiduciary relationship, Wilson J. stated that the Court should consider which would provide the more appropriate remedy to the innocent party and give that party the benefit of that remedy, stating in part:

> ... Since the result of LAC's breach of confidence or breach of fiduciary duty was its unjust enrichment through the acquisition of the Williams property at Corona's expense, it seems to me that the only sure way in which Corona can be fully compensated for the breach in this case is by the imposition of a constructive trust on LAC in favour of Corona with respect to the property. Full compensation may or may not be achieved through an award of common law damages depending upon the accuracy of valuation techniques. It can most

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[96] *Ibid.*, p. 16.

> surely be achieved in this case through the award of an in rem remedy. I would therefore award such a remedy. The imposition of a constructive trust also ensures, of course, that the wrongdoer does not benefit from his wrongdoing, an important consideration in equity which may not be achieved by a damage award.
>
> It is, however, my view that this is not a case in which the available remedies are different. I believe that the remedy of constructive trust is available for breach of confidence as well as for breach of fiduciary duty. The distinction between the two causes of action as they arise on the facts of this case is a very fine one. Inherent in both causes of action are concepts of good conscience and vulnerability. It would be strange indeed if the law accorded them widely disparate remedies....
>
> I believe that where the consequence of the breach of either duty is the acquisition by the wrongdoer of property which rightfully belongs to the plaintiff or, as in this case, ought to belong to the plaintiff if no agreement is reached between the negotiating parties, then the *in rem* remedy is appropriate to either cause of action.[97]

While the occurrence of a breach of fiduciary duty and a breach of use of confidential information in the same situation involving Aboriginal Peoples and the federal or provincial Crowns may well be exceptional, the comments of Wilson J. as to the available remedy for breach of a fiduciary relationship are still salient.

La Forest J. also rendered a lengthy judgment in *LAC Minerals* in which he found, as did Wilson J., that a fiduciary relationship had existed between the parties and that LAC had been obligated not to misuse the confidential information conveyed by Corona. La Forest J. had had the opportunity to read the reasons of Sopinka J., and the former stated that, while he was content to accept the latter's general statement of facts as well as the legislative history of the case, he took a very different view of a number of salient facts and the interpretation that could properly be put upon them.[98]

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[97] *Ibid.*, p. 17-18.

[98] *Ibid.*, p. 19.

La Forest J. proceeded to find that the lower courts had correctly applied the test for breach of confidential information, and then addressed the question of breach of fiduciary relationship and remedies available under this cause of action in addition to those for misuse of confidential information. He outlined the following three distinct uses of the term fiduciary, of which he considered the second to be most apt in the case of LAC Minerals, and the third to be a misuse of the term:

> 1) As used by Wilson J. in *Frame* v. *Smith* where there was a certain class of relationship, custodial and non-custodial parents, which was a category, analogous to directors and corporations, solicitors and clients, trustees and beneficiaries, and agents and principals, and the existence of such a relationship gave rise to fiduciary obligations. While the presumption that a fiduciary obligation will be owed in the context of such a relationship was not irrebuttable, a strong presumption would exist that such an obligation was present. However, not every legal claim arising out of a relationship with fiduciary incidents would give rise to a claim for breach of fiduciary duty.
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> 2) The imposition of fiduciary obligations was not limited to those relationships in which a presumption of such an obligation arose. Rather, a fiduciary obligation could arise as a matter of fact out of the specific circumstances of a relationship. As such it could arise between parties in a relationship in which fiduciary obligations would not normally be expected.
>
> 3) The resort by courts 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. In this sense, the label fiduciary would impose no obligations, but rather would be instrumental or facilitative in achieving what appeared to be the appropriate result.[99]

La Forest J. commented that given that the first class was not in issue in the case, and that he was not prepared to hold that because a constructive trust was the proper remedy that a fiduciary label should attach, only the second class remained for immediate discussion. He then considered in detail the possible existence of a fiduciary relationship between LAC and Corona, notwithstanding they were at arm's length in a commercial transaction, under the three headings of trust and confidence, industry practice, and vulnerability. However, the essential issue addressed by La

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[99] *Ibid.*, pp. 28-30.

Forest J. under the heading of vulnerability in *LAC Minerals* was that of showing how Corona was vulnerable to LAC, which he considered was beyond argument, notwithstanding they were both commercial parties. It is interesting to note that La Forest J. also specifically distinguished his judgment on this issue of vulnerability by stating that Sopinka J., who found no fiduciary relationship to exist, had concluded that the vulnerability or its absence would conclude the question of fiduciary obligation.[100]

In which of the three headings given above by La Forest J. would the Aboriginal-Crown fiduciary obligation fall, or could the obligation fall in any of the three categories depending on the facts? The judgment of Dickson J. (as he then was) in *Guerin* would suggest that the Crown-Aboriginal fiduciary obligation is substantive, and is not simply invoked to provide an appropriate remedy as under the third heading. While that is so, dicta in his judgment in carefully relating the origin of the fiduciary duty in part to the surrender of the reserve land would suggest that the duty would be under heading two and not one, i.e., would arise as a matter of fact and would not normally be expected in the relationship. As will be discussed in the next Chapter when the concept of fiduciary duty in respect of section 35 of the *Constitution Act, 1982* case is reviewed in *Sparrow*, it may well be that the relationship can now be categorized under the first heading.

Professor Donovan W.M. Waters in his article "LAC Minerals Ltd. v. International Corona Resources Ltd"[101] in commenting on the various judgments in the case states that there appears to be a good deal of difference of opinions but that this has resulted not from differences in doctrine concerning fiduciary relationship but "from differences of interpretations of the character and significance of the facts of the case." Professor Waters also comments on whether or not "vulnerability" is a genuine third element necessary for a fiduciary relationship to exist, or if it is just a consequence of the first

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[100] *Ibid.*, p. 40.

[101] (1990) 69 *Can. Bar Rev.* 457 at 473.

two elements of power holding and reliance, if a person is in an existing fiduciary relationship but in new circumstances.[102] He concludes based on the comments of La Forest J. in *LAC Minerals* that vulnerability is "a third element, but in the sense of being a consequence of power or discretion in one party, and the unavoidable reliance of the other party upon the integrity of the exercise of that power or discretion."[103]

Professor Robert Flannigan also discusses the issue of vulnerability as an element of a fiduciary relationship.[104] After discussing the interpretation of the vulnerability criterion as involving a notion of "pre-existing or situational weakness or lack of power," as opposed to one party simply being "vulnerable to abuse" because of the nature of the relationship and not any specific disability of the party (a mischief analysis), he states that Sopinka J. in *Lac Minerals* relies on the former, and Wilson J. on the latter.[105] Professor Flannigan is critical of the reliance that Sopinka J. apparently places upon the narrow view of "vulnerable to abuse" as an indispensable ingredient of the fiduciary relationship. Professor Flannigan considers that what is inherent in the fiduciary relationship is that one party places "reliance upon the other" and this has the effect of putting that party in a position of disadvantage or vulnerability.

The Fiduciary Duty Concept and Aboriginal Peoples in other Countries

1. Australia

The issue of fiduciary duty owed to Aboriginal Peoples in Australia has been raised recently in the Ranger uranium action dealing with the authority of the Commonwealth or Federal Government to grant the right to commercial interests to carry on mining operations on lands in the Ranger Project Area. The Project Area was part of the

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[102] *Ibid.*, p. 475.

[103] *Ibid.*, p. 476.

[104] "Fiduciary Obligation in the Supreme Court." (1990) 54 *Sask L. Rev.* 45.

[105] *Ibid.*, pp. 62-5.

Ranger land in the Northern Territory in which antecedent native title[106] had been recognized and given effect as "Aboriginal land" by the *Aboriginal Land Rights (Northern Territory) Act (Cth)*. Under that *Act* the power of the Commonwealth to authorize mining under the *Atomic Energy Act 1953 (Cth)* was restricted and subject to consent of the Aboriginal Land Council or a proclamation by the Governor-General that national interests required entry on the land. An agreement between the Land Council and the Commonwealth for entry on the land to conduct mining operations with payments to be made to the Land Council was signed in 1979.

An action was commenced by the plaintiff Land Council seeking relief in respect of the agreement and a number of interlocutory judgments have been given. The defendants in the action were the Commonwealth and also Energy Resources of Australia Ltd., which had been assigned the interests of the original joint venturers authorized by the Commonwealth to carry on uranium mining. After proceedings were commenced by the defendants to strike the Statement of Claim and also by the plaintiff Council to amend, a case was stated in which one of the questions asked was whether the statement of claim disclosed a cause of action for breach of fiduciary duty against the Commonwealth. The High Court of Australia in *Northern Land Council* v. *Commonwealth of Australia and Another*[107] reviewed Australian case law and also *Guerin* v. *The Queen*[108] in considering this and other questions to be resolved before the case could proceed to trial. The Court found on October 21, 1987 that the Commonwealth could come under a fiduciary duty in negotiations with the aboriginal Land Council.

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[106] In the leading case on aboriginal title in Australia, *Milirrpum* v. *Nabalco Pty Ltd* (1971), 17 F.L.R. 141, the Supreme Court of the Northern Territory in a lengthy judgment found that the doctrine of communal native title was not part of the law of any part of Australia and that such a doctrine had no place in a settled colony except under express statutory provisions (finding summarized in headnote at p. 143). As will be discussed, *infra*, these conclusions have now been overruled by the High Court of Australia.

[107] (1987), 75 A.L.R. 210 (H.C. of Australia).

[108] *Supra*, note 1.

In *Mabo et al.* v. *The State of Queensland*,[109] a very recent leading decision of the High Court of Australia on native and aboriginal title, the application of the *terra nullius* concept to settlement of aboriginal lands in Australia, and the principle of vesting of full legal and beneficial title of all lands in the Crown unaffected by any aboriginal claim, were both rejected by the majority of the Court. In addition to claims by the Meriam people of the Murray Islands for unextinguished native title (that title which existed before, and survived annexation of the Murray Islands), aboriginal title (that title which arose under common law by virtue of the annexation), and other customary rights, the concept of fiduciary duty was also raised by the plaintiffs.

Brennan J. (with Mason C.J. and McHugh J. concurring) briefly mentioned fiduciary duty, stating that there may be such a duty on the Crown to exercise its discretionary power to grant a tenure in land to the indigenous title holders if native title had been surrendered to the Crown in expectation of such a grant.[110] However, Brennan J. found that the existence of the duty or its extent need not be considered in the case of the Meriam people as they had not surrendered the native title to their islands. This would possibly appear to be restricting the existence of fiduciary duty by the Crown only to *Guerin*-type surrenders of land and not to the whole range of aboriginal and treaty rights possessed by a given group of Aboriginal Peoples that may be affected by Crown activities.

However, Toohey J., one of the other justices in the majority, provided an extensive review of American and Canadian case law and concluded that the relationship

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[109] (1992), 107 A.L.R. 1, decided on June 3, 1992 by the High Court of Australia. The seven-member Court consisted of Mason C.J. and Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. Six members of the Court (Dawson J. dissenting) found that the Murray Islanders held native title which was recognized by the common law of Australia and that this title had not been extinguished. Three of six of the majority also found that, in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by inconsistent grant by the Crown gives rise to a claim for compensation.

[110] *Ibid.*, p. 43-44.

between the Crown and the Meriam people of the Murray Islands gave rise to a fiduciary duty and that the nature of the obligation was that of a constructive trust.[111] In commenting on the decision in *Guerin* and the finding by Dickson J. that the fiduciary obligation owed to the Musqueam Band depended on the particular statutory scheme, Toohey J. disagreed and stated that "the relevant elements of that scheme appear to be that the Indians' interest in land was made inalienable except by surrender to the Crown, arguably an attribute of traditional title independent of statute in any case."[112]

Dawson J., who dissented on the issue of the existence of native or aboriginal title, also provided an extensive review of American and Canadian case law. After reviewing *Guerin*, he stated:

> The existence of some sort of fiduciary or trust obligation upon the Crown in dealing with surrendered reserve land which is identified in *Guerin* is similar to a manifestation of the fiduciary relationship said to generally exist between the Indian tribes and the United States government. That is that land in the United States, whether held under unrecognized or recognized Indian title, cannot be disposed of without the consent of Congress; in other words, analogously to the position of the Crown in Canada, the United States government has assumed a responsibility to protect the Indian tribes in their land transactions.[113]

However, Dawson J. found that a fiduciary duty or trust obligation of the kind referred to in *Guerin* could not exist because aboriginal or native title did not survive the annexation of the Murray Islands as Crown lands.[114]

Fiduciary duty is not discussed in the judgment of the other two justices in the majority, Deane and Gaudron JJ., except to the extent that interference with native title was said to "attract the protection of equitable remedies" and that in some circumstances "the appropriate form of relief is the imposition of a remedial constructive trust."[115]

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[111] *Ibid.*, pp. 156-160.

[112] *Ibid.*, p. 158.

[113] *Ibid.*, p. 129.

[114] *Ibid.*

[115] *Ibid.*, p. 85.

2. United States

The decision of the United States Supreme Court in 1942 in *Seminole Nation* v. *United States*[116] delivered by Murphy J. is generally cited as the authority for the application of fiduciary principles to the American federal government in the administration of Indian affairs.[117] The Court in considering the responsibility of the government stated that:

> .... Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards....[118]

Aboriginal land rights and governmental obligations, however, still remain somewhat unsettled in American law. For example, in the leading case of *United States* v. *Mitchell* (*Mitchell I*),[119] allegations of mismanagement by the federal government of forest resources on Indian land and trust funds derived from these resources were made by the plaintiff tribe. The Supreme Court of the United States held in 1980 that only a very limited trust was created under the statute that allotted the land and timber to the tribe, the *Allotment Act*,[120] and that the *Act* "does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted land."[121] Later, however in 1983, in *United States* v. *Mitchell* (*Mitchell II*),[122] again dealing with forest management, the Supreme Court held that "a fiduciary duty necessarily arises when the government assumes such elaborate control over forests and property belonging to Indians." As stated by Ms. Donohue in reviewing obligations

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[116] (1942), 316 U.S. 286.

[117] This is the view expressed by David H. Getches and Charles F. Wilkinson in their text *Cases and Materials on Federal Indian Law*, 2nd ed (West Publishing Company: St. Paul, Minnesota, 1986) at p. 219).

[118] *Supra*, note 116, at p. 297.

[119] (1980), 445 U.S. 539 at 542.

[120] 25 U.S.C. *ff* 331 *et seq.* (1970).

[121] *Supra*, note 118, at p. 542.

[122] (1983), 463 U.S. 206 at 225.

of the American government, a general fiduciary duty to American tribes will be found:

> .... if there is evidence of *any* legislative authority for Interior Department supervision or control over Indian property or money *and* if the Secretary does exercise even pervasive authority.... [italics added by Ms Donohue] Even broadly worded statutes will suffice if actual management has taken place. In addition, once the relationship has been established, a determination of breach of trust duties may be found in specific statutes, liberal construction of indefinite statutes or general common law principles of trust. One question remains: whether a trust relationship will be found in the absence of a statute.[123]

Conclusion

Four of the five post-*Guerin* and pre-*Sparrow* aboriginal cases of *Boyer*, *Apsassin*, *Desjarlais* and *Sterritt* discussed above, while not concerned with national defence matters, did consider the Crown-Aboriginal fiduciary relationship. The fifth case, *Kruger*, did concern national defence and was discussed as such in Chapter 3. In two actions, *Kruger* and *Apsassin*, a fiduciary duty was found to be present on the facts, but the majority in the former case found no breach of the duty, and in the latter there was a breach but the action was found to be statute barred. The only other action considered on its merits was *Boyer*, in which no fiduciary duty was found owed to the Band as the lease was sought by individual band members, and not by the Band. The other two actions, *Desjarlais* and *Sterritt*, were interlocutory proceedings and, while fiduciary duty was considered briefly in both, no findings of the application of the duty were made.

The two post-Guerin and non-aboriginal Supreme Court of Canada decisions of *Frame* and *LAC Minerals*, that have been made before *Sparrow*, have considered fiduciary relationship in the context of family law and commercial law respectively. While that is so, and while the Court did not reach a unanimous decision on the question of the presence of a fiduciary obligation on the facts in either case, the judgments have further developed the common law of the fiduciary duty concept which will have

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[123] *Supra*, note 39, at p. 380.

application in the Aboriginal-Crown relationship, including aspects of the federal government's responsibility for national defence. Specifically, as noted by Professor Waters, the element of vulnerability appears based on *LAC Minerals* to be an essential ingredient of the fiduciary relationship, and therefore its presence in any given Crown-Aboriginal factual situation must be ascertained, along with the other two factors, for the establishment of a fiduciary duty by the Crown.

Chapter 6 - The Sparrow Decision and Tests for National Defence Infringement of Rights

Introduction

As noted in previous chapters, *R.* v. *Sparrow*[1] was the first case in which section 35 of the *Constitution Act, 1982,*[2] and the constitutional protection of aboriginal and treaty rights under that section, were considered in detail by the Supreme Court of Canada.[3] In setting out a justification test under section 35 for the infringement of existing aboriginal and treaty rights, the Court built upon the concept of fiduciary duty of the Crown towards Aboriginal Peoples as recognized in the case of *Guerin* v. *The Queen*[4] and as discussed previously in detail in Chapter 5.

In this Chapter, I will first discuss the *Sparrow* case in which section 35 and the fiduciary duty concept were applied to the justification of regulations that infringed the aboriginal right of fishing for food and ceremonial purposes. In considering the fiduciary duty concept in *Sparrow*, I will also discuss the Court's treatment of the concept as compared to that in the *Guerin* case, showing that the fiduciary duty in *Sparrow* is more public law-like in character, as opposed to the duty recognized in *Guerin*, which was analogous to the normal private law or commercial type fiduciary duty. Then I will consider section 35 and the fiduciary duty concept in respect of national defence policy and consequent executive action, which do not directly regulate

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1 70 D.L.R. (4th) 385, [1990] 1 S.C.R. 1075, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, [1990] 3 C.N.L.R. 160, 56 C.C.C. (3d) 263, 111 N.R. 241.

2 Enacted by the *Canada Act 1982 (U.K.)* c. 11, Schedule B.

3 One week earlier on May 24, 1990, the Supreme Court of Canada decided *R.* v. *Sioui* (1990), 70 D.L.R.(4th) 427, 109 N.R. 22, [1990] 1 S.C.R. 1025, which included a brief mention at p. 433 (D.L.R.) that the accuseds had abandoned all arguments at the Quebec Court of Appeal based, *inter alia*, on section 35. Inasmuch as the offending legislation was provincial in origin, section 88 of the *Indian Act*, R.S.C. 1985, c. I-5, made specific provisions in such legislation inapplicable to the accuseds in the face of rights guaranteed in a treaty made with the Hurons by Brigadier General James Murray in 1760. Given the finding of a valid treaty and contradictory terms in a provincial statute, resort to section 35 was not required for resolution of the issues in the *Sioui* case.

4 (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, 20 E.T.R. 6, 36 R.P.R. 1, 55 N.R. 161.

aboriginal rights such as the right to fish for food as in *Sparrow*, but may have significant impact on aboriginal and treaty rights. Such action, for example, would include the authorization of military manoeuvres pursuant to section 257 of the *National Defence Act* on the land of Aboriginal Peoples as discussed in Chapter 4. In considering national defence action that infringes aboriginal and treaty rights, I will identify and analyze those legal authorities for national defence activities and consider the specific justification for infringement given the authorities.

Lower Court History of the Sparrow Case

Following a period of six years after the fiduciary duty was first considered in the context of the surrender of Indian reserve land in *Guerin* in 1984, the Supreme Court of Canada was seized in *Sparrow* with considering the application of regulations made under the federal *Fisheries Act*,[5] to a claim of an existing aboriginal right to fish in 1984 by a member of the Musqueam Indian Band[6] in Canoe Passage, British Columbia. A history of the case is as follows:

> 1. The appellant was charged under section 61(1) of the *Fisheries Act* with the offence of fishing on May 25, 1984 with a drift-net 45 fathoms in length, which was longer than the 25 fathom length that was permitted by the terms of the band's Indian food fishing licence which had come into force on March 31, 1984.
>
> 2. The appellant was convicted on March 29, 1985 in Provincial Court by Goulet P.C.J. who held that a person could not claim an aboriginal right unless it was supported by a special treaty, proclamation, contract or other document.
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> 3. An appeal to the County Court of Vancouver was dismissed by Lamperson C.C.J. for similar reasons on December 20, 1985.[7]
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> 4. The British Colombia Court of Appeal held on December 24, 1986 that the courts below had erred in holding that the appellant could not rely on an

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[5] R.S.C. 1970, c. F-14 (now R.S.C. 1985 c. F-14), as amended.

[6] It is interesting to note that both the leading cases of *Guerin* and *Sparrow* relate to the Musqueam Indian Band, which has its reserve on the north shore of the Fraser River, within the city limits of Vancouver. Surrender of reserve lands of the Musqueam Indian Band was the subject matter in the *Guerin* case.

[7] [1986] B.C.W.L.D. 599.

aboriginal right to fish.[8] The Court of Appeal further found that the right had not been extinguished, but was subject to reasonable regulations necessary to ensure the proper management and conservation of the resource, rejecting arguments that the regulation of fishing was an inherent aspect of the aboriginal right to fish and that such regulation must be confined to necessary conservation measures only. The Court of Appeal also stated that the right was for a purpose, i.e., to fish for food and related traditional band activities, and not one related to a particular method, that the aboriginal food fishery right was entitled to priority over the interests of other user groups, and that the right by virtue of section 35 could not be extinguished.

Appeal to the Supreme Court of Canada

The appellant sought leave to appeal to the Supreme Court of Canada, and leave was granted on June 1, 1987. The appellant appealed on the grounds that the Court of Appeal had erred:

1. In holding that section 35 protects the aboriginal right only when exercised for food purposes and permits regulations whenever reasonably justified as being necessary for management and conservation or in the public interest; and

2. In failing to find that the net restriction in the Band's food fish licence was inconsistent with section 35.[9]

Crown Cross-Appeal

The Crown also cross-appealed in the case, arguing that the Court of Appeal had erred in holding that the aboriginal right to fish had not been extinguished prior to April 17, 1982, and that the appellant as a matter of fact and law possessed the aboriginal right to fish for food.[10] In the alternative, the Crown also argued that the Court of Appeal had erred in its conclusions respecting the scope of the aboriginal right to fish for food and the extent to which it may be regulated, in holding that the right to take fish for food included the right to take fish for the ceremonial purposes and societal needs of the Band, and that this right enjoyed a constitutional protection over the rights of others

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[8] 32 C.C.C. (3d) 65, 36 D.L.R. (4th) 246, 9 B.C.L.R. (2d) 300.

[9] *Supra*, note 1, at p. 392.

[10] *Ibid.*, at pp. 392-3, and factum of respondent (Crown) at pp. 16-7.

engaged in fishing. The Crown further argued that section 35 did not invalidate legislation passed for the purposes of conservation and resource management, public health and safety, and other overriding public interests such as the reasonable needs of other user groups.[11] It was also asserted that the Court of Appeal had erred in shifting the burden of proof to the Crown before the appellant had established a *prima facie* case that the reduction in length had unreasonably interfered with the exercise of his right to fish for food.

Constitutional Question

The facts alleged and constituting the offence were admitted throughout by the accused. However, a defence of exercising an existing aboriginal right to fish, and that the net length restriction was inconsistent with subsection 35(1) of the *Constitution Act, 1982* and therefore invalid, was made on behalf of the accused. The constitutional question stated and heard by the Supreme Court of Canada on November 3, 1988 was as follows:

> Is the net length restriction contained in the Musqueam Indian Band Food Fishing Licence dated March 30, 1984, issued pursuant to the *British Columbia Fishery (General) Regulations*, SOR/84-248, and the *Fisheries Act*, R.S.C. 1970, c. F-14, inconsistent with s. 35(1) of the *Constitution Act, 1982*?[12]

Decision of the Supreme Court of Canada

In a unanimous decision of the Supreme Court of Canada given on May 31, 1990 and delivered[13] by Dickson C.J. and La Forest J., the meaning in section 35 of "existing"

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[11] *R.* v. *Sparrow*, *supra*, note 1, at p. 407. The Court also refers to the very narrow view taken by the Crown at the B.C. Court of Appeal that section 35 had no effect on aboriginal or treaty rights, and was merely a preamble to the parts of the *Constitution Act, 1982* which deal with aboriginal rights.

[12] *Ibid.*, p. 392.

[13] While unanimous judgments are not uncommon in the Supreme Court of Canada, a single judgment delivered by two justices is quite unusual and probably reflects the importance that the Court has placed upon the protection of the rights and interests of Aboriginal Peoples in the absence of positive government action (legislative or executive) in fulfilment of its fiduciary duty and trust-like responsibility to such Peoples. In addition, in light of Chief Justice Dickson's imminent retirement, the inclusion of La Forest J. as one of the two authors of the judgment permits it to live on with the present Court.

aboriginal rights, and "recognized and affirmed" were addressed by the Court for the first time. The word "existing" was found to mean rights which were in existence when the *Constitution Act, 1982* came into force on April 17, 1982 and extinguished rights were not revived by the *Act*.[14] The Court also found that unextinguished rights were not defined by the regulatory scheme in place in 1982, and that "existing" meant unextinguished and not exercisable in a particular manner in history. The rights were found to be "affirmed in a contemporary form rather than in their primeval simplicity and vigour."[15]

Specifically as to the aboriginal right of the appellant, it was found based on the evidence adduced that he had been fishing in ancient tribal territory where members of his tribe had fished since time immemorial, and was exercising an unextinguished aboriginal right which extended to fishing for food and other community purposes.[16] While the right had been restricted and regulated by federal legislation, the Crown had failed to discharge the onus of proving the extinguishment of this right, and the right was thus recognized and affirmed under section 35 as an existing right with constitutional protection.[17]

The Court further found that any legislation affecting or interfering with the exercise of aboriginal and treaty rights recognized and affirmed under section 35 must meet a test for justifying the interference with such a right, including recognition of the fiduciary duty of the government for Aboriginal Peoples.[18] While a hallmark decision in respect

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[14] *Supra*, note 1, at pp. 395-6.

[15] *Ibid.*, at p. 397, referring to a statement by Professor Brian Slattery in "Understanding Aboriginal Rights," (1987) 66 *Can. Bar Rev.* 727 at 782.

[16] *Ibid.*, pp. 398-9.

[17] *Ibid.*, p. 401.

[18] *Ibid.*, pp. 409-10. As noted by Professor Catherine Bell in her article entitled "Reconciling Powers and Duties: A Comment on *Horseman*, *Sioui* and *Sparrow*," (1991) 2 *Constitutional Forum* 1-4, the rulings of the Court in *Sparrow*, and also in *R.* v. *Sioui* (1990), 109 N.R. 22, 70 D.L.R. (4th) 427, [1990] 1 S.C.R. 1025, represent a new era of judicial opinion on the question of aboriginal and treaty rights by the shift from

of section 35 as it protects aboriginal and treaty rights, I will generally confine my comments and analysis to those portions of the judgment concerning the justification of interference with the rights of Aboriginal Peoples recognized and affirmed under section 35, and the element of fiduciary duty of the Crown to Aboriginal Peoples in the justification test.

Some criticism has been expressed, however, that the *Sparrow* decision is not in the best interests of Aboriginal Peoples in its broader application. For example, W.I.C. Binnie in a recent article entitled "The Sparrow Doctrine: Beginning of the End or the End of the Beginning?"[19] considers that the decision offers little hope for furthering self-government as a right included under section 35, and also that the establishment of an economic base such as by commercial component of aboriginal food fishing is unlikely because of *Sparrow*. This view is not entirely supported, however, by Thomas Isaac in his note entitled "Understanding the *Sparrow* Decision: Just the Beginning,"[20] which was a comment on the article written by Mr. Binnie. Mr. Isaac believes that the *Sparrow* doctrine must be applied holistically to section 35 and not simply to subsection 35(1) as was under discussion in *Sparrow*. Inasmuch as self-government provisions are contained in land claim agreements, for example, in the *James Bay and Northern Quebec Agreement*, and subsection 35(3) pertaining to land claim agreements is just a definitional component of subsection 35(1), Mr. Isaac argues that this form of self-government has been constitutionalized, even if not a form of inherent self-government as favoured and put forward by Aboriginal groups.

Professors Michael Asch and Patrick Macklem also comment on the effect of the

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confirming the absolute power of the Crown to unilaterally extinguish aboriginal and treaty rights, as in *R.* v. *Horseman*, [1990] 1 S.C.R. 901, to the duty to act a fiduciary in dealings with Canada's first peoples. Professor Bell also comments at p. 4 that, despite this evolution in Canadian law from power to duty, "the same conceptual shift is not evident in the political arena."

[19] (1990) 15 Queen's L.J. 217-253.

[20] (1991) 16 Queen's L.J. 377-9.

decision of the Supreme Court of Canada in *Sparrow* in their discussion of the debate between a contingent rights theory and an inherent rights theory of aboriginal rights, the first of course requiring state action for the existence of aboriginal rights.[21] The authors find that the contingent rights theory rests on unacceptable notions about the inherent superiority of European nations, and also assert that the decision in *Sparrow* has severely curtailed the possibility that section 35 includes an aboriginal right to sovereignty and self-government,[22] citing the comment of the Court in *Sparrow* that:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown....[23]

In a short commentary on the article by Michael Asch and Patrick Macklem, Mr. Isaac recently stated that their discussions were incomplete and painted a picture of the *Sparrow* decision that was not entirely accurate in that they stated that the Court relied on "a belief in the inherent superiority of European nations" and a contingent rights theory as opposed to one of inherent rights.[24] Mr. Isaac, on the other hand, argued that aboriginal sovereignty and inherent aboriginal rights denote a form of absolute power which is unattainable not only in law but also politically.[25]

The contingent versus inherent rights debate on Aboriginal self-government has also recently been discussed by the Royal Commission on Aboriginal Peoples in "The Right of Aboriginal Self-Government and the Constitution: A Commentary"[26] in the context of

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[21] "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*." (1991) 29 *Alberta L. Rev.* 498-517.

[22] *Ibid.*, p. 507.

[23] *Supra*, note 1, at p. 404.

[24] "Discarding the Rose-Coloured Glasses: A Commentary on Asch and Macklem." (1992) 30 *Alberta L. Rev.* 708.

[25] *Ibid.*, pp. 709-10.

[26] Royal Commission on Aboriginal Peoples. February 13, 1992.

the Federal Government proposals of last September on self-government. The Commission states that "it is essential that the right of self-government be explicitly identified in the Constitution as inherent in nature"[27] (underlining by Commission) and that "the right of self-government would benefit from the rulings of the Supreme Court of Canada in the *Sparrow* case."[28]

1. Justification Test under Section 35

After considering the nature of aboriginal rights and finding that the appellant had discharged the burden of proof on that issue, and that the Crown had failed to discharge its burden of proving that such a right to fish had been extinguished in *Sparrow*, the Court addressed the impact of section 35 on the regulatory power of Parliament and on the outcome of the appeal. The Court specifically considered both American and Canadian case law, including *Guerin*, and also stated government policy in 1969 and 1973.[29]

After discussing various cases in respect of the constitutional and aboriginal law principles to be applied in the interpretation of section 35, the Court referred again to its own decision in *Guerin*, stating:

> ... This court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R.* v. *Taylor and Williams*[30] ... ground a general guiding principle for s. 35(1). That is, the

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[27] *Ibid.*, p. 18.

[28] *Ibid.*, p. 26. The Commission does not, however, attempt to explain the dicta in *Sparrow* referred to above by Professors Asch, Binnie, and Macklem that suggests that section 35 in the eyes of the *Sparrow* Court may well be bereft of the right of self-government.

[29] *Supra*, note 1, at pp. 403-6.

[30] (1981), 62 C.C.C. (2d) 227, 34 O.R. (2d) 360 (C.A.). In *R.* v. *Taylor and Williams*, MacKinnon A.C.J.O states specifically at p. 235-6 in respect of the Crown and the treaty in question that in approaching its terms, the honour of the Crown is always involved and no appearance of "sharp dealings" should be sanctioned and that any ambiguity in the words or phrases used in Treaty No. 20, the treaty in issue, should be interpreted against the framers or drafters of the treaties, and "not be interpreted or construed to the

> government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[31]

Given the Court's reference to the *sui generis* nature of Indian title and the Crown's historic powers and responsibility, there would appear to be no ambiguity that the fiduciary duty to restrain the exercise of sovereign power in Canada is considered to be an independent legal doctrine and not dependent on treaties, statutes or other authorities. As such it is not restricted, for example, to the operation of a statute such as the *Indian Act* and the surrender of land under that *Act*, as suggested by dicta in the *Guerin* case.

This is an ambiguity, however, which still remains in the Marshallian guardianship doctrine in American Indian law, as discussed by Professor Reid Peyton Chambers, in his article "Judicial Enforcement of the Federal Trust Responsibility to Indians."[32] Under one view, the trust relationship with American tribes can be seen as a consequence of federal preemption of state laws and the trust relationship viewed as merely "a descriptive status arising out of the treaties and statutes."[33] Such status would then vary from tribe to tribe, be dynamic over time and be somewhat fragile as terms could be changed at any time by Congress. The trust would therefore be seen as directed principally at confirming federal as opposed to state control over Indians and Indian land, and not towards preserving tribal autonomy, the other view of the trust concept.

The second ambiguity noted by Professor Chambers is that of enforceability against

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prejudice of the Indians if another construction is reasonably possible." As for grounding such a general guiding principle, *i.e.*, that the Crown has the responsibility to act in a fiduciary capacity with respect to Aboriginal Peoples, there are no other comments.

[31] *Supra*, note 1, at p. 408.

[32] (1975) 27 *Stanford L. Rev.* 1213 at 1220.

[33] *Ibid.*

federal, as well as state, officials to prevent modification of the terms of the trust relationship by either the executive or the legislative branch. Given the Court's comment in *Sparrow* at p. 406 that section 35(1) "... also affords aboriginal peoples constitutional protection against provincial legislative power," application of the fiduciary duty concept to both levels of government in Canada appears reasonably certain. While this responsibility has not been noticeably acknowledged by provincial authorities since the *Sparrow* decision, the decision of McEachern C.J.B.C. in *Delgamuukw et al.* v. *The Queen in Right of British Columbia et al.*[34] has applied *Sparrow* and outlined the fiduciary duty in the relationship of the Crown in right of the Province of British Columbia and Aboriginal Peoples in that province, albeit in the case of rights considered to be extinguished by his Lordship. As to past discussions on the question of responsibility for Aboriginal Peoples, other than Indians and Inuit[35] who fall under section 91(24) of the *Constitution Act, 1867*, an amendment to this section to reflect that it applies to all Aboriginal Peoples has been proposed, and has received support, in the 1992 Multilateral Meetings on the Constitution.[36]

The Court in *Sparrow* then went on to discuss the test for justifying an interference with an aboriginal or treaty right recognized and affirmed under section 35, first stating that the words "recognition and affirmation" incorporate the fiduciary duty referred to earlier and thus import some restraint on the exercise of sovereign power. The Court then stated:

> .... Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that

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[34] (1991), 79 D.L.R. (4th) 185, [1991] 3 W.W.R. 97 (B.C.S.C.).

[35] In *Re Eskimos,* [1939] S.C.R. 104, 2 D.L.R. 417, the Supreme Court of Canada held that the Inuit are included within the word "Indians" in section 91(24) and thus fall within federal and not provincial jurisdiction.

[36] Item 52 of "Status Report - The Multilateral Meetings on the Constitution," July 16, 1992.

> reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretative principle enunciated in *Nowegijick*[37] ... and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin* v. *The Queen, supra*.[38]

The Court later set out the following two-part test or framework for justification, given a *prima facie* interference with an existing aboriginal right:

> 1. The determination of valid legislative objectives by:
>
> a. Parliament in authorizing the particular federal department to enact the contested regulations, and
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> b. the actual department in setting out the particular regulations; and
>
> 2. Consideration of the special trust relationship and the responsibility of the government, or honour of the Crown, which is at stake in dealings with Aboriginal Peoples, to ensure that any legislative objective upholds the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's Aboriginal Peoples.[39]

The Court also added that the constitutional recognition afforded by section 35 therefore gives a measure of control over government conduct and a strong check on legislative power, holding the Crown to a substantive promise.

2. Test of Prima Facie Interference with a Section 35 Right

Before considering justification of the regulations under the *Fisheries Act*, the Court set out its test for a *prima facie* interference with an existing aboriginal right, stating that the new constitutional status of the aboriginal right to fish enshrined in section 35 for the accused suggested a different approach than the line of cases based on facts and law before April 17, 1982 which held that the right to fish was subject to regulation by legislation and also to extinguishment. The Court considered that the inquiry began

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[37] *Nowegijick* v. *The Queen* (1983), 144 D.L.R. (3d) 193, [1983] 1 S.C.R. 29, [1983] C.T.C. 20, 83 D.T.C. 5041, 46 N.R. 41.

[38] *Supra*, note 1, at p. 409.

[39] *Ibid.*, pp. 412-3.

with reference to the characteristics or incidents of the right at stake, with sensitivity to the aboriginal perspective itself on the meaning of the right at stake. To determine if interference constituted a *prima facie* infringement of section 35, the Court stated that the following questions must be asked:

1. Is the limitation reasonable?
2. Does the regulation impose undue hardship? and
3. Does the regulation deny to the holders of the right their preferred means of exercising that right?[40]

The burden on proving a *prima facie* infringement of section 35 would of course be on the group challenging the legislation to prove the infringement. In applying this test in the *Sparrow* appeal, the Court then posits certain facts which would result in a finding of a *prima facie* infringement of section 35. For example, a regulation found to be an adverse restriction on the Musqueam exercise of their right to fish for food would be a *prima facie* infringement of section 35. In the case of the Musqueam exercising their right to fish for food this would not be merely looking at whether the fish catch had been reduced below that needed for reasonable food and ceremonial needs of the Band, but asking if either the purposes or effect of the restrictions "unnecessarily infringes the interests protected by the fishing right."[41] Having to spend undue time and money per fish caught, or if the net length restriction resulted in hardship in catching fish, would be such infringements. Both of these latter examples would appear to relate to the second question, *i.e.*, that of "hardship," and it thus appears that a finding of *prima facie* infringement of section 35 could be based on an affirmative answer to just one of the above questions. If a *prima facie* interference was found, then the first branch of the section 35 test would be met, and the analysis would move on to the issue of justification.

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[40] *Ibid.*, p. 411.

[41] *Ibid.*, p. 412.

In his recent seminal article on self-government entitled "First Nations Self-Government and the Borders of the Canadian Legal Imagination,"[42] Professor Patrick Macklem is very critical of the Court's reliance on the requirement by an aboriginal plaintiff to show that a regulation is "unreasonable" and "constitutes undue hardship." Professor Macklem states that:

> .... The application of a reasonableness standard to the initial stage of determining whether a violation of s. 35(1) has occurred injects considerations which ought to be extraneous to this aspect of the constitutional inquiry. Whether a particular infringement is unreasonable has little to do with the fact that it infringes on s. 35(1) interests.... The scope of aboriginal rights remains dependent upon the actions of those institutions against which First Nations ought to receive constitutional protection....[43]

As noted by Professor Macklem, underlying the reasoning of the Court on this point is of course the assumption that Canada enjoys sovereign authority over its indigenous population, based on the discovery doctrine and steeped in the notion of native inferiority.[44]

3. Application of the Justification Test in Sparrow

After finding on the facts of the appeal in *Sparrow* that the regulation was a *prima facie* interference, an analysis of the issue of justification was made. Under the first part of the justification test, the Court considered in *Sparrow* that regulations would be valid if reasonably justified as "necessary for the proper management and conservation of the resource."[45] However, the Court considered that measures simply necessary in the "public interest," as found by the Court of Appeal, would be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights. Query if "national defence interests" may also be such a vague concept as to be unworkable as a test for the justification of a limitation

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[42] (1991) 136 *McGill L.J.* 382 - 456.

[43] *Ibid.*, p. 449.

[44] *Ibid.*, p. 450.

[45] *Supra*, note 1, at p. 412.

on aboriginal constitutional rights? As will be discussed later in this Chapter, a different justification test, given the non-competing nature of such activities and other considerations, is warranted for national defence interests.

In *Sparrow* in applying the first part of the justification test, the Court did not make an express finding as to whether or not the net length restriction in the regulations made under the *Fisheries Act* was a valid legislative objective. Under the second part of the justification issue, i.e., that the honour of the Crown is at stake in dealings with Aboriginal Peopies, and that the special trust relationship and the responsibility of the government vis-a-vis Aboriginals must be the first consideration before the action in question can be justified, the Court referred back to the guiding interpretative principles of *Taylor and Williams* and *Guerin*. The Court than stated:

> The problem that arises in assessing the legislation in light of its objective and the responsibility of the Crown is that the pursuit of conservation in a heavily used modern fishery inevitably blurs with the efficient allocation and management of this scare and valued resource. The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource. There is a clear need for guidelines that will resolve the allocational problems that arise regarding the fisheries....[46]

As for the need for such guidelines, the Court referred to the reasons of Dickson J., as he then was, given in 1979 in *Jack* v. *The Queen,*[47] involving a charge of fishing for salmon during a prohibited period. In *Jack*, Dickson J. stated that conservation was a valid legislative concern and that any limitation upon Indian fishing established for a valid conservation purpose would override the protection afforded the Indian fishery by article 13 of the British Columbia Terms of Union of 1871.[48] While acknowledging that

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[46] *Ibid.*, p. 413.

[47] (1979), 48 C.C.C. (2d) 246 at 261.

[48] R.S.C. 1985, Appendix II, No. 10.

the detailed allocation of maritime resources was a task that must be left to those having expertise in the area, the Court in *Sparrow* stated that the Indians' food requirement must be met first when that allocation is established and that:

> .... If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right....[49]

The brunt of conservation measures would thus be borne by the practices of sport and commercial fishing. The Court in *Sparrow* noted with approval the decision of March 5, 1990 of Clarke C.J. of Nova Scotia in finding in the case of *R.* v. *Denny*[50] that the *Nova Scotia Fishery Regulations*[51] made under the federal *Fisheries Act* were in part inconsistent with the constitutional rights of the appellant Micmac Indians in failing to recognize that section 35 provided them with a priority of allocation and access to any surplus of the fisheries resource once the needs of conservation had been taken into account.

4. Additional Considerations

Within the second part of the justification analysis, the honour of the Crown is at stake in dealings with Aboriginal Peoples. As discussed above, the special trust relationship and the responsibility of the government vis-à-vis Aboriginals was the first consideration in this part, and the constitutional entitlement embodied in section 35 required that the Crown ensure that its regulations provide for Indian food fishing to be given priority over the interests of other user groups. In addition to this constitutional entitlement, the Court considered that there were the following additional questions to be addressed, depending on the circumstances of the inquiry:

1. Had there been as little infringement as possible in order to effect the desired result?

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[49] *Supra*, note 1, at p. 414.

[50] 55 C.C.C. (3d) 322, 94 N.S.R. (2d) 253, [1990] 2 C.N.L.R. 115 (N.S.C.A.)

[51] C.R.C. 1978, c. 848.

2. Whether fair compensation was available in a situation of expropriation? and
3. Whether the Aboriginal group in question had been informed and consulted with respect to the conservation measures being implemented?[52]

While not commenting further on the first two considerations, the Court did add in respect of consultation that it would be expected that Aboriginal Peoples would at least be informed regarding the determination of an appropriate scheme for the regulation of the fisheries, given their history of conservation-consciousness and interdependence with natural resources. The Court indicated that the above questions for the assessment of justification were not, however, an exhaustive list, adding that "the recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians."[53] As will be discussed subsequently in respect of the test for justification of the *prima facie* infringement of section 35 rights by national defence activities, other considerations will indeed be relevant in considering justification in such circumstances.

In applying the justification test to the facts in *Sparrow*, however, the Supreme Court of Canada ordered a new trial as there had not been findings of fact to which the tests set out by the Court could be applied.[54] Specifically, the trial judge had found section 35 to be inapplicable to the appellant's defence based on his finding that no aboriginal right had been established, and thus no findings of fact were made with respect to either an infringement of the aboriginal right to fish or the justification of such an infringement. The Crown did not however proceed with a new trial, thus ending the proceedings for Mr. Sparrow and permitting one to conclude with some degree of certainty that the impugned regulations would not have met the justificatory standard set out by the Supreme Court of Canada.

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[52] *Supra*, note 1, at pp. 416-7.

[53] *Ibid.*, p. 417.

[54] *Ibid.*

Subsequently, in May 1991, the Department of Fisheries and Oceans issued an "Interim National Policy for Enforcement Within the Aboriginal Peoples Food Fishery" and also "Principles and Procedural Guidelines for the Management of the Aboriginal Peoples Food Fishery" to reflect the constitutional protection given to fishing by Aboriginal Peoples as reflected in *Sparrow*. The *Aboriginal Fisheries Agreements Regulations*[55] made in 1992 also provide further substantive protection to Aboriginal fishing rights by declaring in section 3 of the *Regulations* that "[n]o regulation made under the *Fisheries Act* applies to fishing and related activities conducted in accordance with an Aboriginal Fisheries Agreement, to the extent that the regulation is inconsistent with that agreement."

The Constitutional Nature of the Fiduciary Duty in Sparrow

While the *Sparrow* decision in respect of the exercise of aboriginal rights is singularly important, the fundamental issue before the Supreme Court of Canada, however, was the interpretation of section 35 of the *Constitution Act, 1982* and not the precise scope of the fiduciary duty of the federal Crown. The Court thus does not occupy itself with a detailed analysis of the fiduciary obligation, instead referring to the existing understanding of what the duty involves as described in its own decision in *Guerin* in which Dickson J. considered that the duty was not a private law duty in a strict sense but was none the less in the nature of a private law duty.[56]

However, it is now certain from the *Sparrow* decision that the fiduciary duty has been elevated from its common law position and private-like law duty in *Guerin* to a constitutional and public law basis as noted in the following four remarks in *Sparrow*:

> .... Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power. We are, of course, aware that this would, in any event flow from the *Guerin* case.... (p. 406)

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[55] PC 1992-1456 dated June 26, 1992, registered as SOR/92-415 June 26, 1992.

[56] *Supra*, note 4, at p. 341.

> .... 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.... (p. 408)
>
> 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.... (p. 409)
>
> [In considering the second part of the justification issue under section 35] .... The special trust relationship and responsibility of the government vis-a-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified. (p. 413)

While the earlier finding in *Guerin* of a fiduciary duty involved an Indian band and surrender of reserve land under the *Indian Act*, it is clear by the following sentence in *Sparrow* at p. 406 that the duty under section 35 also extends to the other groups of Aboriginal Peoples identified in subsection 35(2), i.e., Métis and Inuit, and presumably also to both off-reserve and non-status Indians:

> .... it is important to note that the provision [section 35(1)] applies to the Indians, the Inuit and the Métis....

In addition, while in *Guerin* the administration and disposition by Crown officials of the land as assets in the traditional fiduciary private law or commercial sense was scrutinized by the Court,[57] it is clear by the decision in *Sparrow* that the legislative power of the Crown also falls within the ambit of the fiduciary duty owed by the Crown, as noted in the following:

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[57] The analysis of Dickson J. in *Guerin* at pp. 340-1 concerning the relative legal positions in a fiduciary relation in which the one party is at the mercy of the discretion of the other, the fiduciary, and the latter has an obligation to act on behalf of the former, involves the three classic elements in the traditional fiduciary relationship: 1. a duty owed by the fiduciary to act in the interest of the other party, 2. the power to act, and 3. the vulnerability of the other party to the exercise of power by the fiduciary. These are similar to the three hallmark characteristics of the fiduciary relationship as discussed by Wilson J. in *Frame* v. *Smith*, [1987] 2 S.C.R. 99, at pp. 136-7, and considered in the previous Chapter.

> .... The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.[58]

Further, it is clear that the fiduciary duty extends to the Crown in both the right of Canada and of the provinces as evidenced by the comment at p. 406 that section 35(1) "... also affords aboriginal peoples constitutional protection against provincial power."

A review of the origin and scope of fiduciary duty of the Crown in right of Ontario, including an analysis of the *Guerin* and *Sparrow* cases, has been made recently by Wilson A. McTavish, Official Guardian of Ontario, in "Fiduciary Duties of the Crown in the Right of Ontario".[59] After reviewing why a fiduciary duty is imposed in a number of relationships and the remedies available for breach of the duty, he cites the *Guerin* case as one instance in which the courts have intervened to find the Crown to be a fiduciary. He further states, based on the decision of the Supreme Court of Canada in *Sparrow* that:

> The courts seem to be ... saying that there is a positive duty on the Crown and that failure to negotiate with the aboriginal peoples in good faith will be looked at in disfavour.[60]

Mr. McTavish subsequently asks a number of questions concerning fiduciary duty and vulnerable people, including the following in respect of Indians:

- To what extent should the Attorney General of Ontario uphold the honour of the Federal Crown in dealing with Indians?[61]

- How will the proposed Environmental Bill of Rights for all Ontarians mesh with the aboriginal rights of Indians to hunt, fish and trap on their surrendered reserve lands?

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[58] *Supra*, note 1, at p. 410.

[59] (June 1991) 25 *Law Society of Upper Canada Gazette* 181-194.

[60] *Ibid.*, p. 192.

[61] Although Mr. McTavish does not address specific comments to the relationship of the provincial Crown to Aboriginal Peoples, it would appear in my view from his overall remarks that he considers that honour is involved in provincial dealings with Aboriginal Peoples.

- Should the Attorney General advise Ministers of the Crown that resources must be found to reach out to approximately 140 Ontario Indian Bands and ask the Band Councils about their needs and concerns? and

- How, for example, and to be more specific, should the Official Guardian advocate in court the wishes and best interests of aboriginal children?[62]

In summary, given the decision and other comments in *Sparrow*, a fiduciary duty may be owed at least in the following contexts:

1. The exercise of existing aboriginal rights (under the royal prerogative, statute and common law), as in *Sparrow* with respect to the Indian food fishing right and regulations under the *Fisheries Act*;

2. The exercise of other rights provided under treaty or modern land claim agreement, including the surrender of land by treaty; and

3. In *Guerin*-type situations such as the surrender under the *Indian Act* of reserve land, or in other analogous situations under that *Act* or other statutes where the three aspects of duty, power and vulnerability are present.

In respect of the former two, clearly the Court in *Sparrow* contemplates the existence of interests by non-Aboriginal parties, such as commercial or sport fishing groups and individuals, all competing for a scare resource. Consequently, the two-part justification would clearly have application in determining the validity of government regulations in these areas. Inasmuch as provincial government regulations, such as those for wildlife conservation and management, could also have the effect of infringing aboriginal rights, or rights under treaty or modern comprehensive land claim agreements, the fiduciary duty owed by the provincial Crowns would also be scrutinized in such cases.

In respect of the latter situation, i.e., the surrender of Indian reserve land, as in the *Guerin* case, this would not be a case of resource allocation among competing interests. Nevertheless, a fiduciary duty would be owed by the Federal Crown as found in *Guerin* and require the Crown and its agents to act in good faith and with due regard

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[62] *Ibid.*, pp. 193-4.

to the interests of Aboriginal Peoples and to not take advantage of or prejudice Aboriginal Peoples except in the exercise of utmost good faith and with their full knowledge and consent. The third situation would generally not have application to a provincial Crown as reserve land has been held by Her Majesty in right of Canada for the use and benefit of bands, and the surrender mechanism has thus directly involved only federal officials.

Justification Test Applied to National Defence Activities

1. Issues Raised

As discussed above, the Supreme Court of Canada considered section 35 of the *Constitution Act, 1982* in the *Sparrow* case and presented a justification test in 1990 for the infringement of aboriginal and treaty rights that are recognized and affirmed under that section. This test was developed in the face of legislative[63] action directly regulating an aboriginal right, i.e., by restricting the length of the drift-net for the Musqueam Indian Band by the terms contained in an Indian food fishery licence issued to the Band.

While the rights of Aboriginal Peoples to pursue traditional harvesting activities such as hunting, fishing, trapping and gathering will be the most susceptible to legislation, given increased commercial and recreational activities and demand by non-Aboriginal groups for often the same scare or diminishing resources, the infringement of these aboriginal and treaty rights may also occur unintentionally as a result of defence activities authorized pursuant to otherwise valid legislation, *e.g.*, the *National Defence Act.*[64] Defence activities could make the exercise of aboriginal and treaty rights more difficult by the reduced presence of wildlife in an area during and after a military exercise, or even impossible by making traditional land inaccessible to Aboriginal

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[63] For purposes of certainly, I have used the word "legislation" in its normal sense, *i.e.*, the enacting of laws either by a statute of Parliament or of a provincial legislature, or by regulations made under statutory or prerogative authority by ministers, Governor in Council or Lieutenant-Governors in Council.

[64] R.S.C. 1985, c. N-5.

Peoples. Also, as discussed in Chapter 4, pursuant to exchanges of notes and memoranda of understanding authorized under the royal prerogative, training in Canada by foreign military forces has threatened the traditional way of life of Aboriginal Peoples, *e.g.*, that of the Innu and the exercise of their aboriginal rights in Labrador, as raised in *Naskapi-Montagnais Innu Association (NMIA)* v. *Canada (Minister of National Defence)*.[65]

Mr. Michael Hudson, Senior Legal Counsel, Legal Services (DIAND), in his paper[66] presented at the *Delgamuukw* Conference in September, 1991, also distinguishes between two categories of government activity susceptible to the effect of section 35. His two categories of government activity are:

> 1. The statutory regulation of natural resources and the management of Crown lands "which may interfere with the enjoyment of aboriginal and treaty rights to pursue subsistence activities"; and
>
> 2. "[T]he multitude of decisions made by government officials permitting other persons to affect aboriginal and treaty rights."

An example given by Mr. Hudson of the latter is that of a decision by a Minister of the Crown to allow the construction of a dam which destroys a traditional Indian habitat.[67] Mr. Hudson's categorization unfortunately seems to overlook the situation of defence activities in which government defence officials will affect the exercise of section 35 rights without purporting to either regulate such rights or to authorize third parties to undertake actions which affect the rights. Mr. Hudson also offers no comment or theoretical basis as to whether or not activities in his second category would be treated differently by the courts using a *Sparrow*-type analysis.

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[65] (1991), 5 C.E.L.R. (N.S.) 287 (F.C.T.D.).

[66] "Fiduciary Obligations of the Crown towards Aboriginal Peoples." Conference Proceedings - Delgamuukw and the Aboriginal Land Question. Victoria, British Columbia. September 10 & 11, 1991, at p. 5.

[67] Given the ongoing controversy as to the decision to permit the construction of the dam on the Oldman River in Alberta, its effect on the Peigan Indians downstream, and the requirement for environmental review, this example is a current one.

The possible situations in which the infringement of aboriginal or treaty rights by national defence activities occur or can be raised could be broadly categorized as follows, based on the location and authority for the contested activity:

1. During manoeuvres of units or other elements of the Canadian Forces authorized by the Minister of National Defence for the purpose of training pursuant to section 257 of the *National Defence Act* on the land[68] of Aboriginal Peoples (hereinafter "section 257 training manoeuvres");

2. During air, sea or ground training exercises by units or other elements of the Canadian Forces, or by foreign military forces (hereinafter "base training" and "foreign training" respectively), in areas under the *de facto* control of DND, *e.g.*, Canadian Forces Bases and ranges, or other federal departments or provincial authorities, but subject in part to claims of existing aboriginal or treaty rights.[69] Such claims of aboriginal rights in respect of base training have been made in *Chief Francis Laceese et al. (Toosey Band)* v. *Minister of National Defence and Minister of Environment*,[70] and claims of treaty rights in respect of base training have been raised in *The Cold Lake First Nations et al.* v. *Her Majesty in right of Canada*.[71] Foreign training has been challenged in *Naskapi-Montagnais Innu Association* (NMIA) v. *Canada (Minister of National Defence)*;[72]

3. During defence activities not for purposes of training but conducted during a time of emergency (hereinafter "defence operations"); and

4. In respect of the occupation of defence establishments[73] in Canada. Such challenges have been seen in the claims of improper or invalid surrender as in

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[68] Such land would include all land controlled by groups of Aboriginal Peoples under the comprehensive land claim agreements, all reserve land held under section 18 of the *Indian Act* for Indian bands, land subject to aboriginal title claims, and other land used for aboriginal harvesting purposes pursuant to aboriginal and treaty rights.

[69] A further type of right held by Aboriginal Peoples would be some residual fiduciary duty in the absence of existing aboriginal and treaty rights, possibly after the extinguishment of such rights. Such a fiduciary duty is raised by McEachern C.J.B.C. in *Delgamuukw et al.* v. *The Queen in Right of British Columbia et al.*, *supra*, note 34.

[70] Federal Court Trial Division Action No. T-273-90. Addy J. in an unreported decision on January 19, 1990 dismissed the application.

[71] Federal Court Trial Division Action No. T-2026-89.

[72] (1991), 5 C.E.L.R. (N.S.) 287 (F.C.T.D.).

[73] "Defence establishment" is defined in section 2 of the *National Defence Act* to mean "any area or structure under the control of the Minister [of National Defence], and the material and other things situated in or on any such area or structure."

Sarcee Band of Canada v. *Canada*[74] or invalid expropriation or retention of Indian land as in *Angeline Shawkence et al.* v. *Her Majesty The Queen*[75] (hereinafter "defence establishment claims").

A number of constitutional questions would be raised in the trials of the above actions. For example, could aboriginal and treaty rights be affected or infringed by defence activities unintentionally without concern for section 35, if there was no direct regulation of these rights in the infringement? If not, would the two-part justification test developed by the Supreme Court of Canada in the *Sparrow* case or some other test be applied to the issue of infringement of aboriginal hunting rights by defence activities? Would such indirect or unintentional infringement attract more or less judicial scrutiny than in the case of direct regulation necessary for proper management and conservation with competing user groups for a particular resource as in the *Sparrow* case? Would foreign military flying, for example, conducted pursuant to a treaty entered into on a government-to-government basis and authorized under the royal prerogative be subject to a different justification test than defence activities of the Canadian Forces authorized under domestic legislation?

2. Lack of Immunity of Defence Activities

Some assistance in answering the above questions is of course provided by the decision of the Supreme Court of Canada in *Sparrow*. First, as to the possible absolute immunity of national defence activities affecting aboriginal and treaty rights from the reach of section 35, the Court in *Sparrow* addressed the question of aboriginal rights and federal powers by stating:

> .... Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24)[76] of the *Constitution Act, 1867*.

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[74] Federal Court Trial Division Action No. T-1627-82, now settled out of court by parties as discussed in Chapter 3, with provision for the return of all parts of the Calgary military base under various leases, terminable by the Department on notice to the Sarcee Band, not later than 2050.

[75] Federal Court Trial Division Action No. T-702-85.

[76] Section 91(24) is the federal matter of "Indians, and Lands reserved for the Indians."

> These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretative principle enunciated in *Nowegijick*[77]... and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin* v. *The Queen*....[78]

The impugned regulations in the *Sparrow* case were made, not under the *Indian Act*, but under the federal *Fisheries Act*[79] which had been made pursuant to the federal authority under section 91(12) of the *Constitution Act, 1867*.[80] National defence authority is simply another federal power, also provided under the *Constitution Act, 1867*, specifically by section 91(7), which provides that "Militia, Military and Naval Service, and Defence" are exclusively federal matters. Accordingly, there would appear to be little doubt that those defence activities of the Canadian Forces authorized and ordered[81] under the *National Defence Act*, in the absence of any overriding considerations such as ensuring the safety and security of the country during an emergency, as will be subsequently discussed in this Chapter, would have to be reconciled with the federal obligation owed by the Crown and now incorporated into section 35 by the words "recognized and affirmed" in that section.

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[77] (1983), 144 D.L.R. (3d) 193, [1983] 1 S.C.R. 29, [1983] C.T.C. 20, 83 D.T.C. 5041, 46 N.R. 41.

[78] *Supra*, note 1, at p. 409.

[79] R.S.C. 1979, c. F-14 (now R.S.C. 1985, c. F-14).

[80] Section 91(12) is the federal matter of "Sea Coast and Inland Fisheries."

[81] While military orders issued by lawful authorities for the conduct of defence activities would not be subordinate legislation in the same legal sense as *Fishery Regulations*, for example, made under the federal *Fisheries Act*, such orders are nevertheless provided for under section 18 of the *National Defence Act* as the means to give effect to the decisions, and to carry out the directions, of the Government of Canada or the Minister.

3. Justification Test for National Defence Activities of the Canadian Forces

A. Valid Legislative Objectives

As discussed earlier in this Chapter, the first part of the two-part justification test developed by the Supreme Court of Canada in *Sparrow* consists of the determination of valid legislative objectives.[82] In considering the validity of legislative objectives, an inquiry would be made into the objectives of Parliament in authorizing a department to enact regulations, and also into the objectives of the department in making particular regulations. Ira Barkin in an analysis of the *Sparrow* decision, and the justification test developed by the Court, states:

> It would seem that the first portion of the justificatory standard will always be met: governments do not generally bother to enact legislation unless there is some pressing objective. The real issue will almost certainly boil down to the second portion - whether the trust relationship vis-à-vis aboriginals has been broken....[83]

As will be discussed in the next chapter, which will be a review of cases that have applied the *Sparrow* test, the above comment has been largely correct.

Valid objectives in the *Sparrow* case dealing with the regulation of salmon fishing were considered by the Court to be those:

1. Aimed at preserving section 35 rights "by conserving and managing a natural resource;"

2. Purporting to prevent the exercise of section 35 rights "that would cause harm to the general populace or to aboriginal peoples themselves;" or

3. Found to be "compelling and substantial."[84]

However, regulations simply in the "public interest" were found by the Court to "be so vague as to provide no meaningful guidance and so broad as to be workable as a test

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[82] *Supra*, note 1, at pp. 412-3.

[83] "Aboriginal Rights: A Shell Without the Filling." (1990) 15 *Queen's L.J.* 307 at 318-9.

[84] *Ibid.*, p. 412.

for the justification of a limitation on constitutional rights."[85]

This test was of course developed in the context of reconciling the aboriginal right to fish for food and related purposes, and the federal power to regulate the fisheries. National defence is only one of several other federal powers[86] which are exercised by federal Ministers and have affect on the lives of Aboriginal Peoples. As to national defence legislative objectives related in any way to section 35 of the *Constitution Act, 1982*, or Aboriginal Peoples, the *National Defence Act* at the present time is completely silent. While numerous regulations, as discussed in Chapter 2, have been made under section 12 of the *Act* by the Governor in Council, the Minister of National Defence and Treasury Board in respect of the control of the myriad of details of military life, discipline and financial matters, these too are silent on policy towards aboriginal and treaty rights recognized and affirmed in section 35.[87] Accordingly, the *Act* and regulations made under the *Act*, as the applicable defence legislation for the Canadian Forces which provides authority, in part,[88] for the training and operations which may have the effect of infringing aboriginal and treaty rights, cannot be assessed against the first two objectives given by the Court, *i.e.*, those aimed at preserving section 35 rights or preventing their exercise in the interest of Aboriginal Peoples or others.

While the *Act* and the many military regulations do not directly regulate section 35

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[85] *Ibid.*

[86] Significant federal powers affecting Aboriginal Peoples over the years have included the regulation of fisheries, authority for "Indians and Lands reserved for the Indians," and criminal law. Provincial laws in respect of hunting, forest management, mining and child welfare have also had tremendous impact on the lives of Aboriginal Peoples. If the right to self-government (inherent or otherwise) is recognized for Aboriginal Peoples, with the transfer of specific powers to groups of Aboriginal Peoples, the adverse effects of these powers should potentially be reduced.

[87] While the *Act* and regulations are silent, consideration is of course given by military authorities in the actual planning and execution of defence activities as to the impact on third party interests, including those of Aboriginal Peoples.

[88] As will be discussed in more detail later in this Chapter, the royal prerogative is also an important source of authority for defence decisions.

rights, the Supreme Court of Canada in the test for validity of legislative objectives also included those objectives "found to be compelling and substantial."[89] If these objectives must be compelling and substantial in the context of section 35 rights, *i.e.*, somehow either preserving such rights for Aboriginal Peoples, or preventing the exercise of section 35 rights that would be harmful to the general populace or to Aboriginal Peoples themselves, then again the *Act* and regulations would be found lacking under this first part of the justification test and therefore defence activities resulting in *prima facie* interference with section 35 rights would not satisfy the first part of the test.

On the other hand, however, the Court may be presenting an entirely separate head of justification in its test by requiring an objective, possibly unrelated to the preservation or direct prevention of the exercise of section 35 rights, to be "compelling and substantial." If such is the case, then national defence policy[90] formally presented by the Federal Government, that was "compelling and substantial," and outside of any legislative objectives, could be found to be a valid objective for the implementation of various defence activities infringing section 35 rights.

Such a test of justification of national defence policy objectives unrelated to section 35 may be suggested by considering the question of intention to regulate, and the resulting infringement of, section 35 rights by defence activities. Defence activities authorized as such under the royal prerogative[91] or the *National Defence Act* would not

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[89] *Supra*, note 1, at p. 412.

[90] Foreign policy supporting allied military training in Canada will be discussed separately in the next section of this Chapter.

[91] Wilson J. in *Operation Dismantle Inc. et al.* v. *The Queen* (1985), 18 D.L.R. (4th) 481 (S.C.C.) considers the application of the *Canadian Charter of Rights and Freedoms* to the authority to make international agreements. She refers at p. 497 to a submission by Crown counsel that the prerogative power of the Crown is the source of authority under common law and section 15 of the *Constitution Act, 1867* for decisions relating to national defence. As discussed in Chapter 1, section 15 declares that "Command-in-Chief" of the military forces of Canada continues and is vested in the Queen. While the submission of Crown counsel is not discussed further, other constitutional authorities for

be attempting to regulate section 35 rights directly, as were the impugned regulations in *Sparrow*. The infringement, if any, would occur only unintentionally from the impact of such activities.[92] Given that the nature of the infringement is unintentional, as opposed to direct in the case of the fisheries, the test of justification of a national defence activity should not involve the strict application of the first part of the *Sparrow* test in seeking a valid legislative objective related to section 35.

In assessing the "compelling and substantial" nature of specific national defence objectives under the first part of the test, and the consequent defence activities in support of such objectives, the circumstances in which such activities are authorized will be important in the analysis. National defence activities of the Canadian Forces, either training or defence operations,[93] would be authorized and conducted in Canada under the royal prerogative or legislative authority in the following circumstances or categories:[94]

1. Defence operations given the existence of an "emergency" as defined under section 2 of the *National Defence Act* as meaning "war, invasion, riot or insurrection, real or apprehended";

2. Defence operations given the declaration of a "national emergency"[95] as

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defence of course also exist, *i.e.*, section 91(7) and the opening words of that section in respect of the "peace, order, and good government" power of the Federal Government, as discussed in Chapter 2.

92 An example of such unintentional effect is found in the affidavits of band members in the *Toosey* case cited *supra*, note 70, who claimed that game was scarce for trapping after major military exercises and that trapping was an important source of income for some members.

93 Such defence operations are of course distinguished from the unarmed assistance provided by the Canadian Forces to other federal departments and provincial authorities, such as the provision of specialized equipment and air transport of persons threatened by natural disasters, *i.e.*, forest fires, floods, etc.

94 An additional category of defence activity in Canada is foreign military training conducted under the royal prerogative. This category will be discussed separately in more detail subsequently in this Chapter.

95 A "national emergency" under the *Emergencies Act* can be a "public welfare emergency" (section 6), a "public order emergency" (section 17), an "international emergency" (section 28), or a "war emergency" (section 38).

defined in section 3 of the *Emergencies Act*[96] as:

> an urgent and critical situation of a temporary nature that
>
> (a) seriously affects the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or
>
> (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada
>
> and that cannot be effectively dealt with under any other law of Canada;

3. Defence operations on call out of the Canadian Forces under section 278 of the *National Defence Act* for suppressing or preventing any actual riot or disturbance, or any riot or disturbance that is considered likely to occur, given a requisition in writing made by an attorney general under section 277 of the *Act*;

4. Training manoeuvres on third party property pursuant to section 257 of the *National Defence Act*; and

5. Base training, in the absence of an emergency or section 257 training, and armed assistance to other federal departments, such as in the enforcement of federal drug and immigration laws.[97]

Specific authority for defence activities is also provided under treaty or proclamation. For example, as discussed in Chapter 4, rights of access and occupation of the Canadian Forces are permitted specifically under the provisions of the comprehensive land claim agreements. The *Royal Proclamation of 1763* also expressly gives some limited authority for arrest to military personnel. Such authority is provided by the last paragraph of the *Proclamation* which states that "all officers, whatever, as well military" and others are enjoined and required to seize and apprehend within the reserved territories all persons who stand charged with treason, misprison of treason (knowledge or concealment of an act of treason), murder, or other felonies or misdemeanours who

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[96] R.S.C. 1985, c. 22 (4th Supp).

[97] Other defence operations not under concern in this thesis are those performed by the Canadian Forces in United Nations peacekeeping deployments, which should have no effect on the Aboriginal Peoples of Canada given the location of such operations.

"fly from justice and take refuge i ..ie said territory." *Quaere* if this authority includes a modern day right of access for the Canadian Forces to pursue any accused military or civilian person (Aboriginal or non-Aboriginal) onto Royal Proclamation land presently occupied by Aboriginal Peoples, particularly in light of mention of the *Proclamation* in section 25(b) of the *Charter of Rights*, or has this authority under the *Proclamation* devolved to federal and provincial authorities with policing responsibility, at least in respect of civilian accused?[98]

None of the circumstances of the specific defence activities as authorized and cited above would of course preclude judicial review if the activities were alleged to have an adverse effect on the exercise of aboriginal and treaty rights. However, if an emergency was so declared under either category 1 or 2, or a riot or disturbance real or apprehended considered to exist by provincial authorities under category 3, some judicial deference in the determination of valid objectives would be expected as in the approach taken by the Supreme Court of Canada in the reference *Re Anti-Inflation Act*.[99] In the review of the anti-inflation legislation in that case, Laskin C.J., Judson, Spence and Dickson JJ. concurring, found that the Court:

> ... would be unjustified in concluding, on the submissions in this case and on all the material put before it, that the Parliament of Canada did not have a rational basis for regarding the *Anti-Inflation Act* as a measure which, in its judgment, was temporarily necessary to meet a situation of economic crisis imperilling the well-being of Canada as a whole and requiring Parliament's stern intervention in the interests of the country as a whole.[100]

This comment carefully avoided any judicial duty to make a finding that an emergency existed, and in effect placed the onus on the opponents of the legislation to show that

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[98] Given the role of the military at the time of the making of the *Royal Proclamation* in maintaining basic law and order in *Proclamation* land, and the present statutory authority for civilian police forces to act in the apprehension of an accused person, it is unlikely in my opinion that a court would interpret this provision to support a right of access to, and search of, Aboriginal lands and dwellings by military forces in the pursuit of an accused.

[99] [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452.

[100] *Ibid.*, p. 425.

a rational basis did not exist.

Where the validity of legislation depends on findings of fact concerning physical, social or economic conditions of the country, it is also apparent, based on *Re Anti-Inflation Act*, that it will be impossible for a court to make such definitive findings and that some degree of judicial deference will be afforded to the governmental decision upon which legislative policy for emergencies is based. While *Re Anti-Inflation Act* was decided before the enactment of section 35 in 1982 and constitutional status was given to aboriginal and treaty rights, and the enactment of the *Canadian Charter of Rights and Freedoms*[101] with other legal and political rights, some degree of judicial deference in the review of a decision of the government declaring an emergency, and resulting national defence operations infringing aboriginal and treaty rights, should be expected.

This proposition is also supported by the judicial review, albeit brief, given to the *Public Order Regulations, 1970,*[102] which were made by the Federal cabinet under the power in subsection 3(1) of the *War Measures Act.*[103] Before making the regulations, the Governor General had first signed a proclamation declaring the existence of an apprehended insurrection in Canada in response to criminal acts of the Front de Libération du Québec in October 1970. On review in *Gagnon and Vallières* v. *The Queen*,[104] the Quebec Court of Appeal dismissed an appeal from the refusal of a writ of *habeas corpus* by Bergeron J. who held that the court was not competent to consider the reasons leading the Governor General to proclaim an apprehended state of

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[101] Part 1 of the *Constitution Act, 1982*, enacted by the *Canada Act 1982 (U.K.)*, c. 11.

[102] SOR/70-444, 104 Canada Gazette (Part II) 1128, October 16, 1970. The *Regulations* were subsequently replaced by the *Public Order (Temporary Measures) Act, 1970*, S.C. 1970, c. 2.

[103] R.S.C. 1970, c. W-2. Repealed by section 80 of the *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp).

[104] (1971), 14 C.R.N.S. 321, [1971] Que. C.A. 454.

insurrection. This decision attracted considerable criticism at the time,[105] including the comment of Professor Herbert Marx in his article "The 'Apprehended Insurrection' of October 1970 and the Judicial Function"[106] that "the Quebec judges have sterilized the courts in their essential function of judicial review."

The *War Measures Act* has of course been repealed, largely in part due to criticisms such as those expressed by Professors Marx and Lyon as to the lack of judicial review available to challenge proclamations, and regulations made under the *Act*, and the need for a greater role of accountability to Parliament in review of the emergency process. The *Emergencies Act* has been enacted to address these deficiencies and any "public order emergency" declared under section 17 of that *Act* would now require the Governor in Council to believe on "reasonable grounds" that such an emergency existed and to consult under section 25 with the provincial governments involved.[107] In addition, once a public order emergency has been declared, a motion for confirmation must be tabled in Parliament, with an explanation of reasons for making the declaration, within seven days in accordance with section 58 of the *Act*.

As for base training and section 257 training manoeuvres under categories 4 and 5, these activities would normally be conducted in the absence of the declaration of an emergency under categories 1 or 2, or riot under category 3, and less judicial

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[105] Professor Noel Lyon states in his article "Constitutional Validity of Sections 3 and 4 of the *Public Order Regulations, 1970*," (1972) 18 *McGill L.J.* 136 at 138, that the *Regulations* "... substituted executive judgment for judicial decision in areas so basic to judicial duty as to threaten the integrity of our constitution."

[106] (1972) 55 U.B.C. Law Review 55 at 58.

[107] The Indigenous Bar Association in a brief prepared by Professor Darlene Johnston and others entitled "Presentation by the Indigenous Bar Association to the Standing committee on aboriginal Affairs Regarding the Events at Kanesatake and Kahnawake during the Summer of 1990," [1991] 2 *C.N.L.R* 1-10, argues that the declaration of such a "public order emergency" under the *Emergencies Act* during the 1990 crisis at Kanesatake and Kahnawake, instead of aid of the civil power under Part XI of the *National Defence Act* by the Canadian Forces, would have provided greater opportunity for judicial review and accountability of decisions of the government in the employment of military force in Quebec.

deference, if any, would be anticipated. If an evidentiary burden was placed on the Federal Crown, if challenged, to show "compelling and substantial" objectives for military training in the face of any real and substantial alleged infringement of aboriginal and treaty rights, would or could a court make a finding on this point? Wilson J. in *Operation Dismantle* on the question of the appropriateness for the Court to "second guess" the federal executive on questions of defence, in effect to express its opinion on the wisdom of the executive's exercise of its defence powers, concluded that it would not be appropriate.[108] While that is so, Wilson J. added that it would be appropriate and the courts would have an obligation to decide if any particular act of the executive violated the *Charter* rights of citizens. Applying this statement to the question of infringement of section 35 rights, a court would be obligated to decide if specific national defence activities infringed aboriginal or treaty rights protected under that section. However, inasmuch as the objectives of defence policy and consequent defence activities would not be made in the context of section 35 rights and thus not reviewable in the context of the first two heads in the first part of the *Sparrow* test, and could not be assessed as "compelling and substantial" without second guessing the federal executive under the third head, the first part of the *Sparrow* test, i.e., the determination of valid legislative objectives, seems inappropriate for national defence objectives in any of the above five categories of national defence activities.

B. The Special Trust Relationship and Fiduciary Duty

In the absence of any determination of valid legislative objectives for national defence activities as discussed above, justification for the infringement of section 35 rights would be considered strictly under the second part of the two-part test developed in *Sparrow*, i.e., examination of the honour of the Crown and the special trust relationship with Aboriginal Peoples. If valid national defence legislative objectives are required under the first part of the justification test, then failure to identify such objectives would result in a finding that the infringement of the section 35 rights in question was

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[108] *Supra*, note 91, at p. 540.

unjustified and the court would move to the question of remedy. However, as stated earlier in the comment by Ira Barkin, it is likely that the test of validity of objectives will always be met.[109] If the objectives were found to be valid or valid defence objectives were not considered necessary, the examination would move to the second part of the test as will be discussed in this section.

In considering the honour of the Crown in allocation of fish stocks, the Court in *Sparrow* quoted with approval the guidelines for allocation given by Dickson J. (as he then was) in the case of *Jack* v. *The Queen*,[110] in which the order of priorities, in descending value, was given as:

1. conservation;
2. Indian fishing;
3. non-Indian commercial fishing; and
4. non-Indian sport fishing.

While such an order of priorities in the resource allocation of fish stocks, given the honour of the Crown and the special trust relationship, was appropriate in the specific instance of the *Sparrow* case, allocation of a scarce resource is not *per se* the fundamental issue in cases such as *NMIA* and *Toosey* as discussed in Chapter 4. In these cases and others the issue to be resolved is the conduct of the Crown given competing responsibilities, *i.e.*, the establishment of national defence programs and activities for the defence of the country and other political reasons, competing with the exercise of aboriginal and treaty rights, and the fiduciary duty of the Federal Crown to promote and respect the exercise of these rights by, as a minimum, interfering with them to the least degree necessary. The legal issues to be considered to reconcile the fiduciary duty now entrenched in section 35 and other responsibilities of the Crown in national defence activities will include a consideration of the authority for these activities, as discussed in the previous pages in respect of legislative objectives, and also behaviour of the Crown officials in resolving the conflict in Crown responsibilities.

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[109] *Supra*, note 83.

[110] (1979), 48 C.C.C. (2d) 246, 100 D.L.R. (3d) 193, [1980] 1 S.C.R. 294, [1979] 5 W.W.R. 364, 28 N.R. 162.

The question of such competing Crown responsibilities was raised in the leading case of *Kruger* v. *The Queen*[111] as discussed in Chapter 3. *Kruger*, while decided by the Federal Court of Appeal in 1985, involved pre-section 35 law, and the expropriation of Indian land, not fishing rights. Urie J. stated that to have acceded in full to demands of the Indian parties or to have withdrawn entirely from the transactions to avoid a breach of fiduciary duty may not have been acceptable given the competing obligations of the Crown.[112] While Urie J. and also Stone J. found no breach of fiduciary duty in *Kruger*, is there a specific test to resolve competing Crown responsibilities based on either that case or in *Sparrow*, or is this a political question that the courts will not review? Given the diversity of impact by possible defence activities on aboriginal and treaty rights, the test imposed by a Court will probably at least involve the following considerations:

1. **Planning**: Did planning for the defence activity include a process for identification of aboriginal and treaty rights that could or would be affected by the proposed activities, and was this process adequate and implemented?

2. **Alternatives**: Were alternative defence activities considered or available, including the selection of other training areas and seasonal times, which would have had less or no impact on Aboriginal Peoples, and what were the other additional costs and possible benefits to these alternatives in terms of monetary, operational, political, social and other heads?

3. **Consultation**: Did meaningful consultation by defence officials with representatives of the groups of affected Aboriginal Peoples occur in advance, both to identify protected aboriginal and treaty rights, and to minimize possible infringement of these rights?

4. **Disclosure**: Was full disclosure given of the defence activities and their possible impact on the interests of Aboriginal Peoples, taking into account any the protection of interests related to national security and international relations?

5. **Record of consideration and compensation:** Is there evidence on the record to indicate that careful consideration and due weight was given to the representations of the Aboriginal Peoples by defence and other Crown officials, and was adequate and fair compensation, or alternative opportunities in the form of land or money, offered to the Aboriginal Peoples?

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[111] (1985), 17 D.L.R. (4th) 591 (F.C.A.).

[112] *Ibid.*, p. 654.

6. **Other reviews**: Were all necessary environmental guidelines complied with and reviews of the activity completed, such as under the *Canadian Environmental Protection Act*[113] and the *Environmental Assessment and Review Process Guidelines Order*[114] (*EARP*), and did the recommendations of these processes support or not support defence activity which could result in the infringement of section 35 rights? and

7. **Proportionality**: Was the forecast level or degree of infringement of the aboriginal and/or treaty rights properly reflected in the efforts and willingness of the Crown, *i.e.*, the more significant the violation or infringement, the higher the expected standard that the Crown should have to face?

These considerations may all involve sensitive military information to some degree, and proof in court by the Crown of compliance with the trust relationship and fiduciary duty may involve disclosure of some of this information. Likewise, an Aboriginal party alleging infringement of section 35 rights may seek such information to prove a breach of fiduciary duty. At a trial in which violations of section 35 rights were alleged, the Crown, notwithstanding its burden of proof with respect to justification could object to disclosure of information under the provisions in sections 37 and 38 of the *Canada Evidence Act*[115] on the grounds of a specified public interest. Section 37 applies generally to the disclosure of government information by the Minister of National Defence or other minister of the Crown in right of Canada, and section 38 specifically for objection to information that could be injurious to international relations, national defence or security. Under subsection 38(2), the Chief Justice of the Federal Court, or such other judge as the Chief Justice may designate, would hear an application to determine an objection to disclosure. Under subsection 38(5), such an application would be held *in camera*, with provision in subsection 37(6) for the person who made the objection to the disclosure to make representations *ex parte*.

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[113] R.S.C. 1985, c. 16 (4th Supp.).

[114] SOR 84/467, made pursuant to section 6 of the *Department of the Environment Act*, R.S.C. 1970, c. 14 (2nd Supp), now R.S.C. 1985, c. E-10. The EARP guidelines will only continue to apply to those proposals referred to the Minister of the Environment before section 74 of Bill C-13 (the *Canadian Environmental Assessment Act*) comes into force (given Royal Assent on June 23, 1992 but not yet proclaimed in force).

[115] R.S.C. 1985, c. C-5, as amended.

Given the importance of the fiduciary duty in the protection of aboriginal and treaty rights, with the view of preserving and enhancing aboriginal autonomy, rigorous scrutiny by a court of the above considerations should be expected. Evidence of any unnecessary, avoidable or indifferent action resulting in the infringement of section 35 rights during defence activities of the Canadian Forces would be subject to review, and could warrant the finding of unjustified infringement and the order of an equitable remedy to compensate the aggrieved Aboriginal party.

4. Justification Test for Foreign Military Training in Canada

The justification test developed in *Sparrow*, modified as discussed above, should be suitable to determine the justification of defence activities of the Canadian Forces that infringe aboriginal and treaty rights protected under section 35. As discussed above, any such test would probably not involve a consideration of the federal legislative objectives behind the activity in question, but would include other considerations respecting the trust relationship and fiduciary duty of the Crown.

Foreign military training conducted in Canada such as low-level military flying or land force exercises may well also have a very significant impact on Aboriginal Peoples. For example, it could take considerably more time and effort to hunt for game for food as claimed in the *Naskapi-Montagnais Innu Association* (NMIA) v *Canada (Minister of National Defence)*[116] and discussed in Chapter 3, as a result of the low-level flying by the foreign forces operating out of the Goose Bay airport. The justification test in *Sparrow*, as modified above for defence activities of the Canadian Forces, should also apply to such foreign military training. Some additional considerations in respect of foreign military training to be discussed in this section are as follows:

1. An argument of non-reviewability,
2. Absence of supporting legislation for such training,

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[116] (1991), 5 C.E.L.R. (N.S.) 287 (F.C.T.D.).

3. Review of objectives in implementing treaties and memoranda of understanding,

4. Consultation, and

5. Disclosure of information sensitive to international relations.

Non-reviewability

As to possible grounds that could be argued to support the non-reviewability in court of the decision to authorize such foreign military training in Canada and ensuing infringement of section 35 rights, these could be that:[117]

1. The signing of the treaty or exchange of notes was an exercise of the royal prerogative;[118]

2. The nature of the factual questions made the question inherently non-justiciable; or

3. It was a purely political question that a court should not decide.

The above questions were answered in the negative by Wilson J. in *Operation Dismantle Inc.* v. *The Queen*,[119] in which the decision of the Government of Canada to permit the United States to test the air-launched cruise missile in Canada was challenged on the grounds that the testing would infringe the rights of Canadians in section 7 of the *Canadian Charter of Rights and Freedoms.* In a separate judgment given by Dickson J. (as he then was), concurred in by Estey, McIntyre, Chouinard and Lamer JJ., the decision of the federal Cabinet to permit the testing was also found to

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[117] Grounds 2 and 3 could also be argued in respect of defence activities of the Canadian Forces.

[118] It is clear from the decision of Reed J. in *NMIA* in which she considered the application of the federal *Environmental Assessment and Review Process Guidelines Order* (*EARP*), that the exchange of notes with the countries of the foreign military forces were in law international treaties, made by cabinet under the prerogative authority of the Crown, and that legislative authority was not involved.

[119] *Supra*, note 91, at pp. 497-505.

be reviewable by the Court under section 32(1)(a) of the *Charter of Rights*.[120]

Section 35 of the *Constitution Act, 1982*, which recognizes and affirms aboriginal and treaty rights, is of course not in the *Charter of Rights*, unlike section 7, and there is also no corresponding section 32 that provides expressly that section 35 applies to Parliament. However, it is very clear from *Sparrow*, as discussed earlier in this Chapter, that a fiduciary duty is now entrenched by this section for both the federal and provincial Crowns and therefore review in court under section 35, of foreign military training in Canada authorized by the Cabinet under the royal prerogative, will be permitted in some form.

Absence of supporting legislation

Foreign military training in Canada is normally authorized by Cabinet decision made under the royal prerogative and is not supported by legislation, either in the form of a statute or regulation, which could possibly, but not probably, be scrutinized for validity as discussed previously in respect of defence activities of the Canadian Forces. It is also distinguishable from defence activities by units and other elements of the Canadian Forces in terms of the approval process of the activity. For example, discussions with the governments of military allies as to training in Canada would be involved in any proposed training by foreign military forces, and such discussions would usually be conducted in strict confidence until the treaty or exchange of notes, the latter being the usual method of making such arrangements, could be finalized and announced in public and implemented. While that is so, the Federal Government as represented by the Prime Minister and the Minister of National Defence would still be politically accountable for the arrangements for foreign military training, at least to the extent of questions in the House of Commons.

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[120] *Ibid.*, at p. 485.

Review of objectives in implementing treaties and memoranda of understanding

Instead of a possible search for a valid legislative objective as in the case of training by units or other elements of the Canadian Forces, a court in the review of foreign military training under section 35 could examine the applicable exchange of notes, and implementing memoranda of understanding, to ascertain the objective(s) of the executive branch of the Federal Government in entering the exchange. As discussed above in the context of defence activities of the Canadian Forces, however, any assessment by a court of such objectives as to whether or not they were "substantial and compelling" could be viewed as second guessing the executive on questions of defence and foreign relations. I would submit that a court in light of the dicta in *Operation Dismantle* would not wish to make these determinations and would proceed to the second part of the *Sparrow* test.

If this view is incorrect, some assessment of the validity of objectives in permitting foreign military training could be made by comparing such objectives with those in stated government defence policy such as in Defence 90 discussed in Chapter 2. If the objectives were found to be compelling and substantial, the first part of the justification test thus would be satisfied and the second part then considered. If the objectives were not found to be "compelling and substantial," a court would consider the objectives to be invalid, and the infringement not justified without proceeding to the second part of the test.

Consultation

As in the case of the contested regulation in the *Sparrow* case, adequate consultation with the affected Aboriginal Peoples would be required as part of the constitutionally entrenched fiduciary duty, possibly even during the negotiations between the parties leading to the treaty or exchange of notes on foreign training. Matters of international relations, national defence or security, however, could likewise preclude any meaningful consultation with groups of Aboriginal Peoples as required under the second part of the justification test. Some allies might wish, however, to have the appropriate

representatives of groups of Aboriginal Peoples consulted in advance to avoid later controversy, and perhaps court actions and embarrassment in respect of foreign relations.

Aside from such questions of international relations, national defence or security, the desire, or lack of it, for consultation is more a political question, dependent on the domestic reasons for such training, usually and exclusively in bringing increased employment in some depressed area of the country; the desire or willingness of the foreign ally to simply leave such issues for Canada to resolve; and the expected response of the Aboriginal Peoples concerned. Aboriginal representation could also be viewed as an unnecessary further politicization of the treaty-making process, with the possible introduction of a much wider agenda, for example, to seek compensation for the past ills of foreign allies on their traditional lands, to the point of frustrating any meaningful consultation.

Perhaps in some circumstances denial of consultation with Aboriginal Peoples would be argued by the Crown, but in the second or third renewal of an activity in Canada, as in the case of training at Goose Bay, could military sensitivity still be raised as a reason for not having such consultation? In any event, the fiduciary duty now in section 35 would require that in the absence of such consultation with the representatives of Aboriginal Peoples, there would have to be careful consideration of how any contemplated foreign training would impact on aboriginal and treaty rights, and a very heavy burden would fall on the government to show that all alternative courses of action were considered to minimize any negative impact on Aboriginal Peoples.

Disclosure of information sensitive to international relations

As discussed under the justification test for defence activities of the Canadian Forces, objection to the disclosure of information on the grounds of specified public interest may be made. In the case of foreign military training, this may be particularly applicable in respect of information that could be injurious to international relations.

The Crown could of course avail itself of the provisions of section 38 of the *Canada Evidence Act* to object to disclosure otherwise relevant to both the issue of validity of objectives and to compliance with the fiduciary duty.

Remedy for Infringement

If a national defence activity of the Canadian Forces or the implementation of an agreement providing for foreign military training failed either or both parts of the justification test for infringement of an aboriginal or treaty right, a court would then consider the appropriate remedy. Given that federal implementation legislation would not be required to give effect to such a treaty with a military ally, there would be no remedy available at least under subsection 52(1) of the *Constitution Act, 1982* to have impugned legislation declared to be of no force or effect to the extent of any inconsistency with aboriginal or treaty rights protected under the Constitution of Canada as in aboriginal harvesting-type cases affected by legislation.

While a remedy under section 52 would be unavailable, a declaration of rights could be sought in Federal Court, as an extraordinary remedy against the Crown for national defence or foreign military training, in addition to any ordinary relief such as in the form of damages, that aboriginal or treaty rights had been infringed without valid justification. A declaration of rights should in most circumstances have the desired effect of causing the appropriate authorities to direct that operations on Canadian soil under the *de jure* control of the Canadian Forces cease, and that any interference with the rights of Aboriginal Peoples be minimized or eliminated.

In those circumstances, however, in which national defence activity or foreign military training could drastically and permanently alter the lifestyle of Aboriginal Peoples by permanent destruction of habitat for important wildlife, a declaration of rights in favour of an Aboriginal plaintiff party, after a lengthy trial process with discovery and oral evidence, may indeed be a Pyrrhic victory if the environment was permanently altered and only damages as compensation were then available. As for possible injunctive

relief in the form of an order to halt specific defence activities in advance, such relief cannot normally be granted against the Crown based on the immunity of the Federal Crown under common law.[121] This prohibition on injunctive relief also cannot be circumvented by seeking such relief against the Minister of National Defence unless he or she has acted beyond the scope of lawful authority.[122] However, if an infringement of a constitutional right, such as in section 35, was alleged, Crown immunity may well not be a defence in an aboriginal rights' case.[123]

If injury to aboriginal or treaty rights, resulting from a course of action pursuant to a treaty or exchange of notes to which the federal Crown had committed itself, could not be avoided, fair compensation would be necessary.[124] As discussed in Chapter 5, fair compensation could be determined using equitable principles, and common law foreseeability, reasonableness and remoteness would not necessarily be applicable.

Conclusion

As discussed in this Chapter, the conduct of the Crown in the exercise of national defence authority, that has impact on section 35 rights, i.e., aboriginal rights or those rights based on treaty or comprehensive land claims, should now include consideration of fiduciary duty. A modified two-part test, actually a one-part test, should be used in the justification of any *prima facie* interference with such rights caused by either national defence activities or foreign military training.

A recent non-defence example of the assumption of fiduciary duty by the Crown is

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[121] See the review of extraordinary remedies available against the Crown in Paul Lordon's recent text *Crown Law* (Butterworths: Toronto, 1991) at pp. 176-80.

[122] *Ibid.*, p. 177.

[123] See the recent article by Roger Townshend, "Interlocutory Injunctions in Aboriginal Rights Cases," [1991] 3 C.N.L.R. 1-21, in which he reviews how courts have dealt with interlocutory injunctions to protect the rights of Aboriginal Peoples.

[124] *Supra*, note 1, at pp. 416-7.

evident in the preamble to the Barriere Lake Trilateral Agreement[125] concerning a draft plan for the management of renewable forest and wildlife resources, in which the Government of Canada acknowledges its "special fiduciary responsibility" towards the Algonquins of Barriere Lake. However, as noted by J.R.M. Gautreau in an article on misconceptions in fiduciary duty:

> The term fiduciary does not connote a single class of relationship to which a fixed set of rules and principles apply. Rather, when a person assumes a fiduciary role the undertaking is that he will act in the interest or interests of the principal, as defined, and will not allow his own interests to conflict with the duty that he has undertaken. The scope of the undertaking will be as varied as are human engagements, both with respect to the interests to be served, the nature and content of the duty and the extent of the concomitant restrictions. The obligations will vary from case to case, both in content and degree.[126]

While acknowledgment by the federal Crown of its fiduciary duty is significant, it is difficult to understand how this will necessarily assist the parties if a breach of the agreement is alleged, without further legal analysis of the power, duties and interests at stake and the precise scope of the fiduciary duty.

In the following Chapter, I will discuss how the fiduciary duty between the Crown and Aboriginal Peoples, now recognized as entrenched in section 35 by the Court in *Sparrow*, and adopted by the Crown (to some extent) in its dealings with Aboriginal Peoples, as suggested by the Barriere Lake Agreement, has been interpreted by courts in subsequent aboriginal cases, based on the specific facts and law in those cases, and how the tests developed for domestic and foreign training in Canada should be modified.

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[125] Between Canada, Quebec and the Algonquins of Barriere Lake, 1990.

[126] J.R.M. Gautreau, "Demystifying the Fiduciary Mystique." (1989) 68 *Can. Bar Rev.* 1 at 10.

Chapter 7 - Post Sparrow Review of the Justification Test for the Infringement of Aboriginal and Treaty Rights by National Defence Activities and Fiduciary Duty

Introduction

As discussed in Chapter 6, the justification of *prima facie* infringement by national defence activities of aboriginal and treaty rights protected by section 35 will require an approach similar but not identical with that developed in the test in the case of *R.* v. *Sparrow*[1] in which that section was reviewed by the Supreme Court of Canada for the first time. While legislative objectives for national defence activities will not, in all likelihood, be examined under this test, the honour of the Crown at stake in dealings with Aboriginal Peoples will be reviewed, with consideration of the special trust and fiduciary duty in the relationship of the Crown and Aboriginal Peoples.

Under the *Sparrow* test for the justification of regulations, the scheme of allocation of resource product among Aboriginal groups, and competing commercial and non-commercial groups, was one of the hallmark interpretive principles in assessing the honour of the Crown. In the case of national defence activities infringing section 35 rights, however, there would not be such a scheme of priorities. Instead, as discussed in the second half of Chapter 6 in the development of a test or framework for justification of national defence activities infringing existing rights, an assessment of justification would be based on a full examination of the conduct of the Crown and its officials in the planning and implementation of any defence activity with real or potential impact on section 35 rights.

Such an examination would involve such aspects as the identification of aboriginal and treaty rights that could or would be affected by proposed defence activities; the consideration of other training areas and seasonal times, which would have had less or little impact on the rights of Aboriginal Peoples; consultation by defence officials with

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[1] 70 D.L.R. (4th) 385, [1990] 1 S.C.R. 1075, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, [1990] 3 C.N.L.R. 160, 56 C.C.C. (3d) 263, 111 N.R. 241.

representatives of the groups of affected Aboriginal Peoples; the disclosure of details of defence activities; the record of consideration to the representations of the Aboriginal Peoples; compliance with, and reviews of the activity completed, such as under the *Canadian Environmental Protection Act*[2] and the *Environmental Assessment and Review Process Guidelines Order*[3] (*EARP*); and consideration of the proportionality of seriousness of the infringement of the aboriginal and/or treaty rights, and the efforts and willingness of the Crown to minimize or eliminate any infringement.

This Chapter will now examine the above test in light of the legal issues raised in court decisions after *Sparrow*, in the area of aboriginal and treaty rights, and also those cases involving fiduciary duty considered in non-aboriginal situations, with a view to confirm the test or modify it as necessary. Since the *Sparrow* decision in the Supreme Court of Canada, however, there have been no Canadian court decisions involving national defence and either aboriginal or treaty rights. The most recent decision before *Sparrow* involving Aboriginal Peoples and national defence was that of Reed J. in the Federal Court Trial Division on April 12, 1990 in *Naskapi-Montagnais Innu Association (NMIA)* v. *Canada (Minister of National Defence)*,[4] as discussed *supra* in Chapter 3.

Aboriginal Law and Section 35 Decisions since Sparrow

1. Supreme Court of Canada and Courts of Appeal Decisions

After the decision of the Supreme Court of Canada on May 31, 1990 in *Sparrow*, many Canadian courts, including that Court and three provincial courts of appeal, have considered the infringement of aboriginal and treaty rights in criminal proceedings involving aboriginal harvesting. Unfortunately, as will be subsequently discussed, the

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2 R.S.C. 1985, c. 16 (4th Supp.).

3 SOR 84/467, made pursuant to section 6 of the *Department of the Environment Act*, R.S.C. 1970, c. 14 (2nd Supp), now R.S.C. 1985, c. E-10. The EARP guidelines will only continue to apply to those proposals referred to the Minister of the Environment before section 74 of Bill C-13 (the *Canadian Environmental Assessment Act*) comes into force (given Royal Assent on June 23, 1992 but not yet proclaimed in force).

4 (1991), 5 C.E.L.R. (N.S.) 287 (F.C.T.D.).

test of the Supreme Court of Canada in *Sparrow* has not been applied in any substantive fashion in the judgments in the that Court and in the courts of appeal.

The first of two such cases since *Sparrow* considered by the Supreme Court of Canada was that of *R.* v. *Agawa*[5] involving the convictions of Mr. Greg Agawa for fishing with a gill net for commercial and other purposes without a licence contrary to subsection 12(1) of the *Ontario Fishery Regulations*.[6] The appellant's Band had obtained commercial licences from 1950 to 1983 and had not applied for one in 1984 apparently to test section 35

The unanimous judgment of the Court of Appeal[7] on August 3, 1988 restored the convictions that had been quashed by the summary conviction court. Blair J.A. found that the requirement to obtain a licence for gill-net fishing applied to all Ontario residents under the *Regulations*, served a valid conservation purpose and constituted a reasonable limit on the right to fish under the Robinson Huron Treaty of 1850, citing with approval the decision of the British Columbia Court of Appeal in *Sparrow*.[8] While the Supreme Court of Canada eventually developed a different test for section 35 than used by the Ontario Court of Appeal in *Agawa*, the judgment in the latter case is nevertheless cited and followed by Dickson C.J.C and La Forest J. in the *Sparrow* decision on the issues of the meaning of "existing" rights in section 35 and the proper principles of interpretation of Indian treaties and statutes.[9]

The accused appealed to the Supreme Court of Canada after his convictions were

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5 [1991] 1 C.N.L.R. vi, 41 O.A.C. 320, 118 N.R. 399, 58 C.C.C (3d) vi.

6 C.R.C. 1978, c. 845.

7 (1988), 53 D.L.R. (4th) 101, [1988] 3 C.N.L.R 73, 43 C.C.C. (3d) 266, 28 O.A.C. 201 (Ont. C.A.). In finding that the regulations requiring a license for fishing were a reasonable limitation on the Indian treaty right to fish, the Court of Appeal did not, however, consider the special trust relationship or fiduciary duty of the Crown in its analysis of section 35.

8 (1987), 36 D.L.R. (4th) 246, 32 C.C.C. (3d) 65, 9 B.C.L.R. (2d) 300 (B.C.C.A.).

9 *Supra*, note 1, at p. 396 and pp. 407-8.

restored. The first memorandum for application for leave to appeal was filed on November 28, 1988. In light of the decision in *Sparrow* by the Supreme Court of Canada, counsel for the accused sought and was granted permission to file a fresh application for leave to appeal.

In seeking leave to appeal to the Court, considerable reliance was placed on the decision of the Court in *Sparrow* by counsel for both sides, notwithstanding that case considered neither issues of treaty rights nor commercial fishing. The appellant argued that the *Regulations* placed no priority on aboriginal and treaty fishing rights, that the licensing system was not inconsistent with the concept of a constitutionally protected right and that the Court of Appeal had failed to discharge the burden of justification.[10] On the other hand, the respondent alleged that no *prima facie* interference with a section 35 right had been proved by the appellant, that obtaining a licence *per se* was not an infringement of section 35 under the *Sparrow* test, *i.e.*, requiring the appellant to spend undue time or resulting in hardship, that the net-length restriction attached as a condition to the licence required in the *Sparrow* case was an infringement but not the licence itself, and that licensing allowed the government to monitor numbers.[11] Leave to appeal was denied on November 11, 1990 by a three member court without reasons, as is the practice.

The Court of Appeal decision in *Agawa* is still relied on by Crown authorities in Ontario, such as in *R.* v. *Jackson*,[12] *infra*, to avoid the rigorous second half of the justification test in *Sparrow*. But as decided in *Jackson*, the *Agawa* decision, notwithstanding leave to appeal the latter decision was not granted by the Supreme Court of Canada, no longer appears to be the law on the justification of infringement of rights recognized under section 35.

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[10] Appellant's Fresh Application for Leave to Appeal, pp. 75-9.

[11] Respondent's Memorandum on Fresh Application for Leave to Appeal, pp. 6-14.

[12] [1992] 4 C.N.L.R. 121 (Ont. Ct. of Justice). Decision given on February 19, 1992 by Eddy P.D.J.

The one other case considered by the Supreme Court of Canada since *Sparrow* that considers aboriginal rights is that of *Bear Island Foundation et al.* v. *Attorney General of Ontario*,[13] a very important case dealing with aboriginal title in Ontario, in which the appeal was dismissed by a Court of five members on August 15, 1991. In a short judgment the Court agreed with the decisions of the lower courts that the appellants' aboriginal right to the land in question had been extinguished, but disagreed in part with the finding of Steele J. in the Ontario High Court of Justice that the appellants had not possessed such a right. An appeal from the decision of Steele J. had been dismissed on February 27, 1989 by the Ontario Court of Appeal.

The Supreme Court of Canada cited its own decision in *Sparrow* in the context of the finding of exercise of sufficient occupation of the lands in question to establish an aboriginal right to the land. In respect of the Robinson-Huron Treaty, the Court also added:

> .... It is conceded that the Crown has failed to comply with some of its obligations under this agreement, and thereby beached its fiduciary obligation to the Indians....[14]

This comment, after the incorporation of fiduciary duty in the test of justification given in *Sparrow* for the infringement of rights protected by section 35, now eliminates any argument that the Court's decision in *Guerin* v. *The Queen*[15] restricted the concept of fiduciary duty in the Aboriginal-Crown relationship only to the surrender of reserve land, as found by some courts after that decision and discussed in Chapter 4.

The three court of appeal cases involving the infringement of aboriginal or treaty rights

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[13] (1991), 83 D.L.R. (4th) 381 (S.C.C.), affirming (1989), 58 D.L.R. (4th) 117, 68 O.R. (2d) 391 (C.A.), dismissing appeal from (1985), 15 D.L.R. (4th) 321, 49 O.R. (2d) 353 (H.C.J.).

[14] *Ibid.*, p. 384.

[15] (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, 20 E.T.R. 6, 36 R.P.R. 1, 55 N.R. 161.

since the *Sparrow* decision are *R.* v. *Flett*,[16] *R.* v. *Machatis and R.* v. *Marten*[17] and *R.* v. *Howard*.[18]

In the first case, the accused Henry Flett was acquitted on May 14, 1987 of charges of hunting Canada geese and having possession of two geese contrary to the regulations under the *Migratory Birds Convention Act* (hereinafter *MBCA*).[19] The trial judge applied the British Columbia Court of Appeal decision[20] in *Sparrow* and declined to follow the Saskatchewan Court of Appeal decision in *R.* v. *Eninew*[21] and *R.* v. *Bear*[22], which held that the *MBCA* regulations were reasonable and desirable limitations on the right to hunt preserved by various treaties. A Crown appeal was dismissed by the Manitoba Queen's Bench on September 1, 1989,[23] and leave to appeal by the Crown was refused on September 7, 1990 by the Manitoba Court of Appeal without reasons except for an order by the Court that the Crown pay costs to the intervenor, the National Indian Brotherhood/Assembly of First Nations, fixed in the lump sum of $15,000 without disbursements.[24] No order for costs in favour of the respondent was made.

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[16] (1990), 68 Man. R. (2d) 159, [1991] 1 C.N.L.R. 140 (C.A.). Decision in the Court of Appeal given by O'Sullivan, Huband and Philp JJ.A. on September 7, 1990.

[17] (1992), 117 Alta. R. 281 (C.A.), dismissing appeal from (1990), 104 Alta. R. 33, [1991] 1 C.N.L.R 154 (Q.B.). Decision in the Court of Appeal given by Bracco, Coté and Cawsey JJ.A. on January 17, 1991.

[18] [1992] 2 C.N.L.R. 122, 8 O.R. (3d) 225 (O C.A.). Decision given by Finlayson, Galligan and Arbour JJ.A on March 13, 1992.

[19] R.S.C. 1952, c. 179.

[20] (1987), 36 D.L.R. (4th) 246, 32 C.C.C. (3d) 65, 9 B.C.L.R. (2d) 300 (B.C.C.A.).

[21] 12 C.C.C. (3d) 365, 10 D.L.R. (4th) 137, 32 Sask R. 237 (Sask. C.A.).

[22] *Ibid.*

[23] (1990), 60 Man. R. (2d) 294 (Q.B.). On the issue of extinguishment, Schwartz J. adopted the reasoning of Conrad J. in her decision of February 22, 1989 in *R.* v. *Arcand* (1989), 65 Alta. L. R. (2d) 326 (Q.B.) that the "original rights thesis" should be accepted and accordingly an "existing treaty right" for purposes of section 35 was a treaty right that had not been extinguished. Schwartz J. also applied the finding of Conrad J. that the MBCA regulations had not extinguished the treaty right to hunt. An appeal by the Crown in the *Arcand* case was abandoned in October 1990.

[24] *Supra*, note 16.

In *R.* v. *Machatis* and *R.* v. *Marten*, the appellants were charged with fishing with a gill net without a license in Alberta and acquitted in provincial court. The Court held that restricting license holders to fishing only for themselves was an infringement of the treaty right to fish afforded to the appellants as members of a Band recognized as a party to Treaty No. 6. A Crown appeal to the Court of Queen's Bench was allowed.[25] The accused appealed to the Alberta Court of Appeal, which gave its decision on January 17, 1991.[26] As to the infringement of a section 35 aboriginal or treaty right based on the mere requirement of a licence issued on demand without fee to a treaty Indian, the Court of Appeal found that obtaining such a licence was not unreasonable. While the Court does not allude expressly on this point to the various components of the *Sparrow* test for infringement and justification, it would appear that the Court is finding that the mere requirement to obtain a no cost licence was not a *prima facie* infringement of a section 35 right, *i.e.,* the limitation was not unreasonable, it did not impose undue hardship and did not deny to the holders the preferred means of exercising their rights. The Court thus did not proceed to consider any aspect of justification, including the upholding of the honour of the Crown.

Counsel for the appellants *Machatis* and *Marten*, also argued that the aboriginal and treaty rights were collective rights and the licensing scheme in effect replaced them with a series of individual rights, which were seen as a derogation of their rights. There was no evidence, however, that a band licence had ever been sought and the Court of Appeal declined to rule on this issue using the justification procedures in *Sparrow* as the issue had not been argued at trial and evidence tendered. The appeal was dismissed and the appellants remained convicted with absolute discharges.

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[25] (1990), 104 Alta. R. 33 (Q.B.).

[26] *Supra*, note 17. Reasons for the judgement were released in a memorandum dated January 21, 1991.

In *Howard*, the appellant, a status Indian and a member of the Hiawatha Band,[27] was convicted of unlawfully fishing for pickerel on January 18, 1985 during a prohibited period contrary to the *Ontario Fishery Regulations*[28] in an area near, but not on, the reserve land of the appellant's Band. The appellant's Band is a party to treaties made with the Crown in 1818 and 1923. While certain fishing rights were covered by the 1818 Treaty, the Court of Appeal found that the Band agreed to the surrender under the 1923 Treaty of its fishing rights throughout Ontario except on reserves set apart for the Band.

On March 13, 1992, the Ontario Court of Appeal allowed the application for leave to appeal but dismissed the appeal.[29] The appellant argued in part that his aboriginal right to fish was infringed by the *Ontario Fishery Regulations*. However, as the lower court had found that the fishing rights that the Band members had before 1923 were extinguished by the 1923 Treaty, those rights were not "existing rights" at the time the *Constitution Act, 1982* came into force in 1982 for section 35 to have application. Accordingly, inasmuch as the aboriginal fishing right was found extinguished, the Court did not have to proceed under the test given by the Supreme Court of Canada in *Sparrow*[30] to consider justification of infringement of the right and the fiduciary duty of the Crown.

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[27] As of December 31, 1989, Indian and Northern Affairs Canada recorded in the *Schedule of Indian Band, Reserves and Settlements Including - Membership and Population Location and Area in Hectares, December 1990*, that the Hiawatha First Nation had a band membership of 331 and a reserve population of 129 on a reserve with 790.4 hectares (1952 acres) of land located on the shore of Rice Lake in the County of Peterborough, with other land owned jointly with the Curve Lake and Scuggog Bands.

[28] *Supra*, note 6.

[29] *Supra*, note 18.

[30] The Court in *Sparrow* had, of course, found that the members of the Musqueam Band had an existing aboriginal right under section 35 to fish for food, social and ceremonial purposes.

2. Provincial Court and Superior Court Cases

As is evident in the brief review of the two cases considered in the Supreme Court of Canada and the three in the provincial courts of appeal, the justification of infringement of section 35 rights since the *Sparrow* case has not been commented upon in the judgments of those courts. Many cases, however, have arisen and been tried in provincial criminal courts, with appeals in provincial superior courts, in the context of quasi-criminal prosecutions of Aboriginal Peoples in the exercise of hunting, fishing and other harvesting-type aboriginal and treaty rights.

Many of these cases have applied the second part of the justification developed in *Sparrow* in May 1990 in their decisions. Findings that the Crown has not given priority to section 35 rights or has not treated the rights seriously, under the question of justification of infringement, have been responsible for acquittals in several cases involving aboriginal fishing without a licence, such as *R.* v. *Bones, Jack, Sellars and Alphonse*,[31] *R.* v. *Joseph and Underwood*,[32] *R.* v. *Commanda et al.*,[33] *R.* v. *Nikal*,[34] and *R.* v. *Jackson*.[35] Evidence of lack of consultation with the Han Gwitch'in has also been cited in *R.* v. *Joseph*,[36] along with lack of priority to Indian food fishing and inconsistency in enforcement practices, as reasons for concluding that the infringement of the aboriginal right to fish was unjustified in that case.

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[31] [1990] 4 C.N.L.R. 37 (B.C. Prov. Ct.). Decision given on June 27, 1990 by Barnett P.C.J. Decision appealed and hearing not yet completed as of July 30, 1992.

[32] [1990] 4 C.N.L.R. 59 (B.C.S.C.). Decision given on July 16, 1990 by Murphy J. Under appeal and argued before British Columbia Court of Appeal in Fall 1991.

[33] [1990] O.J. No. 1603 (Ont. Dist. Ct.). Decision given on August 23, 1990 by Pettras D.C.J.

[34] [1991] 2 W.W.R. 359, [1991] 1 C.N.L.R. 162 (B.C.S.C.). Decision given on October 16, 1990 by Millward J. Under appeal and argued before British Columbia Court of Appeal in Fall 1991.

[35] *Supra*, note 12.

[36] [1992] 2 C.N.L.R 128 (Yukon Terr. Ct.). Decision given on February 7, 1991 by Lilles Terr. Ct. J.

Other cases resulting in acquittals have been less precise in providing reasons for finding that infringements of section 35 rights were unjustified. In some cases, such as *R.* v. *Potts et al.*,[37] which attracted considerable media attention in the Fall of 1991, acquittals at trial have also resulted simply based on the absence of any evidence on the issue of justification of infringement, in that case of the treaty right to hunt commercially and sell wildlife products.

The right to hunt under treaty and the justification test in *Sparrow* were subject to rigorous analysis in *R. v. McIntyre*,[38] decided on November 20, 1990 in Saskatchewan Provincial Court. Fafard P.C.J. applied the two-component *Sparrow* test developed by the Supreme Court of Canada to a charge laid against a member of the English River Band[39] of unlawful possession of a moose killed in a road corridor game preserve in contravention of the Saskatchewan *Wildlife Act*.[40] Having first found that the conservation of the moose population by the creation of a road corridor game preserve was a valid legislative objective, Fafard P.C.J. then stated that the Crown had a difficult task ahead in meeting the justificatory standard.[41]

Expert evidence was presented by a provincial government wildlife biologist as to the rationale and justification for hunting restrictions in the road corridor. Based on this

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[37] [1992] 1 C.N.L.R 142 (Alta. Prov. Ct.). Decision given on November 15, 1991 by Ayotte P.C.J. The Crown appealed the acquittals of the three accused, and Bielby J. in Alberta Court of Queen's Bench on June 30, 1992 upheld the appeal and convicted the three accused on some 25 charges as reported at [1992] A.J. No. 574. Bielby J. found that a treaty right to hunt commercially was extinguished by the *Constitution Act, 1930*.

[38] [1991] 1 W.W.R. 548, [1991] 2 C.N.L.R. 146 (Sask. Prov. Ct.). Decided on October 16, 1990.

[39] As of December 31, 1989, Indian and Northern Affairs Canada recorded in the *Schedule of Indian Band, Reserves and Settlements Including - Membership and Population Location and Area in Hectares, December 1990*, that the English River Band had a band membership of 805 and a reserve population of 480 on seven reserves, with 11,884.6 hectares (29,365 acres) of land.

[40] S.S. 1979, c. W-13.1.

[41] *Supra*, note 38, at p. 563.

and other evidence, Fafard P.C.J. found that priority had not been given to the treaty right to hunt for food, infringement had not been minimized as little as possible, and consultation had been inadequate.[42] The regulation creating the corridor was thus found to be of no force and effect by virtue of section 52 of the *Constitution Act, 1982*.

The Crown appealed the judgment of Fafard P.C.J. and, in a decision[43] on December 2, 1991, Wright J. of the Saskatchewan Court of Queen's Bench found that the former had erred in the application of the decision in *Sparrow* in the Supreme Court of Canada, set aside his decision and entered a conviction for the accused. After quoting with approval from the Saskatchewan Court of Appeal decision in *Horse* v. *R.*[44] that provided that the *Natural Resources Transfer* Agreement had merged and consolidated hunting and fishing treaty rights such as contained in Treaty No. 8 and that the *Agreement* had been made part of the Constitution of Canada under section 52 of the *Constitution Act, 1982*, Wilson J. found that section 35 dealing with aboriginal and treaty rights had simply no effect on limitations to the right to hunt under Treaty No. 8 and section 12 of the *Agreement*. With respect to the fiduciary duty analysis of Fafard P.C.J., Wright J., thus having found section 35 to be inapplicable, found it unnecessary to comment on the other findings of Fafard P.C.J., including those as to lack of justification of the infringement.

Based on the above decisions concerned with the direct regulation of aboriginal and treaty fishing and hunting rights, how would a court now apply similar justification analysis to national defence activities that were found to be a *prima facie* infringement

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[42] *Ibid.*, pp. 564-9.

[43] [1992] 1 C.N.L.R. 129 (Alta. Q.B.).

[44] [1985] 1 W.W.R 1 (Sask. C.A.). The Court of Appeal in *Horse* found that, while section 35 provides constitutional protection to treaty rights, it must be read subject to the so-called game laws paragraphs in the Constitution, i.e., those hunting, trapping and fishing provisions in the *Natural Resources Transfer Agreement*. An appeal by the accused was dismissed in an unanimous judgment by the Supreme Court of Canada (1988), 47 D.L.R. (4th) 526.

of section 35 rights? As discussed in Chapter 6 in respect of the *Sparrow* decision and regulation of salmon fishing, ensuring that the honour of the Crown is upheld would involve three primary considerations: first, allocation of the resource so that the aboriginal right to use it was given priority as required under section 35; second, requiring as little infringement as possible of the protected right; and third, adequate consultation with the Aboriginal group with respect to the conservation measures being implemented. A further consideration is that, in a situation of expropriation, fair compensation is available.

While the first consideration, *i.e.,* given priority to section 35 rights and treating the rights seriously, has received the most attention in the cases reviewed above, it will not generally have application in the instance of national defence activities of a non-regulatory nature that nevertheless infringe section 35 rights. The other two factors have also been used by courts, but questions of infringing the rights as little as possible and adequate consultation have been factually intertwined in most cases with the issue of priority of aboriginal and treaty rights. While none of the cases reviewed above can provide confirmation of the seven-item national defence justification test repeated in the introduction to this Chapter, the readiness of the courts to examine all aspects relevant to the priority of rights, minimizing infringement and consultation suggests that the seven items would not be inappropriate in addressing the special aspects of defence infringement of section 35 rights.

Other Aboriginal Cases and Fiduciary Duty Cases Post-Sparrow

While the above cases have applied the second part of the justification test in *Sparrow* in some manner, such analysis has of course only occurred after unextinguished, *i.e.,* existing section 35 rights have been found, these rights have been infringed and valid legislative objectives have been found under the first part of the *Sparrow* justification test.

A most significant case concerning aboriginal title in British Columbia and fiduciary

duty, which did not reach the justification test inasmuch as any right of aboriginal title was found extinguished, is that of *Delgamuukw et al.* v. *The Queen in Right of British Columbia et al.*[45] In *Delgamuukw* the plaintiffs were 35 Gitksan and Wet'suwet'en hereditary chiefs who sought a legal declaration *inter alia* that they owned approximately 22,000 square miles in north-west British Columbia and were entitled to govern the territory by aboriginal laws that were paramount to the laws of British Columbia, or in the alternative that they had unspecified aboriginal rights to use the territory. In a very detailed and lengthy decision given on March 8, 1991, McEachern C.J.B.C. found that the evidence entitled the plaintiffs to some unspecified rights in the land but that it fell short of establishing ownership or the right to govern, and that the plaintiffs were only entitled to a declaration that they were entitled to use vacant Crown land for aboriginal purposes subject to the laws of the province. This decision is now under appeal.

This decision has been extensively criticized by Aboriginal groups and others,[46] including comments that portions of the decision are racist in character. While a very significant case in the area of extinguishment of aboriginal title and sovereignty, and one that may well be appealed[47] to the Supreme Court of Canada after the present appeal to the British Columbia Court of Appeal is completed, it is important to note the

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[45] (1991), 79 D.L.R. (4th) 185, [1991] 3 W.W.R. 97 (B.C.S.C.).

[46] Professor Hamar Foster in his article "It Goes Without Saying: Precedent and the Doctrine of Extinguishment by Implication in Delgamuukw et al. v. The Queen," (1991) 49 *The Advocate* 341-357, is very critical of the extinguishment found in the case, and the substitution of reconciliation under the fiduciary duty test in place of rights for the plaintiffs.

[47] As stated by Ms. Wendy Moss at p. 17 of her article "B.C. Aboriginal Title Case (Delgamuukw v. The Queen)," Library of Parliament Research Branch BP-258E, May 1991, in which she considers issues of language, sovereignty, treaties and extinguishment, a clear answer as to the question of indigenous peoples' sovereignty may now have to wait a decision of the Supreme Court of Canada. Similarly, the question of express language required for the "clear and plain" intention test of extinguishment is also now an unresolved issue coming out of this case.

comments of McEachern C.J.B.C. as to the fiduciary duty of the Crown.[48] After referring to the judgments of Dickson J. (as he then was) and Wilson J. in the decision of *Guerin*[49] and their comments on the nature and origin of the fiduciary duty, McEachern C.J.B.C. stated:

> ... In both cases [referring to *Delgamuukw* and *Guerin*] the Indians had a legal right, both with their roots in aboriginal rights. In both cases they lost that right, in *Guerin* by surrender, and in this case by extinguishment. In the former, the court imposed a fiduciary duty upon the Crown [in right of Canada]; in this case the Crown [in right of the province] promised the Indians they could use the land of the colony and province for aboriginal purposes until it was required for other purposes. Keeping in mind the general obligation of the Crown towards Indians, and that "the categories of fiduciary, like those of negligence should not be considered closed" (*Guerin*, p. 341), it is my view that a unilateral extinguishment of a legal right, accompanied by a promise, can hardly be less effective than a surrender as a basis for a fiduciary obligation.[50]

McEachern C.J.B.C. then referred to the decisions in *R.* v. *Sioui*[51] and in *Sparrow*, and stated that the Crown's obligation in the *Delgamuukw* case permitted Aboriginal Peoples, but subject to the general law of the province, to use any unoccupied or vacant Crown land for subsistence purposes until such time as the land was dedicated to another purpose, and that the Crown would breach its fiduciary duty if it sought to limit aboriginal use of vacant Crown land.[52] As for mandating the use of a justification test by analogy to *Sparrow*, he decided he should not do so for the following reasons, as summarized:

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[48] Comments on fiduciary duty are found in Part 15 of the judgment, entitled "Extinguishment of Fiduciary Duty." I note in the index of the judgment, however, that this part is entitled "Extinguishment **and** Fiduciary Duty" (emphasis added). The latter title appears to be the correct one as McEachern C.J.B.C. first deals in part 15 with extinguishment of aboriginal rights, and then resulting fiduciary duties, not the extinguishment of the latter.

[49] *Supra*, note 15.

[50] *Supra*, note 45, at pp. 481-2.

[51] (1990), 70 D.L.R. (4th) 427, 109 N.R. 22, [1990] 1 S.C.R. 1025.

[52] While McEachern C.J.B.C appears to be addressing these comments in respect of the obligation of the Crown in right of the province of British Columbia, there should be no reason that the comments of his Lordship should not have application in analogous situations at the federal level.

1. The fiduciary duty assumed by the Crown upon the extinguishment of the aboriginal rights was not a constitutionally recognized right, *i.e.*, under section 35, and was therefore subject to the general law of the province; and

2. The *Sparrow* case arose in a closely regulated industry where the issues were narrow, but the situation in *Delgamuukw* involved the province in the ordinary discharge of its powers under section 92 of the *Constitution Act, 1867* and thus reconciliation was more of a two-way street than in the former case.[53]

By "two-way street" this would appear to mean that the rights of the plaintiffs for aboriginal sustenance activity or aboriginal purposes, in competition with other non-Aboriginal user groups, would not be given priority after the needs of conservation, but such rights and the exercise of conflicting provincial rights under section 92 would be settled or reconciled on some other basis. It is also apparent that this fiduciary duty described by his Lordship would not have application in other situations in which aboriginal rights were unextinguished, *i.e.*, as in the case of the right to fish for salmon for food and other purposes as found in *Sparrow*, and in reserve land rights as in *Guerin*, both situations under federal jurisdiction.

The fiduciary duty so found by McEachern C.J.B.C. was considered "novel" by Mr. E. Roberts A. Edwards of the Ministry of the Attorney General of British Columbia, who provides a brief review of fiduciary duty and the implications of the decision of McEachern C.J.B.C. in his paper "*Delgamuukw and others v. Her Majesty the Queen in right of the Province of British Columbia and the Attorney General of Canada* - Fiduciary Duty."[54] Mr. Edwards considers that the description of the duty ties the provincial government's obligations to questions of land and resource use which may affect aboriginal sustenance practices, but not in other areas of provincial government activity such as education, health and welfare.[55]

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[53] *Supra*, note 45, at pp. 482-3.

[54] Conference Proceedings - Delgamuukw and the Aboriginal Land Question. Victoria, British Columbia. September 10 - 11, 1991.

[55] *Ibid.*, p. 8.

After reviewing in some detail the history of European settlement in British Columbia and associated interference in the way of life of Aboriginal Peoples, McEachern C.J.B.C. then proceeds to outline the following six factors or propositions for the assistance of the parties in respect of the specific fiduciary duty so found and to set out a framework[56] for a justification and reconciliation process (as summarized):

> 1. Both federal and provincial Crown, each in its own jurisdiction, always keeping the honour of the Crown in mind, are free to direct the development of the province and the management of its resources and economy in the best interests of both the Indians and non-Indians of the territory and of the province;
>
> 2. Provincial ministers and staff must always keep the aboriginal interests of the plaintiffs in mind in recommending legislation, and reasonable consultation, without a right to veto or a requirement for consent, must occur;
>
> 3. Genuine efforts should be made to ensure that aboriginal sustenance and cultural activities are not impaired arbitrarily or unduly, with provision for suitable alternative arrangements;
>
> 4. Whether aboriginal interests are disrupted unduly by any proposed or resulting interference and the honour of the Crown is brought into question will depend: upon the nature and exercise of the aboriginal activity, reasonable alternatives, the nature and extent of interference, its duration, and a fair weighing of advantages and disadvantages both to the Crown representing all citizens and to the Indians;
>
> 5. Some sustenance priority to Indians in the use of vacant land would be expected to the extent permitted by the *Charter*; and
>
> 6. Given the vastness of the territory, litigation and judicial intervention would not be expected unless conflicts called the honour of the Crown into question with respect to the territory as a whole.[57]

After listing the above factors, McEachern C.J.B.C. stated that it would be unwise to construct a justification process and that the range of potential competition was too

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[56] McEachern C.J.B.C. emphasizes at p. 484 that he is setting out only a framework and is not presuming to describe "a justification process" because he could not "be nearly as specific as in *Sparrow*."

[57] *Supra*, note 45, at pp. 487-90.

vast for a predetermined process, believing that the law relating to fiduciary duty was better able to resolve those questions. McEachern C.J.B.C. also considered that "proper planning and appropriate consultation with, or disclosure to, the plaintiffs or their advisors, and reasonable accommodations on all sides" should make difficulties associated with constantly being burdened with litigation unnecessary.

While the question of extinguishment of aboriginal title in *Delgamuukw* is the central legal issue for the parties, the above model or framework for reconciliation of Crown and aboriginal interests (as opposed to justification in the sense used in *Sparrow*), given the fiduciary duty arising from the extinguishment of the aboriginal title, provides some confirmation of elements of the national defence model discussed in the previous Chapter. While the defence model is needed for examining the justification of defence activities that may result in *prima facie* infringement of existing aboriginal and treaty rights recognized under section 35, justification or reconciliation also may be required if such defence activities occur on land in which aboriginal title has been extinguished but other rights unprotected by section 35 still remain. Such rights could still fall under a general fiduciary obligation, as described by McEachern C.J.B.C. in *Delgamuukw*, and be owed by the Crown to the groups of Aboriginal Peoples affected by extinguishment, to permit use of unoccupied or vacant Crown land for subsistence purposes until such time as the land was dedicated to another purpose.

In considering justification in respect of rights protected under section 35, the national defence model does not incorporate a system of priorities on which to assess the treatment of section 35 rights. In contrast the model considers a number of different aspects and issues on which to judge that the honour of the Crown has been upheld in any given situation. Like the framework developed in *Delgamuukw* in which McEachern C.J.B.C. considers that it would be unwise to establish a predetermined procedure, it also appears difficult or impossible to establish a precise procedure for assessing defence activities beforehand, and only the law of fiduciary duty will be able to resolve any given fact situation.

Fiduciary Duty in the Supreme Court of Canada since Sparrow

The Supreme Court of Canada since *Sparrow* has not commented directly on the scope of the fiduciary obligation or compensation for the breach of the duty owed by the Crown in a case involving the rights of Aboriginal Peoples except briefly as discussed in *Bear Island Foundation* v. *Attorney General of Ontario*.[58] Outside of the area of native law, however, in *Canson Enterprises Ltd.* v. *Boughton & Co.*,[59] a case decided by the Supreme Court of Canada on November 21, 1991, the fiduciary duty concept and remedy for breach of the duty were thoroughly reviewed in a private law commercial setting involving fiduciary duty in the relationship of solicitor and client, and the remedy for breach of the duty. In the recent case of *Norberg* v. *Wynrib*[60] involving a doctor-patient relationship and a sex-for-drugs arrangement with the addicted patient, the three characteristics attributed to a fiduciary relationship were also thoroughly examined in the judgment delivered by McLachlin J., with L'Heureux-Dubé J. concurring, on June 18, 1992.[61]

Canson Enterprises Ltd. v. Boughton & Co.

In *Canson* the full Court of nine members[62] heard an appeal from the British Columbia

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[58] *Supra*, note 13.

[59] (1991), 85 D.L.R. (4th) 129 (S.C.C.).

[60] [1992] 2 S.C.R. 226, allowing an appeal from (1990), 66 D.L.R. (4th) 553, 44 B.C.L.R. (2d) 47, [1990] 4 W.W.R. 193 (C.A.), dismissing an appeal from a judgment of Oppal J. (1988), 50 D.L.R. (4th) 1667, 27 B.C.L.R. (2d) 240, [1988] 6 W.W.R. 305, 44 C.C.L.T. 184.

[61] McLachlin J. in *Norberg* affirmed the three characteristics of a fiduciary relationship as stated by Wilson J. in *Frame* v. *Smith*, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81, 42 C.C.L.T. 1, 9 R.F.L. (3d) 225, and approved by Sopinka and La Forest JJ. in *Lac Minerals* v. *International Corona Resources Ltd.*, (1989) 61 D.L.R. (4th) 14, [1989] 2 S.C.R. 574, 26 C.P.R. (3d) 97, and by McLachlin J., Lamer C.J. and L'Heureux-Dubé J. concurring, in *Canson*, as will be subsequently discussed. The Aboriginal-Crown fiduciary relationship was not discussed or otherwise distinguished in *Norberg* except briefly in the judgment of McLachlin J. who stated that fiduciary obligation must be reserved to those situations that are in need of the protection that equity affords, as asserted in *Guerin*, *supra*, note 15.

[62] Wilson J., however, took no part in the judgment.

Court of Appeal decision[63] involving the issue of compensation for the breach of fiduciary duty held by a solicitor acting in a real estate purchase and sale, and commented on the principles that should be applied to determine the remedy for breach of a fiduciary duty. The solicitor of the respondent law firm did not disclose to two of the three purchasers (his clients and the appellants) the "flip sale" of the property and secret profit of $115,000 made by a third party in the transaction, who was also a client of the solicitor. Subsequently, in developing the property, the appellants incurred substantial losses due to the negligence of third parties. Through no foreseeable fault of the solicitor, the appellants were left with a shortfall of approximately $1 million.

On an agreed statement of facts, the appellants would not have completed the sale if they had had knowledge of the profit of the intermediate purchaser. In dismissing the appeal, three separate judgments were delivered, with La Forest and McLachlin JJ. in the leading judgments disagreeing on the extent that tort principles, as opposed to those in trust, should be applied in assessing equitable compensation for breach of fiduciary obligation. The Court of Appeal had dismissed the appeal of the decision of the trial judge who had found the solicitor liable and had awarded compensation determined in the same manner as in a case of fraud. Such compensation was limited to the secret profit of $115,000 plus consequential damages that arose before the negligence of the third parties.

La Forest J., Sopinka, Gonthier and Cory JJ. concurring, stated that the appellants were entitled to pursue their various claims in either common law or in equity, and could choose whichever offered the most advantageous remedy. Having chosen to proceed in equity for breach of fiduciary duty, however, remedies such as compensation for breach of fiduciary obligation were "designed to put the plaintiff in as

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[63] (1989), 61 D.L.R. (4th) 732, 45 B..L.R. 301, [1989] 1 W.W.R. 375, 39 B.C.L.R. (2d) 177 (B.C.C.A.).

good a position pecuniarily as before the injury."[64] An equitable remedy was therefore not just limited to situations in which the fiduciary received a benefit or advantage from the breach, and payment to the plaintiff was also not limited to the benefit, if any, received by the fiduciary because of the breach of his or her duty.

In considering the application of the result in *Guerin*[65] as discussed *supra* in Chapter 5, in which the plaintiff Band received compensation in effect for the lost opportunity for development of the surrendered land because officials of Indian Affairs had proceeded with a lease that was contrary to the oral terms discussed with the Band, La Forest J. distinguished the following two situations, as summarized:

> 1. Where a person in a trust relationship has control of property that in the view of the court belongs to another, as in the *Guerin* case, the obligation of the fiduciary is to hold the property and, on breach, the concern of equity is to return the property or, if it cannot be done, to afford compensation for what the property would be worth; and
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> 2. Where a person is under a fiduciary duty to perform an obligation, equity's concern is simply that the duty be performed honestly and in accordance with the undertaking the fiduciary has taken on, and to ascertain any loss resulting from the breach of the particular duty.[66]

In the latter situation where there was no property as such held by the fiduciary, which was the case in *Canson,* any benefit received by the wrongdoer would have to be disgorged. However, no benefit was received by the defendant solicitor and, after reviewing Commonwealth and Canadian case law, La Forest J. found that in the absence of any specific principles developed by equity for this situation, the level of compensation should be the same as that developed by common law in tort, i.e., damages should not be limited to what was reasonably in the contemplation of the parties, but also should not extend to losses that arose because of the independent

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[64] *Supra*, note 59, p. 147.

[65] *Supra*, note 15.

[66] *Supra*, note 59, at p. 146.

intervening acts of third parties.[67] La Forest J. also subsequently commented on the fusion of the two streams of common law and equity in this particular area of law, and that "whether one follows the way of equity through a flexible use of the relatively undeveloped remedy of compensation, or the common law's more developed approach to damages, is of no great moment."[68]

McLachlin J., with Lamer C.J.C. and L'Heureux-Dubé J. concurring, agreed with La Forest J. that the solicitor's liability should not extend to the damages caused by the subsequent intervening acts of the third parties. However, McLachlin J. disagreed with La Forest J. that damages for breach of fiduciary duty should be measured by analogy to contract and tort in those cases where the fiduciary does not control the property of the *cestui que trust*. This disagreement was based on the different interests of the parties in contract and tort in which the parties are taken to be independent and equal actors, as opposed to those in a fiduciary relationship in which the fiduciary has pledged to act in the best interests of the beneficiary, and to the trust-like nature of the fiduciary obligation as set out by Wilson J. in *Frame* v. *Smith*,[69] and approved by Sopinka and La Forest JJ. in *LAC Minerals Ltd.* v. *International Corona Resources Ltd.*[70] McLachlin J. emphasized that the distinction as to holding or not holding property as a fiduciary was artificial, and that equity was concerned with enforcing the underlying trust assumed by the fiduciary and deterring other fiduciaries from abusing their powers, not just with compensating the plaintiff beneficiary.[71]

As for analogy with tort, McLachlin J. questioned which measure of compensation would be appropriate as, depending on the nature of the wrongdoing, for example, in

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[67] *Ibid.*, pp. 147-8.

[68] *Ibid.*, p. 152.

[69] (1987), 42 D.L.R. (4th) 81, [1987] 2 S.C.R. 99, 42 C.C.L.T. 1.

[70] (1989) 61 D.L.R. (4th) 14, [1989] 2 S.C.R. 574, 26 C.P.R. (3d) 97.

[71] *Supra*, note 59, at pp. 154-5.

deceit as opposed to negligence, different measures of compensation would be available, and referred to the decision in *Guerin* for support of the proposition that trust principles, not those in tort, should govern the assessment of compensation.[72] In *Guerin*, as discussed earlier, the trial judge assessed damages on the value of the actual opportunity lost, and not what was reasonably foreseeable as in contract or tort under common law. While foreseeability would not be a factor, McLachlin J. stated that equitable compensation must still be limited to loss flowing from the trustee's acts in relation to the interest he or she undertook to protect. Such value would be calculated at the time of trial as in *Guerin*. In addition, while not required to mitigate damages, a plaintiff would not be able to claim losses resulting from clearly unreasonable behaviour on his part. As for losses caused by third parties as in *Canson*, McLachlin J. stated:

> .... Where the trustee's breach permits the wrongful or negligent acts of third parties, thus establishing a direct link between the breach and the loss, the resulting loss will be recoverable. Where there is no such link, the loss must be recovered from the third parties.[73]

In a brief judgment, Stevenson J. stated that he agreed with the conclusion reached by La Forest J. and was in substantial agreement with his reasoning except for the question of compensation as a remedy, and the fusion of law and equity.

While the judgment of La Forest J. was supported by three members of the Court, and that of McLachlin J. by two, neither judgment was a majority in the Court of eight that took part in the judgment. However, Stevenson J. stated that he agreed with the conclusion of La Forest J. and was in substantial agreement with his reasoning except on two points, neither of which directly addressed the distinction to be made based on the holding of property by a fiduciary. The judgment of La Forest J. as representing five of the eight justices can therefore be seen as a majority decision requiring the restitution of the whole of the loss which occurred as a result of the breach of a

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[72] *Ibid.*, pp. 158-61.

[73] *Ibid.*, p. 163.

fiduciary duty, regardless of considerations of remoteness, only to situations of fiduciary relationship in which the fiduciary can be considered to be the holder of property or in control of property for the use of the beneficiary.

Application of Guerin in the Canson Decision and of Canson to the rights of Aboriginal Peoples

In the leading judgments of both La Forest and McLachlin JJ. in *Canson*, there have been extensive references made to the Court's earlier decision on fiduciary duty in *Guerin* and the calculation of compensation for breach of the duty. While the method for the determination of damages in *Guerin* was considered but not applied in *Canson*, the principle in *Guerin*, that compensation for breach of fiduciary duty should be calculated on the same basis as for a breach of trust when the Crown acts contrary to its statutory and common law responsibilities for Aboriginal Peoples, was certainly reaffirmed. Such compensation, according to La Forest J., was to be calculated "... to place the Indians, so far as money could do it, in the same position as they would have been but for the breach of the Crown's obligation to the Indians."[74] However, La Forest J. also distinguished the *Guerin* decision inasmuch as he approved of the decision of the lower courts in *Canson* not to follow the determination of compensation as was done in *Guerin* on the basis that in the latter case the Crown was considered to be a fiduciary holding property for the benefit of the Indian Band, but the defendant solicitor in *Canson* was not holding property in either the traditional sense or in a constructive fashion.

McLachlin J., on the other hand, applied the findings in the *Guerin* decision extensively in her judgment. Specifically, she considered that the Court in *Guerin* had rejected the submission that tort principles should govern the assessment of compensation and proceeded on the basis that the plaintiffs were entitled to compensation based on trust principles used in an equitable approach. McLachlin J. also relied on *Guerin* to reject

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[74] *Ibid.*, p. 138.

the distinction made by La Forest J. in respect of the holding of property, stating that *Guerin* was not concerned with abuse of trust property in the classic trust; that there were no assets or property which had been misappropriated; and that the wrong in *Guerin* was the failure to adhere to the conditions of surrender and to consult with the band in accordance with the Crown's fiduciary duty. She also referred to comments by both Dickson J. (as he then was) and Wilson J. in *Guerin* that notwithstanding the legal relationship was not a true trust but a fiduciary duty, the appropriate measure of damages was trust damages.[75]

Accordingly, restitution of the whole of the loss which an Aboriginal group has suffered, regardless of considerations of remoteness, as a result of the breach of fiduciary duty may not apply in the following circumstances:

> 1. When the Crown is found not to be holding property for Aboriginal Peoples, either in trust or constructively, such as in those land claim agreements in which fee simple over portions of land has been granted absolutely to groups of Aboriginal Peoples in exchange for financial compensation and the surrender of whatever aboriginal title may have existed over the land or other contested areas;
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> 2. In self-government agreements not involving the control of property; or
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> 3. In other breaches of obligations under programs, services or treaties not related to the holding of property.

However, in some circumstances, extinguishment of aboriginal title may be viewed as passing a beneficial interest or title to be held by the Crown, and thus fiduciary duty could possibly be present in situations numbered 1 and 3 where such title was held by the Crown. In addition, given that the Crown may be holding and administering funds for programs for Aboriginal Peoples, a duty could also be found in any of the three situations if funds are so held by the Crown.

Based on the decision of La Forest J., in the case of a breach of a fiduciary obligation to perform a duty honestly as undertaken, common law principles in tort such as

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[75] *Ibid.*, p. 159.

remoteness and foreseeability would be applied to limit liability. In addition, given the decision of McLachlin J., who rejected the distinction as to whether or not the fiduciary has control of property for the beneficiary, an Aboriginal plaintiff may also not be entitled to recover losses from the Crown which occurred after learning of a breach by the Crown or its servants, or that were caused by third parties after the fiduciary obligation had ended.

Conclusion

From the cases that have considered the *Sparrow* decision in the context of the infringement of section 35 rights in aboriginal harvesting-type criminal prosecutions, it is apparent that the second part of tne justification test, dealing with the honour of the Crown being upheld with priority going to aboriginal and treaty rights, minimizing interference with these rights as much as possible, and having adequate consultation with the groups of Aboriginal Peoples affected, will be applied rigorously by courts in the protection of section 35 rights. While that is so, as found on appeal in *McIntyre*, the *Natural Resources Transfer Agreements* in the western provinces are very relevant inasmuch as they have been made part of the Constitution of Canada by virtue of the *Constitution Act, 1930* and thus restrict the rights which would otherwise be "existing" for purposes of receiving constitutional protection under section 35.

As discussed in this Chapter, the first consideration of affording priority and respect to these rights protected by section 35 has been instrumental in the majority of the cases in which acquittals have resulted. The other two factors, minimizing interference and adequate consultation, as discussed in Chapter 6, however, will have paramount importance in the test for consideration of *prima facie* infringement of section 35 rights by national defence activities. The national defence model for justification developed in Chapter 6 may well be similar to the framework set out by McEachern C.J.B.C. in *Delgamuukw* for considering the reconciliation of the fiduciary duty, owed to Aboriginal Peoples arising as a result of the extinguishment of aboriginal title, and the exercise of provincial powers under section 92.

Finally, as noted in *Canson*, a case dealing with fiduciary duty in the traditional commercial private law sense but providing comment and approval on the leading decision of that Court in *Guerin*, the Supreme Court of Canada appears divided on the principles that should be applied in determining the remedy for breach of a fiduciary duty, and the importance that the holding of property by a fiduciary should play in providing compensation to a party who has suffered a breach of duty at the hands of a fiduciary.

In the next and final Chapter of this dissertation, analysis and comment will be provided based on the constitutional changes discussed in early 1992 in respect of aboriginal and treaty rights, and the impact of these changes, if enacted, on fiduciary duty and the national defence infringement of these rights.

Chapter 8 - Conclusion

The Past

As discussed in Chapter 3, defence activities of both Canadian and foreign military forces in Canada for training have been seen at times by Aboriginal Peoples to be in conflict with their exercise of aboriginal and treaty rights, and as threats to the aboriginal way of life. As a result there have been a number of recent court actions initiated by groups of Aboriginal Peoples in which a variety of remedies have been sought, for example, environmental reviews and injunctions,[1] compensation and land for improper surrenders and expropriations,[2] and access to defence controlled land for the exercise of aboriginal and treaty rights.[3] There have also been instances of self help by Aboriginal Peoples, such as the use of road blocks, to halt military activities and draw attention to ongoing grievances.

While only approximately 0.27% of the total area of the country consists of Indian reserve lands at the present time, additional land areas of Canada, as discussed in Chapter 4, will come under exclusive or some other lesser degree of control by Aboriginal Peoples pursuant to land claim agreements, self-government agreements or other agreements, regardless of the results of the ongoing proposals for constitutional change. These agreements will of course provide increased jurisdiction[4] for the

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1 Environmental reviews and injunctions in relation to the infringement of aboriginal rights were discussed in the cases of *Chief Francis Laceese et al.* v. *Minister of National Defence and Minister of Environment*, Federal Court Trial Division Action No. T-273-90, and *Naskapi-Montagnais Innu Association (NMIA)* v. *Canada (Minister of National Defence)* (1991), 5 C.E.L.R. (N.S.) 287 (F.C.T.D.).

2 Compensation and land for improper surrenders and expropriations were discussed in *Kruger et al.* v. *The Queen* (1985), 17 D.L.R. (4th) 591 (F.C.A.), *Angeline Shawkence et al.* v. *Her Majesty The Queen*, Federal Court Trial Division Action No. T-702-85, and *Sarcee Band of Canada* v. *Canada*, Federal Court Trial Division Action No. T-1627-82.

3 Access to defence controlled land is a major issue in *Cold Lake First Nations et al.* v. *Her Majesty in right of Canada*, Federal Court Trial Division Action No. T-2026-89.

4 See Chapter 3 of *Aboriginal Peoples and Government Responsibility - Exploring Federal and Provincial Roles*, David C. Hawkes (ed.) (Carleton University Press: Ottawa, 1989) at pp. 59-64, in which Professor B.W. Morse comments on the divergent uses of the words "jurisdiction" and "responsibility" in relation to Aboriginal constitutional matters and the

exercise of present federal and provincial powers by Aboriginal Peoples in the areas of resource and land use, and development. Consequently, the training requirements of the Canadian Forces will require separate discussions, negotiations and arrangements with the respective Aboriginal group leaders, either before the conclusion of such agreements or after, or most likely both before and after. Resort to possible powers under section 257 for access to the lands of Aboriginal Peoples for peace-time training manoeuvres as discussed will be most unlikely unless no other alternate sites can be found for training.[5]

As discussed in Chapter 6, the 1990 judgment by the Supreme Court of Canada in *R.* v. *Sparrow*[6] has been a most significant decision in interpreting section 35 and further delineating the scope of the fiduciary duty of the Crown to Aboriginal Peoples. The *Sparrow* case concerned the direct regulation of an aboriginal right in the context of competition with the rights of non-Aboriginal commercial and sport groups. The justification of defence activities that have the unintended effect of infringing aboriginal and treaty rights protected under section 35, or other rights not so protected but still involving the fiduciary duty of the Crown in its relationship with Aboriginal Peoples, as found in *Delgamuukw et al.* v. *The Queen in Right of British Columbia et al.*[7] by McEachern C.J.B.C., will involve a test or framework which does not consider the validity of the legislative objectives supporting the defence activities. Such a test will instead, in my view, focus on an examination as to whether or not the honour of the Crown has been upheld in minimizing interference with aboriginal and treaty rights and

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great deal of misunderstanding that results from a lack of common understanding of these words.

5 Given the size of Canada and its diversity of geography, availability of suitable training sites should not be a problem, but increased development in semi-urban areas in the country will put pressure on existing training ranges, and limit the expansion or development of new ones.

6 *R.* v. *Sparrow* (1990), 70 D.L.R. (4th) 385, [1990] 1 S.C.R. 1075, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, [1990] 3 C.N.L.R. 160, 56 C.C.C. (3d) 263, 111 N.R. 241, reversing in part 32 C.C.C. (3d) 65, 36 D.L.R. (4th) 246, 9 B.C.L.R. (2d) 300 (B.C.C.A.).

7 (1991), 79 D.L.R. (4th) 185, [1991] 3 W.W.R. 97 (B.C.S.C.).

ensuring that adequate consultation with the representatives of affected groups of Aboriginal Peoples has occurred.

Such a test would involve the following factors, as discussed in Chapter 6:

1. Planning and identification of aboriginal and treaty rights by military authorities,

2. Alternatives considered by military authorities,

3. Consultation with Aboriginal Peoples,

4. Disclosure to Aboriginal Peoples of all information related to a defence activity, subject to concerns as to injury to international relations, national defence or security,

5. Record of consideration of comments and concerns of Aboriginal Peoples,

6. Compliance with other statutory reviews, and

7. Proportionality of defence effort and degree of infringement of aboriginal or treaty right.

The broad language of the *Sparrow* decision has undoubtedly left the Court with room to provide additional clarification and to promote the rights of Canada's first peoples as required in future cases. Given the Court's statements in *Sparrow* that "there can be no doubt that over the years the rights of the Indians were often honoured in the breach" and that for "many years, the rights of Indians to their aboriginal lands - certainly as *legal* rights - were virtually ignored,"[8] it would be surprising not to see additional decisions in which the Court defends the aboriginal and treaty rights of Canada's Aboriginal Peoples using the concept of fiduciary duty. Whether such cases will involve the infringement of aboriginal and treaty rights by defence activities remains to be seen.

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[8] *Supra*, note 6, at p. 404.

The Future - Possible Constitutional Changes

As of late June 1992, the draft resolution for changes to the Constitution of Canada had not been made available publicly for Aboriginal or any other matter under discussion, *e.g.*, Senate, Supreme Court, House of Commons, First Ministers' Conferences, Bank of Canada, roles and responsibilities of federal, provincial and Aboriginal governments, and the amending formula. A final "Status Report - Multilateral Meetings on the Constitution" was released on July 16, 1992 by the Federal Government, reflecting results of the Multilateral Meetings through July 7, 1992. Part IV of that Report is entitled "First Peoples" and contains 15 paragraphs in respect of the inherent right of self-government and issues related to the exercise of that right.[9]

Paragraph 40 in Part IV of the Report provides that:

> The Constitution should be amended to recognize that the Aboriginal peoples of Canada have the inherent right of self-government within Canada. This right should be placed in a new section of the *Constitution Act, 1982*, 35.1(1)

How will such a change in the Constitution to recognize that the Aboriginal Peoples of Canada have the inherent right of self-government within Canada affect the fiduciary duty of the Crown and the conduct of defence activities in Canada? As for fiduciary duty, Professor Brad Morse is quoted by Rudy Platiel[10] as stating that recognizing native sovereignty in itself does not generate a legal obligation on Canadian governments to provide money for Aboriginal governments, because none existed before, but that some financial obligations would flow from treaties and "the fiduciary obligations of the Crown." Inasmuch as the fiduciary obligation of the Crown is premised in part on both the power and obligation that the Crown has in respect of the land of Aboriginal Peoples, it is likely that the scope of the general fiduciary duty owed by the Crown and incidence of its operation would be reduced as the powers and

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[9] An explanatory note on the front cover of the Report provides that all decisions are provisional and that delegations reserved their positions on the overall package pending completion of the discussions. In respect of Aboriginal issues, consensus was considered to have been achieved only where there was substantial support from Aboriginal delegations.

[10] *The Globe and Mail* (October 22, 1991) p. A7.

obligation of the Crown are correspondingly reduced in a move to Aboriginal self-government as a third order of government and greater Aboriginal sovereignty with significant new powers for Aboriginal Peoples in the areas of land, resource control and management, education, health, law enforcement, etc. If on the other hand, however, some greater measure of municipal-type government is negotiated, or if fiduciary duty is found to flow from the Crown acquisition of aboriginal title, one would expect the present fiduciary obligation to continue relatively unchanged.

As for any effect on defence activities, given that the inherent right of self-government is described as a right "within Canada," jurisdiction exercisable under that right should not be inconsistent with the phrase "within Canada." Therefore, for example, a Mohawk Defence Force or other Aboriginal armed forces established generally for purposes other than to enforce applicable laws on the lands of Aboriginal Peoples as is now done by native police forces, *i.e.*, armed forces with a mandate for the armed defence of aboriginal lands or substantial armed operations beyond such lands, would be beyond the reach of Aboriginal governments based on the inherent right of self-government.

Will aboriginal and treaty rights "recognized and affirmed" under section 35 receive greater protection under changes to the Constitution than at present, and consequently be less susceptible to infringement by defence activities? Mention is made in paragraph 47 of the Report that the Constitution should provide that all the Aboriginal Peoples of Canada have access to those aboriginal and treaty rights recognized and affirmed in section 35 that pertain to them. No other direct reference is made to section 35 in the Report. While paragraph 47 when implemented may broaden the base of persons who can benefit from the protection of rights under section 35, it would not appear that the scope of protection of these rights has been strengthened or changed, at least directly by changes presently under discussion.

Outside of Part IV of the Report dealing with First Peoples, paragraph 39 in Part III

dealing with "Roles and Responsibilities" pertains to "Aboriginal Peoples' Protection Mechanism" and provides:

> There should be a general non-derogation clause to ensure division of powers amendments will not affect the rights of the Aboriginal peoples and the jurisdictions and powers of Aboriginal peoples.

Inasmuch as there has been no suggestion that national defence powers and jurisdiction would not remain as exclusively federal in nature, *i.e.*, defence powers would not be shared with the provinces or the governments of Aboriginal Peoples, a general non-derogation clause to ensure that division of power changes do not affect the rights of Aboriginal Peoples should have no direct effect on national defence activities.

Summary of Findings

The fiduciary duty, owed by the Crown and as set out in the *Guerin* and *Sparrow* cases, has imposed standards in the relationship of the Crown and Aboriginal Peoples. The *Sparrow* case clearly provides that fiduciary duty is incorporated into section 35 by the words "recognized and affirmed" for aboriginal and treaty rights, and a fiduciary duty is likewise present under *Guerin* in the surrender of reserve land. The *Guerin* situation is analogous to that in private law in which a fiduciary relationship will be established if the three conditions set out by Wilson J. in *Frame* v. *Smith*[11] are present. The three conditions in the context of the Aboriginal-Crown relationship would be:

> 1. A Minister of the Crown or other official as a fiduciary would have scope for the exercise of some discretion or power in respect of Aboriginal Peoples (the beneficiary);
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> 2. The fiduciary can exercise that power or discretion unilaterally so as to affect the legal or practical interests of the beneficiary; and
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> 3. The beneficiary is particularly vulnerable to the power or discretion held by the fiduciary.[12]

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[11] [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81.

[12] *Ibid.*, p. 136.

If a *Guerin*-type fiduciary relationship is established, then duties of the Crown would include those of utmost loyalty to the Aboriginal Peoples, dealing in good faith, and giving priority to the interests of Aboriginal Peoples.

The Ministers of National Defence and defence officials, however, do not normally have scope for the exercise of a discretion or power specifically on behalf of Aboriginal Peoples. Thus the *Guerin*-type of fiduciary duty would not normally be applicable to defence matters, except to the extent that other federal departments, notably DIAND, exercise power or discretion for Aboriginal Peoples in relation to some defence matter, *e.g.*, in *Kruger et al.* v. *The Queen*[13] in negotiations to obtain land for an airport for defence purposes. While that is so, defence activities conducted in the exercise of national defence authorty, provided under the royal prerogative and section 91 of the *Constitution Act, 1867*, may clearly infringe those rights of Aboriginal Peoples protected under section 35. An assessment of justification of any *prima facie* infringement will involve a range of considerations as discussed in Chapter 6.

The constitutional protection now afforded to existing aboriginal and treaty rights by section 35 has presented the federal and provincial governments with both additional responsibilities and opportunities to assist in providing for the well-being of the descendants of the first peoples of this country. As for the past record in dealing with Aboriginal Peoples, Dickson C.J.C. and La Forest J. in *Sparrow* stated that "there can be no doubt that over the years the rights of the Indians were often honoured in the breach,"[14] and quoted the remarks of MacDonald J. in *Pasco* v. *C.N.R.*[15] that "[w]e cannot recount with much pride the treatment accorded to the native people of this country." While defence activities of the Canadian Forces and of foreign allies in Canada may have adversely affected the aboriginal and treaty rights of the Aboriginal

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[13] (1985), 17 D.L.R. (4th) 591 (F.C.A.).

[14] *Supra*, note 6, at p. 404.

[15] (1985), 69 B.C.L.R. 76 at 79 (S.C.).

Peoples of Canada, section 35 and the entrenched fiduciary duty now require careful planning of these activities and consultation with the affected Aboriginal groups to ensure that the honour and fiduciary duty of the Crown are upheld.

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