CROWN-ABORIGINAL FIDUCIARY RELATIONSHIPS: FALSE OPTIMISM OR REALISTIC EXPECTATIONS?

by

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ABSTRACT

As a result of the Supreme Court of Canada's decision in R. v. Sparrow, the government's fiduciary obligations towards aboriginal peoples was extended into the area of constitutionally entrenched aboriginal and treaty rights. Native people expressed their expectations that this doctrinal development would be an instrument for native empowerment. To date, the Courts have delivered little under the fiduciary rubric. After examining the history and jurisprudence associated with the fiduciary concept, a critical approach is adopted in order to determine what phenomena are acting to limit the doctrine's potential. Three areas are explored in an attempt to determine why the legal system may operate to prevent the realisation of substantive gains. These include: inherent textual limitations, law and politics, and 'dominant' and 'judicial' ideologies. Sparrow represents the best impusles of reform from the Supreme Court of Canada. Yet, because the judgment does not openly question a hierarchical position of authority for the Crown, it may reproduce dependency in a new form. The study of native people's experience with fiduciary litigation provides instruction for all disadvantaged groups in relation to the potential of using law to achieve social change.

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DEDICATION

During my three years of study at Queen's Law school I had the pleasure of befriending Laurel Johnson, a Mohawk women living in north eastern Ontario. During my third year a program was established to provide tutors for students from "non-traditional" backgrounds. For one year Laurel and I worked together. She taught me far more than I taught her. This thesis is dedicated to her.

Important to the relationship between the Crown and aboriginal peoples is the concept of the fiduciary duty owed by the Crown. The duty is rooted in history and reflects the unique and special place of aboriginal peoples in Canada....The determination of the extent to which fiduciary duty continues to exist is a matter for the courts.

- The Report of the British Columbia Claims Task Force, June 29, 1991.

CHAPTER ONE

THEORY AND METHODOLOGY

There are those who maintain that in its present form the Canadian legal system is incapable of rendering justice where Indians are concerned. For example, Mary Ellen Turpell argues that differences between European and native legal systems and especially between their respective conceptions of property and ownership propose formidable barriers to a just resolution of the concerns of aboriginal peoples.[1] Nonetheless the combined effect of a number of recent Supreme Court of Canada decisions raise expectations that skeptics like Turpell might be wrong.[2] The black feminist author Audre Lorde uses a trenchant metaphor which captures the inefficacy of using the legal system to accomplish progressive social change. Lorde writes: "You cannot dismantle the master's house with the master's tools." The slogan is an indictment of well intended law reform projects and points to the futility of engaging with law to accomplish progressive social change. [3]

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[1] Mary Ellen Turpell, "Aboriginal Peoples and the Canadian Charter Interpretive Monopolies, Cultural Differences" (1989/90) 6 Canadian Human Rights Yearbook 3.

[2] R. v. Sparrow , [1990] 1 S.C.R. 1075 places the Crown-Aboriginal relationship on new grounds. R. v. Sioui , [1990] 1 S.C.R. 1025 raises treaty recognition and interpretation to new levels.

[3] Lorde's insights apply to the law reform projects of liberal feminists. Liberal feminists approached issues of inequality with the liberal assumption that women's status could be elevated by fair and neutral laws applied equally to all. See: Boyd, Susan. "Child Custody, Ideologies and Employment" (1989) 3 Canadian Journal of Women and the Law 111. The strategy proved inadequate to achieving substantive equality. Lorde provides this explanation:

In contrast to the scepticism represented by Lorde, there are those who believe that it would be a mistake to uniformly condemn the legal system as it relates to disputes involving native people. Patrick Macklem argues that to reduce the role of law to that of villain in the saga of native struggles is to ignore important moments in which the law has served to improve the lives of native people, and to foreclose "a powerful source of potential social transformation."[4] In a similar vein E.P. Thompson has written that any serious movement for social change cannot treat the legal process as a mere sham but rather must recognize that it is an important aspect of social life and an arena of social struggle. [5] In the context of law and aboriginal people, native Canadians [6] have accomplished a lot more in the

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> What does it mean when the tools of a racist patriarchy are used to examine the fruits of that same patriarchy? It means only the most narrow perimeters of change are possible and allowable.

Audre Lorde, "The Master's Tools Will Never Dismantle the Master's House" in A. Lorde Sister Outsider (Trumansburg, New York: The Crossing Press, 1984), p. 110. For a discussion of the paucity of gains achieved under the liberal feminist project see: Poff, Deborah C.. "Feminism and Canadian Justice: How Far Have We Come? (1990) 2 Canadian Journal of Human Justice 93; Smart, Carol. Feminism and the Power of Law (London: Routledge, 1989).

[4] Patrick Macklem, "First Nation Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill Law Journal 382, p. 393.

[5] E.P. Thompson, Whigs and Hunters: The Origin of the Black Act (New York: Pantheon Books, 1975), pp. 265-267.

[6] Throughout this work the terms 'aboriginal people,' 'native Canadians' and 'First Nations citizens' are used interchangeably. They are terms which are intended to embrace all of the first peoples of what is now called Canada. The terms subsume all Indians, whether registered under the Indian Act, R.S.C. 1970, c. I-6, or not, and include peoples of various First Nations (e.g., Haida, Cree, Micmac), the Métis, and the Inuit.

legal sphere than in the political arena in their attempts to address their grievances. Where aboriginal people are concerned, legal victories have served to initiate political and constitutional change. [7]

What follows is a thesis project which attempts to explore the newly emerging legal area of Crown-aboriginal fiduciary relationships. As represented by Macklem's statement, half of this project is to explore positive doctrinal possibilities outlining where the fiduciary concept could lead. As represented by Lorde's statement, the second half of this project is to engage in critical thinking with respect to the fiduciary concept. Ever since the Supreme Court of Canada handed down its decision in Sparrow parts of the aboriginal community have expressed great expectations in relation to the Court's pronouncements on fiduciary obligations. If Lorde is correct, the fiduciary concept is an example of legal doctrine which seems ripe with possibilities but, in light of lessons from the past, and given the restrictions of the present legal system, has little potential to transform the lives of native peoples. If Macklem is correct, First Nations, governments, lawyers and the Courts have been given windows of opportunity to positively shape native reality into the future.

It has been said that the characterization of the Crown-

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[7] For example, Calder et al. v. Attorney General of B.C., [1973] 1 S.C.R. 313 led to the adoption of the federal native claims policies. By firmly recognizing constitutionally entrenched aboriginal and treaty rights Sparrow provides the basis on which further constitutional negotiations can take place.

aboriginal relationship as fiduciary leaves intact the "underlying hierarchical relationship between the Crown and First Nation." [8] The result is to frustrate the quest for a greater degree of self government for Canada's First Nations. Behind the utilization of the fiduciary concept lays the risk that it may prove impossible to discard long standing notions that the Crown stands to Aboriginal peoples as a guardian towards a ward on the assumption that natives are largely incapable of handling their own affairs. [9]

On the other hand this new doctrinal development is an attempt to move the common law in positive directions. Brian Slattery has written that the most important effect of the Sparrow decision was to entrench the trust relationship with Aboriginal peoples into s. 35 of the Constitution Act, 1982, and to "put it on a more contemporary and democratic footing." [10] According to Slattery the Crown's fiduciary relationship with First Nations differs significantly from the concepts of dependency and vulnerability to which the concept of fiduciary

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[8] Macklem, p. 386.

[9] This dependency notion is well embedded in the common law and can be traced to the view expressed by Chief Justice Marshall of the United States Supreme Court in Cherokee Nation v. Georgia (1831) 30 U.S. (5 Pet.1) (reprinted in Getches and Wilkinson Federal Indian Law (St. Paul, Minnesota: West Publishing, 1986), p. 46) where he characterized Indian tribes as "domestic dependent nations" which were "in a state of pupilage" and stated that their relation to the U.S. "resembles that of a ward to his guardian."(at 47).

[10] Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Canadian Bar Review 261, p. 271.

has been linked in the past. For him the Crown's trust responsibility rests on premises more compatible with fostering independence and self-government for First Nations. The result is to provide doctrinal opportunities to transform and expand the law so that it can serve as a vehicle for native empowerment. For example, one of the components of the justification test for laws which infringe aboriginal and treaty rights is the necessity of consultation with native people affected by state regulation.[11] Hypothetically, if the requirement of consultation is deepened and extended in future cases it could result in a constitutional requirement of an equal partnership between governments and First Nations in the drafting of Laws which affect s. 35(1) rights.

Four chapters comprise the body of this thesis project. In this introductory chapter I attempt to outline the methodology and influences which shape my work. Brief synopses of why the critique of liberalism, feminist legal studies and postmodernism are important to this project are provided. Chapter Two provides a contextual backdrop to the fiduciary concept in the form of a review of jurisprudence and relevant history. If creatively applied Sparrow should establish a basis for expanding the scope and content of the fiduciary concept. The latter part of Chapter Two posits that fiduciary standards could require an equal partnership between governments and First Nations in the drafting of laws and policies affecting

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[11] Sparrow, p. 1119.

aboriginal interests. Using new constitutional requirements it is an attempt to expand the borders of the Canadian legal imagination. In contrast to the optimism of Chapter Two, Chapter Three relies on a more critical approach to delve into the inherent limitations of both the fiduciary concept and the legal system. To this end, explorations of law and politics, the role of cultural difference, and law and ideology are undertaken. Finally in the concluding chapter a theory of law as a means to social change is presented.

Christine Boyle has written, "There is not a dichotomy between political and non-political legal analysis. There is one between values explicitly and implicitly expressed." [12] This thesis is overtly political. The methodology of my project is to study the jurisprudential use of the fiduciary concept in order to reveal some of the politics embedded in law and to reveal how law functions to legitimate the existing order. Its premise is that "liberal legalism" often thwarts attempts at progressive social change. I believe that the law is deeply reflective of the political and ideological conflicts in society. Furthermore I believe that institutional and systemic arrangements - of the economy, state and culture - shape and are shaped by law. The goal of this work (its prescription) is to arrive at a realistic version of law's power to determine when it is best to engage with the legal system and when it is best to undertake alternative avenues to social change.

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[12] "Book Review" (1985) 63 Canadian Bar Review 427, at 432.

Various philosophies and perspectives provide the analytical framework for this project. Feminist legal studies, critical legal studies (CLS) and postmodernism have shaped my thinking. Distinct separations between the three approaches are often difficult for extensive cross-fertilization has occurred among these ideological\philosophical schools. Two deconstructive techniques are central to my analysis. First is that of law and ideology, i.e. an analysis of law which explains the role of law in terms of the way law both legitimates and reproduces status quo social relations. Second is discourse theory, i.e., the study of law that derives from the work of Foucault and Derrida focusing on specific language and power relations which construct knowledge.

Part of the motivation for this work is derived from feminist notions of the "personal as political" and the more recently developed notion of "radical particularization." [13] The latter methodology, also known in feminist literature as "specificity," [14] "identity politics" [15] and "positionality" [16] refers to a theoretical approach that eschews generalized

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[13] Barbara Findlay, "With All of Who We Are: A Discussion of Oppression and Dominance" (Vancouver: Press Gang Publishers, 1991), p. 10.

[14] Kathleen A. Lahey, "On Silences, Screams and Scholarship: An Introduction to Feminist Legal Theory" in Richard Devlin, ed. Canadian Perspectives on Legal Theory (Toronto: Edmond Montgomery Publications, 1991), p. 319.

[15] Dawn Currie and Marlee Kline, "Challenging Privilege: Women, Knowledge and Feminist Struggles" (1991) 2(2) The Journal of Human Justice 1.

[16] Kate Bartlett, "Feminist Legal Methods" 103 (1990) Harvard Law Review 829.

theories of the state and its oppression and instead encourages the idea that "one's identity is taken and defined as a political point of departure, as a motivation for action, and as a delineation of one's politics."[17] In giving full meaning to the power of the personal it is necessary to examine the particularity of each person's location in relation to the oppressions of society. In relation to academic work this means that researchers are urged to acknowledge and explore their own relationships to the questions they are investigating. My experience as a white gay man will be different than my friend's experience as a straight First Nation Cree. Each of us is located differently in relation to the oppression of native people, racism or homophobia. These different locations affect our experience both of the world and of each other.[18]

Recently some changes are noticeable, yet, overall, in the Canadian tradition the legal perspective, i.e. that of judges and academics, has been that of the middle class, white, heterosexual male. The experience of oppression by those who are not members of this group for reasons of gender, race, class, sexual orientation, or other characteristics, are not part of this elite's worldview. Consequently the legal perspective rarely acknowledges let alone understands issues

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[17] See: Brenda Cossman and Ratna Kapur, "Trespass, Impasse, Collaboration: Doing Research on Women's Rights in India" (1991) 1(2) The Journal of Human Justice 99, at 110..

[18] For an insightful discussion of the impact of dominance and difference see Barbara Findlay, "With All Of who We Are: A Discussion of Oppression and Dominance" (Vancouver: Lazara Press, 1991.)

like sexism, racism, or homophobia. [19]

As a white male it is important that I ask myself hard questions about why, as member of the dominant majority, I would consider doing graduate work in aboriginal law. I do not share a common ancestry or culture with those about whom I write. As Turpell points out even the most well intentioned academics unwittingly perpetuate domination as a result of their contributions to the field of the law and aboriginal peoples.[20] This does not mean that non-aboriginals should not write or do research into issues affecting aboriginals. Rather, we should write about law and ideologies that participate in the construction and maintenance of exclusionary systems. In order to deconstruct the interlocking pieces that make existing models

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[19] Readings I have found helpful in exploring the ideas of dominance and exclusion include: Barnes, Robin."Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship" (1990) 103 Harvard Law Review 1864; Bartlett,Katherine. "Feminist Legal Methods" (1990) 103 Harvard Law Review 829; Crenshaw,Kimberle. "Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" (1988) 101 Harvard Law Review 1331; Currie, Dawn and Kline,Marlee. "Challenging Privilege: Women, Knowledge and Feminist Struggles" (1991) 2(2) The Journal of Human Justice 1; Delgado, Richard. "When a Story is Just a Story: Does Voice Really Matter"(1990) 76 Virginia Law Review 95; Duclos, Nitya. "Lessons of Difference: Feminist Theory on Cultural Diversity" (1990) 38 Buffalo Law Review 325; Kline, Marlee "Race, Racism and Feminist Legal Theory" (1989) 11 Harvard Women's Law Journal 115; Lahey, Kathleen . "Until Women have told all they have to tell..(1985) 23 Osgoode Hall Law Journal; Lahey, Kathleen. "On Silences, Screams and Scholarship: An Introduction to Feminist Legal Theory" in Richard Devlin, ed. Canadian Perspectives on Legal Theory (Toronto: Edmond Montgomery Publications, 1991), p. 319; Freedman, Ann E.."Feminist Legal Method in Action : Challenging Racism, Sexism and Homophobia in Law School" (1990) 24 Georgia Law Review 849; hooks, bell."talking back" and "when I was a young soldier for the revolution: coming to voice", in Talking Back: thinking feminist, thinking black (Boston: South End Press, 1989). Monture, Patricia. "Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yay-Gah" (1986) 2(1) Canadian Journal of Women and the Law 159; Monture, Patricia. "Reflections on Flint Woman" in Richard Devlin (ed.) Canadian Perspectives on Legal Theory (Toronto: Edmond Montgomery Publications, 1991), p. 351.

[20] Turpell, p. 11.

seem natural and inevitable it is crucial that non-aboriginals research and write in areas which construct power differences and racism. However, before embarking on a project it is important to acknowledge one's perspective and experience in order to reveal the particular way in which an author experiences and understands the world.[21] It is an attempt to acknowledge privilege as well as acknowledge the complexity of factors that contribute to an author's worldview. By revealing differentiating characteristics "internalized dominance" [22] is confronted and the pretensions of authority and objectivity which often accompany legal discourse are minamalized.

(i) IDENTITY POLITICS (Locating My Position In Relation To My Work)

The motivation for this project is highly personal, and simultaneously highly political. From an epistemological perspective it reflects an intellectual processing of personal experiences, and intuitions that partially result from being a gay man. My perspective can be defined as that of "other"

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[21] In addition to being gay I am white, middle-class, and able bodied.

[22] Findlay, p.4.

looking at the experience of another "other". [23] E v e r since I began studying law, I have had a growing discomfort with the limitations of the law as a vehicle for social change. During my undergraduate law studies I did not confront, as much as I would have liked, issues surrounding the sociology and philosophy of law. Like most law students who are not members of the "ruling classes" for reasons of gender, race, class, sexual orientation or other characteristics that differentiate them, I did not have the energy, power, or support system to pursue issues of oppression, difference, and power. [24] Somehow it did not seem to be quite on point. Instead I stuck to doctrine, doggedly determined to master the volumes of statutes and case law.

When I returned to law school to do a Master of Laws degree it was time to pursue those questions about law which had always interested me: What is the role and function of the law in progressive politics? Are legal institutions crucial terrain on which significant social change can take place? If so, how? If not, why not?

Now, I am in the sixth year of a career in law or rather,

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[23] The concept of the excluded "other" is taken from Simone de Beauvoir, The Second Sex (H.M. Parsely, (trans & ed.) (New York: Vintage Books, 1989), pp. x-xii.

[24] By including this statement I realize I could be accused of avoiding complexity. As Barbara Findlay explains in her work "With All of Who We Are: A Discussion of Oppression and Dominance" (Vancouver: Lazara Press, 1991), a person can exist in multiple positions, as a member of the dominant society in one respect, and at the same time as a member of a subordinated group in another respect.

more accurately, a career in legal education. Among other issues, the past six years have coincided with coming to terms with my sexual identity, as well as coming to terms with the value and potential of law. When I entered Queen's Law school in 1986 I identified as a gay man privately, but was not ready to go public with my orientation. At that time I was convinced that the law could be used to end the oppression faced by disadvantaged groups, gays and lesbians included. Like most individuals my age I had absorbed the perspective of liberalism that harbours excessive expectations for law's power. It seemed natural and right to believe that the law could be used as an instrument to allow those from excluded and oppressed groups to fully participate in Canadian society with equal dignity, respect and opportunities. I was convinced that rights were something worth having. It was my naive impression that all one needed to do was get to court, advance logical arguments, and judges would affirm the legal rights which were one's due. My sense of difference and powerlessness, could be remedied, so I thought, by the intervention of legendary blind justice. In my mind, opportunities had not yet presented themselves for gays and lesbians to place their stories before the courts. Social change was about getting the means (power) to insist that one's rights claims be honoured. It did not occur to me that the experience of gays and lesbians, or women, or minorities,[25]

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[25] I do not mean to imply that aboriginals are minorities. Regarding native Canadians the issue is not just one of numbers or ethnicity. Native Canadians are the original inhabitants of this country. To characterise them

might never by fully accommodated within the law.

Six years later I am an "out" gay man who has a more realistic view of law's potential. As I gradually left the confines of the closet the answer to the question, "What is law's potential?" metamorphised. The question originated from the spaces of my personal experience as a closeted gay, spaces where I filed away difference and powerlessness, and a space where I clung to the hope that law could take away the burden I felt because I had been cast as "other" in a world centred around the experiences of white-heterosexual males. In an inversely proportional relationship, as my confidence to identify as a gay man increased, my faith in the law as an agent for social change decreased. From 1986 onwards, each successive year brought a different answer to the "What is the potential of law for social change?" question. The more I learned and observed the more I realised I had to modify my response. Starting with idealism I moved on to optimism, through scepticism to exorbitant doubts. At present I locate the answer somewhere between liberal optimism and the left's despair. As a result of this thesis project, I believe I now view law's potential from a more realistic perspective: it has its utility, but to expect any large scale social change would be foolish.

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as a group equivalent to ethnic or racial minority status is to devalue their special status. For a discussion of the location of First Nation citizens in the Canadian mosaic see Doug Sanders, "Article 27 and the Aboriginal Peoples of Canada" in Multiculturalism and the Charter: A Legal Perspective (Agincourt: Carswell, 1987), p. 155.

The most frequent question asked of me is, "Why isn't your thesis topic on gay and lesbian legal issues.?" In response I state that the intersection of law and politics is an issue of concern to all disempowered groups whether native, gays and lesbians, women, etc.. I do not mean to imply that one oppression is the same as another. However, oppressions do share common ground, yet in many ways they are completely different. I believe that I know a great deal about the oppression faced by gays. Consequently, to study the law as it affects another disempowered group whose treatment and social situation often offends my sense of justice is a welcome opportunity. [26]

Typically those who belong to a group which has suffered historic exclusion, or to use Justice Wilson's term from Andrews v. Law Society of British Columbia - those who are members of "discreet and insular minorities," [27] - have less power, and suffer from systematic mistreatment ranging from violence through economic disadvantage to ostracism. This mistreatment is institutionalized in the laws and social mores of the society. With respect to native-Canadians the evidence of mistreatment is overwhelming. The challenges faced by aboriginal Canadians and the disparity between native and non-

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[26] My interest in the law and aboriginal people derives from growing up in a small town in rural Saskatchewan located in close proximity to three Cree Indian reserves, as well as work experience as a Policy Analyst at the Department of Indian and Northern Affairs.

[27] (1989), 56 D.L.R. (4th) 1, p. 33.

native living conditions cannot but strike one's sense of injustice. There are approximately 850,000 native people in Canada, comprised of three groups: Indian, Métis, and Inuit, making up about 3 percent of the Canadian population. Report after report documents the systemic racism and brutal living conditions which many aboriginal Canadians endure. Regarding the criminal justice system the horrors faced by Donald Marshall and Helen Betty Osborne, as documented in the Marshall Report[28] and the Manitoba Aboriginal Inquiry[29] respectively, are conclusive evidence of the discrimination natives face. There is also a chorus of appalling statistics:[30] life expectancy of native males is 10-12 years less than non-Native Canadian males; native females it is life expectancy is 10-16 years less than non-Native females. [31] Violence, accidents and poisoning are the major causes of death for natives. Deaths resulting from these causes occur at three times the rate for Canadians as a whole.[32] Incarceration rates show a similar pattern. Native

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[28] Chief Justice T. Alexander Hickman, A.C.J. L. Poitras, et al., Royal Commission on the Donald Marshall, Jr. Prosecution: Digest of Findings and Recommendations (Lieutenant Governor of Nova Scotia, 1989).

[29] Associate Chief Justice A.C. Hamilton and Associate Chief Justice S.M. Sinclair, Report of the Aboriginal Justice Inquiry of Manitoba (Province of Manitoba, 1991).

[30] For a similar discussion see: Macklem, Patrick. "First Nation Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill Law Journal 382.

[31] Siggner, A.J., "The Socio-Demographic Conditions of Registered Indians" in J.R. Pointing (ed.) Arduous Journey: Canadian Indians and Decolonization (Toronto: McClelland and Steward, 1986), p. 57.

[32] Ibid.

people account for 10% of the population of federal prisons, yet they comprise approximately 3% of the Canadian population. The number of native people in federal prisons doubled between 1977 and 1987. [33] Housing standards and unemployment rates are equally disturbing. According to a 1988 study by the Department of Indian and Northern Affairs, 47% of on-reserve housing fails to meet basic standards of physical conditions, and 38% of reserve housing lacks basic amenities such as running water, indoor toilets and/or bathing facilities. [34] The official unemployment rate among natives is two and a half times the national rate. Only 19% of the Native population has attained some sort of post-secondary education, compared to 36% of other Canadians.[35] Two out of three status Indians use English as their home language and numerous native languages are on the edge of extinction. [36]

The legal sphere has been a site of many successes for native people, however, the grim reality is that the law has not significantly contributed to improving their social situation. Legal decisions have served to initiate political

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[33] Correctional Services Canada,Native Population Profile Report (Ottawa: Management Information Services, 1987). Also see Michael Jackson, "Locking Up Natives in Canada" (1989) 23 U.B.C. Law Review 215.

[34] Basic Departmental Data (Ottawa: Indian and Northern Affairs, 1988). For further discussion of the social conditions confronting many aboriginal Canadians see: J.R. Pointing, ed. Arduous Journey: canadian Indians and Colonization (Toronto: McClelland and Steward, 1986); L. Krotz, Indian Country: Inside Another Canada (Toronto: McClelland and Steward, 1990).

[36] Siggner, p. 57.

[36] You Took My Talk Fourth Report of the Standing Committee on Aboriginal Affairs (House of Commons, December 1990).

and constitutional change, yet, current jurisprudence, like the emerging doctrine of Crown fiduciary duties, may prove inadequate to the task of improving the lives of native people. Often the law's effect on Native people offends my sense of justice. That said, frequently, case law strikes me as reasonable, that is, it accords with the worldview and legal mindset in which I have been trained. Initially my reaction to Sparrow was to applaud its progress and fair nature. Not until a Mohawk friend expressed her discontent with the fiduciary concept did I start to consider the negative aspects of the doctrine. [37]

Mary Eaton has written that "if material conditions of inequality are entrenched in the sense that they are rendered invisible by the forces of history, tradition and habit in the ways of the mind" then conditions of inequality will never be alleviated until "they are recognized as manifestations of institutions and social forces with a life beyond individual actors."[38] Following Eaton's exhortation, the goal of this project is to investigate the history, tradition and habit which informs the fiduciary concept. It is not a question of developing tighter or more refined analyses in order to make

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[37] Conversation with Laurel Johnson, mother, Queen's Law Student.

[38] Mary Eaton, "Case Comment: Andrews v. Law Society of British Columbia" (1991) 4 Canadian Journal of Women and the Law 276, at 286. For a discussion of the struggle for individual rights in law which falsely offers freedom, eqaulity and justice to the underclasses see: Crenshaw, Kimberle. "Race, Reform and Retrenchment: Transformation and Legitimation in Anti-discrimination Law" (1988) 101 Harvard Law Review 1331.

current concepts work. I am not approaching this research with the idea that better legal tests can be developed to balance competing rights or to better define aboriginal rights and Crown responsibilities. Rather, I am interested in the fiduciary concept because I am interested in the relationship between power and the law; how law is an ideology and a discourse that serves some interests more than others;[39] how the law works as an institution to at times empower but also to exclude and disempower. In studying the fiduciary relationship I hope to shed light on the following questions: What is the role of the law in progressive politics? Can the law be harnessed and mobilized to the advantage of subordinate groups? Are legal institutions crucial terrain on which significant social change can take place? If so, how? If not, why not?

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[39] The distinction between discourse and ideology is not always clear. Sometimes the concepts are used interchangeably and at other times they are counterposed. In a forthcoming article Trevor Purvis and Alan Hunt explore the overlap and the distinct characteristics of discourse and ideology. Their conclusion is that the theory of ideology stands alongside and supplements discourse theory rather than being opposed to discourse theory. In their words "ideology figures in inquiries which are concerned to identify the way in which forms of consciousness condition the way in which people become conscious of their conflicting interests and struggle over them." On the other hand "discourse focuses attention on the terms of engagement with social relations by insisting that all social relations are lived and comprehended by their participants in terms of specific linguistic or semiotic vehicles which organise their thinking, understanding and experiencing." See: Hunt and Purvis, "Discourse, Ideology, Discourse Ideology, Discourse, Ideology..." (Forthcoming, On file with Professor Marlee Kline, University of British Columbia Faculty of Law); Also see Diane McDonnell, Theories of Discourse: An Introduction (Oxford: Basil Blackwell, 1986).

(ii) LIBERALISM AND ITS CRITICS (Liberal Ideology)

When the field of study is Canadian law, specifically the law as applied to aboriginal peoples, it is helpful to understand the general philosophical and ideological underpinnings of the legal system. The heritage of legal thought in relation to rights, responsibilities and the judicial system in which we presently operate has been labeled by many as "liberal legalism." [40] When liberalism is linked to legal discourse a number of basic principles are implied. The most significant of these are equality, individual rights, and neutrality. [41] The liberal model of society is a pluralist one where interest groups attempt to realise their goals under the auspices of a neutral state intended to interfere as little as possible. Judges are "neutral arbiters" who facilitate market freedom and individual protection through a value-free-adjudication process.

Much of the basis for thinking about rights and responsibilities in law today comes to us from white male liberal theorists who interpret and expand upon the great

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[40] Will Kymlicka, Liberalism, Community and Culture (Oxford: Clarendon Press, 1989),p. 23.

[41]. For a discussion of the tenets of liberalism see: Dworkin, Ronald. "Liberalism" in M. Michael (ed.) Liberalism and its Critics (Oxford: Basil Blackwell, 1984); Dworkin Ronald. "Neutrality, Equality and Liberalism" in D. Maclean and C. Mills (eds.) Liberalism Reconsidered (Ottawa: Rowman and Allanhead, 1983); Galloway, Donald."Critical Mistakes" in R. Devlin (ed.) Canadian Perspectives on Legal Theory (Toronto: Edmond Montgomery Publications, 1991), p. 255.

liberal thinkers of the nineteenth century. [42] John Rawls, one of the most well-known contemporary exponents of liberalism asserted that the liberal version of the social contract was about justice, fairness and individual rights, all peculiarly abstract principles. [43] According to Rawls, the foundation of liberalism is found in the view that there must be no arbitrary distinctions between individuals because we are rational human beings capable of identifying and working toward our own interests, and because each individual has "his [sic] own aims, interests, and conceptions of the good." [44] Thus, liberalism emphasizes the importance of respecting each other's liberty to pursue his or her own interests. When interests collide liberals agree that an individual's right to do as he or she pleases should be circumscribed by commonly agreed to principles of justice interpreted by "objective and neutral" arbiters.

Liberals also hold the idea in common that the self is an independent entity unconnected to community and enjoys freedom of choice. The only constraint on choice is the principle of respect for another's capacity to choose. With this paradigm it becomes difficult to speak of group needs and interests. As a consequence communities seem to have little relevance to the

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[42] For example: John Stuart Mill, On Liberty (New York : Crofts Classics, 1947).

[43] John Rawls, A Theory of Justice (Cambridge: Harvard University Press, 1971. Also see Matsuda, "Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls Theory of Justice,"(1986) 16 New Mexico Law Review 613.

[44] Rawls, pp. 76-79.

liberal's version of individuality. This concept of an independent, "decontextualized" self functions to suppress acknowledgement of the profound differences between individuals based on their situation within groups; it also ignores the profound difference between groups. As Razack points out, "Without a theory of difference, we cannot make clear what the relationship is between groups and communities."[45] Liberalism also inhibits our understanding of power as something other than the power of one individual to assert his or her claim over another. The concept of competition between individuals makes it difficult to explain oppression, that is, the consistent dominance of the claims of one group over another. As Mari Matsuda points out liberal theorists like Rawls choose abstraction as a methodology.[46] The development of highly generalized theories of the state reify the idealized version of law (neutrality, objectivity, equality) and obscure the complex experience of oppressions. For example individuals can only be equal in law if the differences which distinguish them are abstracted away. Consequently, highly abstracted theories of justce and law, like Rawles' version of liberalism, fail to take into account the real oppression of groups, like First Nations,

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[45] Sherene Razack. Canadian Feminism and the Law: The Women's Legal Education Action Fund and the Pursuit of Equality (Toronto: Second Story Press, 1991), p. 15.

[46] Matsuda, p. 618.

who have experienced a history of discrimination.[47]

It should be noted that there are proponents who argue that there are advantages to staying within the paradigm of liberal legalism. Galloway has argued that adding women or native groups or other minority groups to the liberal legal structure leads to a radically transformed system.[48] Similarly Will Kymlicka posits that individualism and communal values are not irreconcilable. For Kymlicka liberalism can be interpreted to support community values because community and culture are the preconditions of free and meaningful choices.[49] Other scholars have argued that staying within the system allows progressives to speak to the system in a language it understands. Elizabeth Schneider comments on the empowering nature of the liberal individual rights tradition for minority groups who have had few victories in their claims for justice.[50] Robert Williams makes a similar point when he advises minority groups to "take rights aggressively" and to use them as primitive weapons loaded with

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[47] For a similar argument in relation to the abandonment of abstractions both in law and in theory in order to become more grounded in the world of women's experiences of oppression see: Lahey, Kathleen. ...Until Women Themselves Have Told Us All There Is To Tell..." (1985) 23 Osgoode Hall L.J. 519.

[48] See Galloway, Don. "Critical Mistakes" in R. Devlin, (ed.) Canadian Perspectives on Legal Theory (Toronto: Edmon Motgomery Publiations, 1991), p. 25.

[49] Kymlicka, Will. Liberalism, Community and Culture (Oxford: Clarendon Press, 1989), p. 144.

[50] Elizabeth Schneider, "The Dialectics of Rights and Politics: Perspectives from the Women's Movement,"(1986) New York University Law Review 599.

myths until they "perfect new weapons out of the materials at hand."[51]

Liberalism is the cultural context in which the discussion of native rights takes place. By identifying and understanding this contemporary intellectual and philosophic environment it is possible to sensitize oneself to worldviews and differences which are not compatible with dominant liberal paradigms. Moreover it is possible to understand why liberal legalism is resistant to progressive change. Liberal legalism has provided an idealized version of law and the state. Law is depicted as objective and neutral and separate and above politics, economics, and culture. To expose the forces which inform and influence the fiduciary concept it is necessary to dig beneath the idealized liberal model and recognize the social and political content of law.

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[51] Robert Williams, "Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Colour," (1987) 5 Law and Inequality 130.

(iii) THE POSTMODERN RESPONSE

From the perspective of many groups and minorities, i.e. those who because of sex, race, ethnicity or sexual orientation, have not previously benefitted from law's power, the introduction of postmodern principles into legal theory has been an empowering development. Law rests on the myth of objectivity based on man's inherent rationalism. The postmodern view of law is directly contrary to liberal legalism. Focusing on a postmodern perspective of law as discourse means exposing law as an arbitrary value and knowledge creating institution. Law tells us what is legitimate and illegitimate behaviour, what is criminal and legal, what is natural and unnatural and what is rational and irrational. The postmodern influence provokes us to ask, "From whose perspective?"

Generally I understand Postmodernism to mean that as a society we have moved beyond the modernism of the early twentieth century; beyond the intellectual projects of grand theorists like Marx, and Freud, and beyond the acceptance of objective and neutral sources of knowledge. It is a revolt against the power of unstated reference points and a rejection of the pretence that the particular is universal. Postmodernism recognizes that all perceptions of reality are a construct contingent upon history, time, geography, and position in structures of hierarchy. As J.C. Smith points out postmodernism has developed out of several intellectual movements that "have

challenged a perceived objective reality," including "Marxism, feminism, cognitive theory and psychoanalyses." [52] Practitioners of Postmodernism challenge us to abandon the linear rationality, and objectivity characterized by Enlightenment thinking and embrace the difficulties of placing ourselves in a world of multiple and equally legitimate perspectives.

A bibliographic list of the sources of Postmodernism would be wide and varied and include characters as diverse as Nietzsche, Rorty, and Wittgenstein. Two philosophers often cited for their influence on the development of postmodern thought are Lyotard and Foucault.

The work of Lyotard has been especially influential in developing postmodern critiques of knowledge. [53] In The Postmodern Condition: A Report on Knowledge Lyotard investigates both the control of information in the Western world and the collapse of legitimizing forces in Western culture. He describes the "modern" account of knowledge as making "an explicit appeal to some grand narrative." For him the over-arching philosophies of history and science are "meta-narratives of legitimation" which from the postmodern perspective should be viewed with incredulity. Lyotard argues that any discourse which posits a

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[52] Smith, J.C. "Psychoanalytic Jurisprudence and the Limit of Traditional Legal Theory" in R. Devlin, ed. Canadian Perspectives in Legal Theory (Toronto: Edmon Motgomery Publications, 1991) 223, at 243.

[53] J.F. Lyotard. The Postmodern Condition: A Report on Knowledge (Minneapolis: University of Minnesota Press, 1984).

universality of the human condition must be suspect.

Second among the leading Postmoderns, Foucault has become a cult figure to students and intellectuals. His analysis of power and power as knowledge has become a shibboleth for entry into some progressive circles. Foucault, who died in June of 1984, was also known for his outspoken opinions on gay rights, making no secret of his own sexual orientation. Foucault argues that history must not be regarded from an essentialist perspective, but by directly examining how people actually construct and express their daily lives. [54] He often applied this analysis to the position of homosexuals in society:

> If gay people are to truly know themselves they must examine and rely on their own potential, in short - create themselves, rather than insist on conforming to the socially constructed role of the homosexual, a consciousness that has primarily been defined by others.[55]

Foucault argues that gays and lesbians should not embrace a social identity that was largely created from the sexual mores of the late nineteenth century, but rather they should pursue "relationships of differentiation, of creation , of innovation...an identity of our unique selves." [56] His message

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[54] Foucault, Michel. The Archaeology of Knowledge (London: Travistoc,, 1972); Power/Knowledge: Selected Interviews and Other Writings) Colin Gordon (ed.) (New York: Pantheon Books, 1977).

[55] "Sex and the Politics of Identity: An Interview with Michel Foucault" in Mark Thompson, ed. Gay Spirit: Myth and Meaning (New York: St. Martin's Press, 1987) p. 25.

[56] Ibid., p. 31.

is inspiring for any marginalized group. He urges the excluded and oppressed to identify the sites of power in their every day lives and to resist. Resistance is advanced through the deconstruction of dominant meaning and bringing into awareness suppressed alternate meanings which are subversive to the established order.

POSTMODERNISM AND THE LAW

Postmodernism has been imported into legal scholarship via Critical Legal Studies and, especially, via Feminist Legal Theory.[57] Its presence is felt in two significant ways. The first is in relation to the concern with text; the second is in relation to reconceptualizing the epistemological underpinnings of legal theory.

Postmodern preoccupation with textual analysis is most apparent in the "doctrinal deconstruction" techniques most often associated with Critical Legal scholars. In order to discover the contingent character of the law the "Crits" unpack legal doctrine (eg. an appellate judgment) to reveal both its internal inconsistencies and its external inconsistencies. Internal inconsistencies are exposed by revealing the often illogical and incoherent nature of judicial reasoning. External

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[57] The influences of a range of critical traditions including American legal realism, sociological discourses on law and marxist theories on law should also be mentioned. See: HuntHunt, "The Big Fear: Law Confronts Post-Modernism" (1990) 35 McGill Law Journal 507, at 522.

inconsistencies are revealed by exposing the politics imbedded within legal doctrine. As political choices are uncovered, the result is to show how the law privileges certain perspectives over others.[58] Hunt makes the point well:

> The product of the deconstructivist critique is to mount a challenge to the legitimacy of the project of law as a means of generating distinctively legal truth. ...The radical inflection of the postmodern intervention exposes the tensions, closures, and contradictions in judicial texts which are linked to the wider dynamics of power and dominant interests. [59]

Notwithstanding Postmodernism's influence in relation to textual deconstruction, it is in the area of epistemology that it offers its most significant and most subversive insights. By focusing on diversity and minority voices, Postmoderns demand that we see the world differently. They require that we recognize the "partial" nature of our knowledge: "partial" meaning both the incompleteness of knowing and the bias inherent in it. Clare Dalton makes the point this way:

> It is not simply a matter of filling, finally, some previously identified and oddly persistent gap in one's understanding. It involves recognizing that the entire perceptual and conceptual apparatus one has previously relied on for knowledge about the world may be faulty. It involves remaking the map of the world

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[58] For a review of the Critical Legal Studies Movement see: Allan Hutchinson, "Crits and Cricket: A Deconstructive Spin (Or was It a Googly?) in Richard Devlin, ed. Introduction to Jurisprudence. (Toronto:Carswell, 1991). p. 181; J.M. Balkin, "Deconstructive Practice and Legal Theory" (1987) 96 Yale L.J. 743. Mark Kelman, "Trashing" (1984) 36 Stanford Law Review 293.

[59] Alan Hunt, "The Big Fear: Law Confronts Postmodernism" (1990) 35 McGill Law Journal 507, at 513.

> one carries about in one's head so that the gaps appear, generating the recognition that they need to be filled. And since it is in relation to this interior map that one locates and identifies oneself, it involved being ready to meet some unfamiliar and sometimes unwelcome images of oneself.[60]

The consequences of reconstituting knowledge means that academics and judges will have to consider more explicitly the implications of minority perspectives and cultural difference in their work. Within legal academia Postmodernism has facilitated the development of new schools of theory such as Critical Race Studies,[61] and a burgeoning interest in gay and lesbian legal issues. [62] Within the courts Postmodernism has

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[60] Clare Dalton, "The Faithful Liberal and the Question of Diversity" (1989) 12 Harvard Women's Law Journal 1, at p. 2.

[61] In the United States Critical Race Theory or Critical Race Scholarship is the latest manifestation of postmodernist pluralism asserting itself in legal scholarship. CRT refe^T ' * ^R ' ork of progressive legal scholars of colour who are attempting to develop a jurisprudence that accounts for the role of racism in American law. These scholars argue that some members of marginalized groups by virtue of their marginal status, are able to tell stories different from the ones legal scholars usually hear, and thereby reveal things about the world that we ought to know. See: Patricia Williams, " Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22 Harvard Civil Rights and Civil Liberties Law Review 401;R. Delgado, "When a Story is Just a Story: Does Voice Really Matter" 76 Virginia Law Review 95 (1990). In Canada an equivalent is the burgeoning scholarship from First Nation academics. See: Patricia Monture, "Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yay-Gah" (1986) 2(1) Canadian Journal of Women and the Law 159.Mary Ellen Turpell, "Aboriginal Peoples and the Canadian Charter Interpretive Monopolies, Cultural Differences" (1989/90) 6 Canadian Human Rights Yearbook 3.

[62] As more and more gay and lesbian academics decide there is no power or force persuasive enough to keep them silent, invisible and marginalised, those who previously sublimated their intellectual talents into other pursuits (often in the human rights field) will turn their attention towards gay and lesbian legal issues. It may lead to the creation of a new form of legal scholarship: "homophile law(?)." It will involve the study of how law perpetuates heterosexist privilege, and I believe, it will owe its genesis to the influence of Postmodernism. Cynthia Peterson,"A Queer Response to

led to the introduction of legal arguments reflecting alternative experience, ideas and world views and the presentation of theoretical arguments as to why the traditional legal conceptual structure should be reinterpreted so as to have some coherency with previously excluded experience and related ideas. An obvious example is litigation surrounding native land claims wherein the world view of particular First Nations is advanced. [63] The contribution of Feminists to constitutional litigation should also not be overlooked. [64] A postmodern jurisprudence seeks to introduce into the legal discourse "alternative" experiences. Postmodernism reveals resistance arising from particular locations thereby replacing the universalizing tendency of a legal system law that is more comfortable with fixed identities.

Michel Foucault has provided important analytical tools for interest groups working for social change. His work on the historical contingency of homosexuality is of specific interest

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Bashing: Legislating Against Hate" (1991) 16(2) Queen's Law Journal 237; Adrienne Rich, "Compulsory Heterosexuality and Lesbian Existence" Signs 5:4 (1980) 631; Kinsman, Gary, The Regulation of Desire: Sexuality in Canada) Montreal: Black Rose Books, 1987); Barbara Findlay, "With All of Who We Are: A Discussion of Oppression and Dominance" (Vancouver: Press Gang Publishers, 1991). Didi Herman,"Are We Family: Lesbian Rights and Women's Liberation" (1990) 38 Osgoode Hall Law Journal 789.

[63] See: Delgamuukw et al. v. Attorney General of British Columbia , [1991], 3 W.W.R. 97 (B.C.S.C.); and especially the opening address of the Git'ksan hereditary chiefs reprinted in [1988] 1 Canadian Native Law Reporter 185.

[64] The litigation group, Women's Legal Education Action Fund (LEAF) has advanced their feminist world view in many cases before the Supreme Court of Canada. Especially notable is the influence LEAF had on the Supreme Court's interpretation of s.15 equality guarantees. See: Law Society of British Columbia v. Andrews, [1989] 2 W.W.R. 289 (S.C.C.).

to gay and lesbian communities. [65] His work on the interrelationship of discourse, power and knowledge is of value to all marginalized groups. [66] Concerning the latter, his analysis provides tools for the deconstruction of ideologies and language that inform disciplines which have contributed to social inequality. According to Foucault discourse profoundly affects the creation of meaning. Discourse is the simultaneous operation of power and knowledge and when we deconstruct certain knowledge systems we expose specific rules which have influenced how we ordered our knowledge and experience of the world. Foucault instructs that it is important to focus on the deepest levels of where meaning is produced (i.e., the matrix of language, discourse and institutions) in order to reveal the rules that operate to suppress certain aspects of experience and highlight others. Foucault argued for the de-centering of this kind of power; for him nothing in society would change unless the mechanisms of power which function concomitantly with state power are also changed. Foucault did not understand power to be uniformly coercive. Rather his starting point is at the "micro-level" of the individual rather than the "macro-level" of social structures. [67] Foucault described these power systems as an insidious force which reaches "into the very grain of

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[65] See: Michel Foucault, The History of Sexuality Vol. 1 (New York: Pantheon Books, 1978).

[66] See: Michel Foucault, Power/Knowledge, Colin Gordon (ed.) (New York: Pantheon Books, 1980).

[67] Michel Foucault Power/Knowledge pp. 109-133.

individuals, touches their bodies and inserts itself into their actions and attitudes, their discourses, learning processes and everyday lives." [68]

One of the most important lessons to be derived from reading Foucault is that knowledge and power are socially created and therefore can be socially transformed. In short his analysis explains why respected sources of knowledge make some belief systems invincible and others invisible. For example, Law is one of the ways society "designs itself and presents the world to itself."[69] Since law is connected to state power and in its idealized form is cloaked in pretensions of neutrality and objectivity, it is an especially authoritative producer of "truth."[70] Foucault refers to the "discursive formation of law" [71] meaning that law puts into place a set of values which are absorbed into and perpetuated by popular culture. Thus, what law deems to be right and wrong, legitimate or illegitimate, relevant or irrelevant, tend to become normative, unquestioned standards of the way things should be. Foucault's analyses of power as discourses advocates the deconstruction of such controlling systems designated as truth or knowledge. His

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[68] Foucault, Power and Knowledge, p. 39.

[69] Allan Hutchinson, "Telling Tales (Or Putting the Plural in Pluralism)" (1985) Osgoode Hall Law Journal 681. Hutchinson exposes law as a terrain where the "struggle for meaning" occurs.

[70] For a discussion of the "idealized model of law" and its attributes see David Kairys (ed.) The Politics of Law: A Progressive Critique (revised edition) (New York: Pantheon Books, 1990), 1.

[71] Michel Foucault, Politics, Philosophy, Culture: Interviews and Other Writings (1977-1984)ed.) (New York: Routledge, 1988), p. 96.

prescription for change is to lobby for "an insurrection of subjugated knowledges."[72]

With the advent of Guerin and Sparrow fiduciary relationships have been added to the legal discourse surrounding aboriginal law. Generally "fiduciary" is a notion steeped in ideas of hierarchy and dependence. By deconstructing prevailing discourse the postmodern approach is useful in determining whether or not the fiduciary concept has any future as an instrument for native empowerment.

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[72] Foucault, Power and Knowledge, pp. 81/82.

(iii) FEMINISM AND POSTMODERNISM

The final influence on this work is that of Feminist Legal Studies, and especially the work of "Postmodern Feminists." [73] Much of feminist jurisprudence reflects postmodern presuppositions. [74] Generally, the feminist project is perceived as responsible for the deconstruction of male conceptions of reality and patriarchal ideology by emphasizing women's experience of being situated in a subordinate position in a set of social relations based on sexual hierarchy. However, by no means is the project known as feminism

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[73] See: Jane Flax. "Postmodernism and Gender Relations in Feminist Theory: in Fraser and Nicholson (eds.) Postmodernism/Feminism (London: Routledge, 1990), p. 39.

[74] In early writings by feminist scholars there is no mention of "Foucauldian epistemologies: or "Derridean deconstruction." However concepts like "hegemonical discourses of power," "the insurrection of subjugated knowledges," and "textual hermeneutics," all taken from the French postmodern philosophers, are consonant with the approach of some feminists. It is also consonant with a lot of the work produced by Critical Legal Studies adherents. Complicated questions surround the origins of any labelled intellectual movement. Cross-fertilization between and amongst schools of thought always occur. Which came first Postmodernism or Feminism? Is a good deal of Feminism postmodernist, or is a good deal of Postmodernism feminist? If so, how much? Did the Postmodernists name what the Feminists were doing, or did the Feminists adopt the Postmodernist's agenda? (Some Feminists might ask why it took French male philosophers to make their methodologies legitimate?) Does Postmodernism supplement or supplant related strands of legal theory? To what extent have the movements influenced each other? Some academics have attempted to unpack the relationship and permeability of related progressive perspectives. See: Duncan Kennedy, "Critical Theory, Structuralism, and Contemporary Legal Scholarship" (1985-1986) 21 New England Law Review 209; Carrie Menkel-Meadow, "Feminist Legal Theory, Critical Legal Studies and Legal Education, or "The Fem-Crits Go to Law School" (1988) 38 Journal of Legal Education 61. Although that is a valid exercise, for the purposes of my studies I do not want to be preoccupied with the imperfection of taxonomy. Labels are flawed conceptual tools, but to dwell on issues of overlap and influence would be paralysing. I acknowledge that there are no rigid lines of demarcation among related theoretical approaches, and that many intellectual traditions have contributed to the insights of feminists and postmodernists.

monolithic. A variety of feminist approaches exist including liberal feminists, socialist feminists, radical feminists and postmodern feminists. [75] In developing their theories Feminists look to and validate the experience of women. Where the dominant view of things does not align with female reality, Feminists disregard the norms and attempt to create explanations that fit their lives. However had Feminism ended in the imposition of a new unifying theory, as in the work of radical feminists like Catherine MacKinnon [76], then it no longer could be called postmodern in its approach.

One of the aspects of feminist legal theory is the project of naming and exposing the world as man-made. The feminist legal scholar Ann Scales writes that men have had the power to organize reality, "to create the world from their own point of view, and then, by a truly remarkable philosophical conjure, were able to elevate that point of view into so-called "objective reality." [77] The idea of the male norm has been

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[75] See: Sheehy, Elizabeth, Boyd, Susan., Canadian Feminist Perspectives on Law: An Annotated Bibliography of Interdisciplinary Writings (Special Publication of Resources for Feminist Research, 1989).

[76] C. MacKinnon, Feminism Unmodified: Discourses on Life and Law (Cambridge: Harvard University Press, 1987). For Mackinnon sexuality and gender relations are what constructs male power. For her feminism is a theory of how the "eroticization of power difference creates male and female in the social form they exist."

[77] Anne Scales, "Towards a Feminist Jurisprudence" (1980-81) 56 Indiana Law Journal 375, at 378.

considered in many law review articles. [78] For example in her work on the subjectivity of criminal law Christine Boyle attempts to expose the non-neutrality of law by exposing and criticizing legal scholarship as embodying "a male perspective on the world masquerading as an objective non-gendered perspective."[79]

Only recently have some feminists started to confront the privilege reflected in universalizing feminist theories. Originally Feminists asked the "gender question:" How does law take into account, or not take into account, the experience of women? [80] In so doing they learned a lot about how oppression works identifying the complex patterns of sexism, institutional and systemic discrimination, and the important distinction between equality of treatment and treatment as an equal.[81] However, there were women on the wings who did not fit all the generalizations that feminist scholars were advancing. Women of

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[78] See: M. Minow, "Supreme Court Forward: Justice Engendered" (1987), 101 Harvard Law Review 10; K. Lahey, "...Until Women Themselves Have Told All They Have to Tell..." (1985) 23 Osgoode Hall Law Journal 519; Janet Rifkin, "Towards a Theory of Law and Patriarchy" (1980) 3 Harvard Women's Law Journal 83.

[79] C. Boyle, "Criminal Law and Procedure: Who Needs Tenure?" (1985) Osgoode Hall Law Journal 427 at 428.

[80] See: Katherine Bartlett, "Feminist Legal Methods" (1990) 103 Harvard Law Review 829.

[81] See: Gwen Brodsky and Shelagh Day, Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back? (Ottawa: Canadian Advisory Council on the Status of Women, 1989); Susan Boyd and Elizabeth Sheehy, "Feminist Perspectives on Law: Canadian Theory and Practice" (1986) 2 Canadian Journal of Women and the Law 1; Elizabeth Sheehy and Susan Boyd, Canadian Feminist Perspectives on Law: An Annotated Bibliography of Interdisciplinary Writings (Special Publication of Resources for Feminist Research, 1989).

colour and lesbian scholars were yelling from the sidelines: "Your theory does not fit my life." [82] It sounded familiar and some feminists started to take its implications seriously:

> There are disquieting gaps and silences even in feminist theory. Unless women attempt to read these gaps and silences along with the gaps and silences in male and masculinist theory, future theorists may draw some unhappy conclusions about Feminism: women of colour may decide that all other feminist theory - along with masculinist theory - is reducible to an ideology of racist supremacy. [83]

It became apparent that the "woman question" had to be rephrased. Exlusion of alternative perspectives both as subject and author meant that the question only addressed the concerns of white, middle class, heterosexual woman. The postmodern sensibility demands that other realms of knowing and experience be integrated into theory. Bartlett explains the trend as follows:

> Feminists working in the law have recently begun converting "the woman question" into the question of the "excluded" as Euro-american, heterosexually-identified feminists have come to recognize the need to "fine-tune Feminism to encompass the breadth and specificity of oppression actually experienced by different women, - and even some men." [84]

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[82] See: Audre Lorde, "The Master's Tools Will Never Dismantle the Master's House" in A. Lorde Sister Outsider (Trumansburg, New York: The Crossing Press, 1984); bell hooks, "talking back" and "when I was a young soldier for the revolution: coming to voice", in Talking Back: thinking feminist, thinking black (Boston: South End Press, 1989).

[83] Kathleen Lahey as quoted in Marlee Kline,"Race, Racism and Feminist Legal Theory" (1989) 11 Harvard Women's Law Journal 115, p. 150.

[84] Kate Bartlett, "Feminist Legal Methods" 103 (1990) Harvard Law Review 829, p. 849..

Consequently, issues of class, ability, race, ethnicity, and sexual orientation are increasingly complicating and enriching the nature of feminist analyses. [85]

The movement away from the presumed universality of Euro-American, middle-class, heterosexually identified women's experience to more diverse and particularized perspectives affirms the complexity and multiplicity of different sources of oppression. Kathleen Lahey exemplifies the "Postmodern Feminists" in her rejection of a homogenous sisterhood. She rejects universalisation by arguing that each individual is shaped by her own personal history as well as by general cultural forces. For her the individual is thus located at the point of intersection of all personal and cultural influences. Consequently, Lahey argues that it is essential that feminist legal theorists increasingly complicate their analyses paying constant attention to factors which shape power relations; including gender, race, class and sexual orientation. [86] Jane Flax makes a similar claim writing that if postmodern feminists do their work well, "reality will appear even more unstable,

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[85] Didi Herman, "Sociologically Speaking: Law, Sexuality and Social Change" (1991) 2(2) The Journal of Human Justice 57.; Marlee Kline, "Race, Racism and Feminist Legal Theory" (1989) 11 Harvard Women's Law Journal 115; M. Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22 Harvard Civil Rights and Civil Liberties Law Review 323; Kimberle Crenshaw, "Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" (1988) 101 Harvard Law Review 1331.

[86] Lahey, Kathleen. On Silences, Screams and Scholarship: An Introduction to Feminist Legal Theory" in Richard Devlin, ed. Canadian Perspectives on Legal Theory (Toronto: Edmond Montgomery Publications, 1991), p. 319, at 328.

complex, and disorderly than it does now."[87]

Contemporary feminists have been active in developing analyses in relation to the "paucity of gains for women arising out of the pursuit of law reform." [88] They note that law reform aimed at improving the social condition of women has the "paradoxical effect of reconstituting patriarchal relations." [89] A clear analogy to native law can be drawn. No matter what the development in legal discourse: usufructuary rights, sui generis aboriginal title, or entrenched constitutional rights - little has changed in the social conditions of Canada's aboriginal citizens. In examining the utility of the fiduciary concept much can be learned from feminist legal scholars who have been frustrated by their inability to predict the failure of reform initiatives. For Feminists disappointments have led to a re-evaluation of the usefulness of promoting legal change as a method of resisting the oppression of women. Several feminist scholars have turned to the concept of ideology to explain the role of law in reinforcing oppression. Gavigan, Smart and Boyd have each contributed to a body of literature which attempts to explain the elastic capacity of the legal

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[87] Flax, Jane. "Postmodernism and Gender Relations in Feminist Theory" in Frase and Nicholson (eds.) Postmodernism/Feminism (London: Routledge, 1991) 39. p. 57. In this sense, Flax queries that perhaps Freud was right when he declared that women are the enemies of civilization.

[88] Carol Smart, "Feminism and Law: Some Problems of Analysis and Strategy" (1986) 14 International Journal of the Sociology of Law 109, at 109.

[89] Dawn Currie and Marlee Kline, "Challenging Privilege: Women, Knowledge and Feminist Struggles" (1991) 2(2) The Journal of Human Justice 1, p. 10.

system to absorb reforms and reproduce dominant social forms.[90] Feminist legal scholars have taken the lead in developing more refined analyses. As Gavigan writes, "if we look for manifest, explicit discrimination or differential treatment in law or in the courtroom, we will miss the subtle processes (which are less visible but even more important) by which legal doctrine, and judicial interpretation and decision making reproduce and reinforce" subordination." [91]

The insights of feminist legal scholars are helpful in evaluating the usefulness of the fiduciary concept as a method of native empowerment. Their work points to the necessity of legal analysis which takes difference into account. Specifically with regard to analysing the fiduciary concept their work is an exhortation to complicate analyses in order to break patterns of dominance in the realm of ideas, values, culture and theory. It points to the necessity of seeking out native perspectives, being sensitive to exclusion, and sensitive to assumptions which perpetuate dominance and privilege. Moreover the insights of feminist legal scholars like Gavigan and Boyd in relation to law and ideology point to a need for sharper analytical tools to understand prevailing systems of knowledge and power.

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[90] Susan Boyd, "Child Custody, Ideologies and Employment" (1989) 3 Canadian Journal of Women and the Law 111. Shelly Gavigan, "Law, Gender and Ideology" in Anne Bayefsky, (ed.) Legal Theory Meets Legal Practice (Edmonton: Academic Printing and Publishing, 1988) 283; Carol Smart, Feminism and the Power of Law (London: Routledge, 1989).

[91] Gavigan, pp. 293-294.

CHAPTER 2

ESTABLISHING THE PARAMETERS OF THE FIDUCIARY RELATIONSHIP

In 1982 part of the package of constitutional amendments included provisions on aboriginal and treaty rights. Although further constitutional conferences were planned, with required aboriginal participation, subsequent First Minister's Conferences (FMC's) provided little help in clarifying the meaning of s. 35(1). Consequently, the task has been left to the courts. [1]

On May 31, 1990 the Supreme Court of Canada handed down its decision in R. v. Sparrow.[2] The decision clears up much of the uncertainty surrounding s. 35 of the Constitution Act, 1982.[3] On

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[1] Section 37 of the Constitution Act, 1982, provided for a first minister's conference within one year, which would include in the agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those people to be included in the Constitution of Canada." See: Sanders, Doug. "An Uncertain Path: The Aboriginal Constitutional Conferences" in Weiler and Elliot, Litigating the Values of A Nation: The Canadian Charter of Rights and Freedoms (Vancouver, Carswell, 1986), p. 63, at 64. For further accounts of the constitutional history of the aboriginal rights provisions and their amendments see: E. McWhinney, Canada and the Constitution: 1972-1982 (Toronto: University of Toronto Press, 1982); N. Zlotkin, Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference (Kingston: Institute of Intergovernmental Relations, Queen's University, 1983); Romanov, J. Whyte, and H. Leeson, Canada Notwithstanding: The Making of the Constitution 1976-1982 (Toronto: Methuen, 1984);B. Schwartz, First Principles, Second Thoughts: Aboriginal Peoples,Constitutional Reform and Canadian Statecraft (Kingston, Institute of Intergovernmental Relations, Queen's University, 1986); D. Milne, The Canadian Constitution: From Patriation to Meech Lake (Toronto: Lorimer, 1989).

[2] R. v. Sparrow., [1990] 1 S.C.R. 1075.

[3] Subsection 35(1) of the Constitution Act, 1982 reads:

S. 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

"Rights of the Aboriginal Peoples of Canada," Part II of the Constitution Act,

the other hand, in the area of fiduciary obligations, it creates much more. The decision begs the question: "What are the limits of the fiduciary relationship between governments and aboriginal peoples?" Case law previous to Sparrow established that the Crown owed a fiduciary obligation to Native people in areas of land rights related to surrender. [4] What is new about Sparrow is the expansion of the fiduciary duty beyond Guerin-like situations and into the realm of interference with constitutionally entrenched aboriginal and treaty rights. It is the thesis of this chapter that the fiduciary duty can be further extended to cover other aspects of Crown-Aboriginal relations.

A narrow reading of Sparrow confines the ruling to fact situations involving interference with aboriginal or treaty rights. A broad reading interprets the decision as confirmation that the entire relationship between the Crown and the Indian peoples is imbued with fiduciary aspects. In Kruger v. The Queen Justice Heald of the Federal Court of Appeal posed the question, "What then are the parameters of the fiduciary relationship?"[5] This chapter

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1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c.11. For a spectrum of views on s. 35 see: Noel Lyon, "An Essay on Constitutional Interpretation" (1988) Osgoode Hall Law Review 95; W. Petney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982/ Part II Section 35: The Substantive Guarantee" (1988) U.B.C. Law Review 314; Doug Sanders, "Pre-existing Rights: The Aboriginal Peoples of Canada (Sections 25 and 35) in Beaudoin and Ratushny (eds.) The Canadian Charter of Rights and Freedoms (2nd ed., 1989); Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Canadian Bar Review 727.

[4] Guerin v. R., [1984] 2 S.C.R. 335.

[5] Kruger v. The Queen 17 D.L.R. (4th) 591 at 598.

attempts to answer that question by exploring the fiduciary conceptual framework as it appears in Sparrow, related case law, history, and the common law. In addition I intend to indulge in creative speculation as to where an expanded fiduciary relationship could lead focusing on the area of aboriginal affairs policy development.

This Chapter is divided into six sections. Section (i) reviews the content of Sparrow establishing how the decision establishes a framework for an expanded conceptualization of the Crown-Aboriginal fiduciary relationship. Section (ii) scans available literature on the subject of the scope of Crown-Native fiduciary relationship and reveals a spectrum of liberal and restrictive viewpoints. Section (iii) is an an attempt to understand the sources of the fiduciary concept in the context of Crown-Indian relations. Both the historical and common law backgrounds are surveyed. Section (iv) is a review of case law which touches on the fiduciary aspect of Crown-Aboriginal relations. Jurisprudence in the area reveals a tension between judges willing to expand the fiduciary concept and those who foreclose any attempts at expansive thought. In section (v) "aboriginal affairs policy development" is targeted as a specific instance of the Crown-Aboriginal fiduciary relationship, and predictions are made regarding possible fiduciary standards applicable in the area. Finally, in section (vi) concerns that the evocation of a fiduciary duty may immobilize the federal

government are addressed. Considering judicial pronouncements indicating that the Courts may be prepared to hurl some surprising "curial thunderbolts" [6] it would seem unwise for the government to adopt a policy of inaction.

[6] W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's Law Journal 217, at 219.

(i) R. V. SPARROW

Sparrow is a remarkably broad ranging decision. It contains sweeping passages, historical summaries, puzzling references, and extraneous comments that can partially be explained by the historical context in which it was written. It is a unanimous judgment co-authored by Justice LaForest and Chief Justice Dickson. It was under deliberation for over eighteen months. This inordinate length of time cannot be fully explained by the backlog of cases or complexity of issues facing the court. Rather it is suggested that to obtain unanimity, compromises between liberal minded and less liberal judges were gained through the byzantine and lengthy process of circulating drafts. These compromises were fueled by the internal politics of a bench that was about to experience a drastic change in composition. Sparrow is the first pronouncement by the Court on the important issue of constitutionally entrenched aboriginal rights. It is also the last pronouncement on the law and aboriginal people to come from the Court before the two most progressive judges, Justice Dickson and Justice Wilson, retired. It is suggested that Sparrow is an attempt by those two judges to influence the future of native law in Canada after their departure from the bench. It is an opus magnum, an epic judgment. In fashioning their legacy, clarity was sacrificed for scope. As for their ambitions and intentions, only the future will reveal what they have wrought.

Essentially Sparrow is a fishing story. The Musqueam Indian Band was issued a fishing licence by the federal Department of Fisheries and Oceans to fish for food with drift nets up to 25 fathoms in length. Ronald Sparrow, a member of the Musqueam Band used a net 45 fathoms long. He was charged under the federal Fisheries Act with fishing contrary to the terms of the band's licence. At trial Sparrow argued that pursuant to s. 35(1) of the Constitution Act the Musqueam Indians have a constitutionally protected right to fish for food within their traditional territory. According to Sparrow, any regulations inconsistent with section 35(1) were rendered of no force and effect by section 52 of the Constitution Act, 1982.

In their interpretation of s. 35 Justice Dickson and Justice La Forest, writing for the Court, first pronounce on the effect of the constitutional recognition and affirmation of aboriginal and treaty rights. In a passage which seems more appropriate to issues raised in R. v. Sioui, [7] the Court refers to an article by Professor Doug Sanders on the issue of the enforcement of treaty rights. [8] In Sanders' view the incorporation of s. 35 into the Constitution gave legal enforceability to previously unenforceable

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[7] [1990] 1 S.C.R. 1025. On May 24, 1990 the Supreme Court upheld the acquittal of Conrad Sioui who was convicted of violating Quebec provincial park regulations for cutting sapling and building fires for a religious ceremony. In quashing the conviction the Court recognized that a document signed in 1760 was a valid treaty and gave Hurons the right to practice their religion. Furthermore, laws affecting treaty rights cannot be developed without aboriginal consent.

[8] Doug Sanders, "Pre-Exisiting Rights: The Aboriginal Peoples of Canada" in Beaudoin and Ratushny, eds. The Canadian Charter of Right and Freedoms, 2nd ed.,p. 730.

treaty promises. The Court also cites a passage from an article by Professor Noel Lyon in which Lyon writes that s. 35:

> renounces the old rules of the game under which the Crown established Courts of law and denied those Courts the authority to question sovereign claims made by the Crown.[9]

Presumably this passage is a reference to the unquestioned sovereignty of Parliament prior to 1982. Both authors are cited, with apparent approval, to establish that s. 35 has provided aboriginals with some form of remedy to protect constitutionally entrenched rights.

After emphasizing the importance of constitutional "recognition and affirmation," the Court develops an analysis to determine when government interference with aboriginal rights is permissable. If federal or provincial governments want to pass laws that impinge on native rights they must justify their actions by balancing federal objectives against federal responsibilities:

> 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.[10]

By locating the source of restraint on legislative power in the

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[9] Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95, at p. 100.

[10] Sparrow, p. 1109.

Crown-Aboriginal fiduciary relationship the Court signals future possibilities for the fiduciary concept. [11]

In the specific situation of regulatory interference with fishing rights governments are not left to speculate as to the present content of their fiduciary obligations. The Court details a three stage analysis as guidelines to proper fiduciary actions. First, the legislation or action must be related to a valid legislative objective. In the area of fisheries the Court cites allocation management and conservation as legitimate reasons for impinging on aboriginal rights. Second, the honour of the Crown must be taken into account. This is described as an elastic requirement which can be tailored to accommodate different types of non-aboriginal interests which will be weighed against aboriginal and treaty rights. The third and final part of the analysis incorporates a series of questions to be addressed including:

> -Is there minimal interference with the right?
> -Has fair compensation been paid if expropriation occurs?
> -Has there been consultation with the aboriginal group in question with respect to the measures to be implemented?

The list, according to the Court, is not exhaustive but rather will vary with the factors of each case. [12]

Most significant about Sparrow is that the category of

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[11] From a critical perspective the Court's beneficence is doubtful. First the passage signals that s. 35 rights can be restricted. Second by using fiduciary language to restrain s. 35 rights the Court attempts to make the bestowment of power on the federal government appear like a necessary and good development.

[12] Ibid., pp. 1111-1119.

fiduciary obligations has been extended into s. 35 of the Constitution Act thereby creating two explicit situations where the Crown has fiduciary obligations towards aboriginal peoples. The first situation arises as a result of Guerin affecting the Crown's handling of reserve land, and by analogy other Indian assets.[13] If a second situation has been created out of the fiduciary concept then Sparrow implicitly supports the principle that the categories of Crown fiduciary obligations towards natives are not closed.

By grounding its analysis in a fiduciary framework the Court has provided future aboriginal litigants or negotiators with a powerful, if not unwieldily, legal tool. Peter Burns argues that, if the government does not negotiate fairly, the fiduciary obligations outlined in Sparrow provide the Courts with a club to award substantial rights to Indians. [14] Sparrow is an indication that the Courts are indeed willing to expand the government's fiduciary obligations towards aboriginal peoples. The boundaries of this expansion, of course, remain to be seen.

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[13] Guerin v. R. [1984] 2 S.C.R. 335.

[14] Globe and Mail, September 11, 1991. For Professor Burns" comments regarding the fiduciary duties recognized by McEachern J. in the Delgamuukw decision see "Delgamuukw v. B.C.: A Summary of the Judgment," conference paper: Delgamuukw and the Aboriginal Land Question: Victoria B.C., Sept. 10, 1991.

(ii) FIDUCIARY DISCOURSE

On September 25, 1990 Prime Minister Mulroney outlined the Canadian government's agenda to "preserve the special place of first citizens in this country." The "Native Agenda" committed the government to progress on what was referred to as "four pillars":

> (i) land claims,
> (ii) economic and social conditions on reserves,
> (iii) the relationship between aboriginal peoples and governments, and
> (iv) the concerns of Canada's aboriginal peoples in contemporary Canadian life." [15]

Finally the federal government appeared to be serious about addressing the grievances and concerns of native people. Two theories as to the reasons for this dramatic response appear probable.

A cynic might interpret the federal government's "Four Pillars" programme as a contrived response to the "Oka Crisis" [16] and an attempt through symbolic rhetoric to quell further uprisings. "Réal politique" adherents would agree. Alternatively, the government's actions can be interpreted as an attempt to fulfil

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[16] Globe and Mail, September 26,1990. For a detailed explanation of the "Native Agenda" see Indian and Northern Affairs, Information Sheet No. 33, March 1991.

[16] In the summer of 1990 a vigil aimed at blocking expansion of a local golf course on land claimed by the Mohawks of the Kanesatake community near the town of Oka erupted into violence when it was raided by provincial police. Armed Mohawks repelled the attack and kept police and Canadian Forces soldiers at bay for the next 77 days before surrendering. See:"The Summer of 1990" Fifth Report of the Standing Committee on Aboriginal Affairs" (House of Commons, May 1991).p. 31.

long standing fiduciary obligations to native people, thereby avoiding further Sparrow-like judicial pronouncements. The "Summer of 1990" not only gave the government a clear indication of the level of discontent felt by First Nations, it also provided the federal Crown with an opportunity to reflect on recent Supreme Court decisions. The message was clear: the courts had carefully noted the governments fiduciary obligations and indicated that they were willing to be activists in the area. Unless the government started to produce on aboriginal policies it was foreseeable that the courts would use fiduciary duties as a base to award substantial rights to Indians.

What follows is a survey of the discourse which surrounds the topic of the potential of the fiduciary concept. Numerous and varied visions of the scope of the fiduciary obligations have appeared. Naysayers and dreamers are equally represented. It is a conversation of extremes with everything in between. In linking the Crown's fiduciary responsibilities to the sui generis concept the Court created an atmosphere where conservatives and liberals could interpret the term from the extreme polarity of "anything goes" to the avoidance tactic of "nothing goes."

When Sparrow was handed down the reaction of some aboriginal people bordered on the ecstatic. George Erasmus pronounced that it was "an extremely major victory", and that Native people had "won big." [17] Chief Conrad Sioui commenting on his victory in Sioui

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[17] Globe and Mail June 1, 1990.

coupled with Sparrow declared that the decisions had expansive consequences including giving natives the power "to block the transfer of powers from the federal government to provinces." [18] A survey of the Minutes of the Standing Committee on Aboriginal Affairs indicates that First Nations perceive Sparrow as a weighty bargaining chip capable of strengthening their position in all arenas of Crown-Aboriginal interaction. [19] From their perspective land claims, land management, provision of services, policy development and constitutional issues all fall under the fiduciary rubric. Metaphorically, the Court gave First Nations a club to threaten government, and to threaten Department of Indian and Northern Development [20] bureaucrats whenever they are perceived to be unhelpful, intransigent or adversarial.

In contrast, government officials view the repercussions of Sparrow from a different perspective. A campaign has been mounted to counter the message that the Crown's fiduciary obligations extend beyond the Sparrow fact situation. It is an exercise in damage control. Michael Hudson, Senior Counsel for DIAND, wrote in a paper entitled "Fiduciary Obligations of the Crown Toward Aboriginal Peoples" that "there is nothing in the Sparrow judgment to suggest that all of the Crown's dealings, regardless of their

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[18] Globe and Mail, June 4, 1990.

[19] "Minutes of Proceedings and Evidence of the Standing Committee on Aboriginal Affairs Considering the Events at Kanesatake and Kahnawake during the Summer of 1990" Issue 47, pp. 30-33. Issue 49. pp. 47,98. Issue 58, pp. 36-52.

[20] Hereinafter referred to as DIAND.

nature, are impressed with fiduciary obligations." [21] Similarly, Robert Edwards, a British Columbian Provincial Attorney General representative, has written that the provincial Crown's fiduciary obligations do not go beyond issues of "land and resource use which may affect aboriginal sustenance practices." [22]

A further example of the government's restrictive position is evident in the Federal Court case of Luke v. Canada [23] where the Kootenay Band of British Columbia sought a declaration that the Crown breached its fiduciary obligations to the band in respect of two land surrenders. Although not a s. 35 case the Crown referred to Sparrow and advanced the following argument:

> ...the fiduciary obligations owed to the Indians do not float above in the air. They must be grounded in dependency. They only exist where the Indians cannot by statute, act for themselves. The obligations only crystallize when the Crown is imposed. [24]

Justice Dubé found for the band and accepted the crystallization argument holding that the Crown's obligation had "crystallized" and thus Crown duties were not met. The result is to characterize the fiduciary obligation as something that is turned on and off by triggering events, rather than to see it as a constant presence

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[21] Michael Hudson, "Fiduciary Obligations of the Crown Towards Aboriginal Peoples" (Conference Paper: "Delgamuukw and the Aboriginal Land Question" Victoria, British Columbia: Sept. 10,11, 1991)

[22] Robert Edwards, "Fiduciary Duties and the Delgamuukw Decision" (Conference Paper: "Delgamuukw and the Aboriginal Land Question" Victoria, British Columbia: Sept. 10,11, 1991).

[23] (1991) 42 F.T.R. 241.

[24] Ibid., p. 281.

with protean qualities to fit differing circumstances. If the fiduciary obligation is akin to private law duties where vulnerability is an issue, then dependency is a necessary ingredient. However, aboriginal and treaty rights exist irrelevant to any dependency; Sparrow prescribes that fiduciary duties are present nonetheless. In Luke Justice Dubé refers to Sparrow even though the case does not involve s. 35 rights and then concludes that dependency is a prerequisite to the presence of fiduciary obligations. By not acknowledging that alternative forms of the fiduciary relationship exist Dubé, J. has cast a multi-dimensional concept in one-dimensional terms.

The divergence of opinion between government and First Nations was starkly exposed during the Parliamentary hearings into the "Summer of 1990 - The Oka Crisis." The issue of the nature and scope of the Crown-Aboriginal fiduciary relationship often became the subject of testimony before and inquiries by the Committee.[25] Many aboriginal advocates suggested that as a result of the 1763 Royal Proclamation and, as confirmed by Sparrow, all dealings between Indian people and the Crown are clothed with a fiduciary aspect. [26] However when Tom Siddon, the Minister of Indian Affairs, was questioned about the extent of the Crown's fiduciary obligations he responded that the fiduciary obligation only

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[25] "Minutes of Proceedings and Evidence of the Standing Committee on Aboriginal Affairs Considering the Events at Kanesatake and Kahnawake during the Summer of 1990" Issue 47, pp. 30-33. Issue 49. pp. 47,98. Issue 58, pp. 36-52.

[26] See testimony of Professor Errol Mendes, Issue 58, pp. 28-56.

attached to issues of Indian land management. [27]

The tension between these competing views is not likely to diminish. In its final report on the Oka Crisis, the Standing Committee on Aboriginal Affairs acknowledged the controversy surrounding the subject of the Crown-Aboriginal fiduciary relationship recommending that the subject-matters of a Royal Commission on Aboriginal Peoples include "the fiduciary responsibility of the federal government to First Nations." [28] Similarly, Brian Dickson, the former Chief Justice of the Supreme Court of Canada, who was appointed to make recommendations regarding the mandate of the Royal Commission, proposed that the "relationship among aboriginal peoples, Canadian government, and Canadian society" become an area of study. [29] It is inevitable that during the anticipated three and one-half years of hearings expected to be held by the recently appointed Royal Commission on Aboriginal Peoples the controversial issue of the nature and scope of the Crown-Aboriginal fiduciary relationships will be at the forefront of discussions.

It is not a new idea that the fiduciary relationship exists when the Crown is engaged in an aspect of Indian affairs other than dealing with Indian lands. After the Supreme Court's decision in

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[27] Ibid., Issue 47, pp. 18-22.

[28] "The Summer of 1990" Fifth Report of the Standing Committee on Aboriginal Affairs" (House of Commons, May 1991).p. 31

[29] For a review of the Royal Commission's terms of reference see the Appendix to the Commission's first published report: "The Rights of Aboriginal Self-Government and the Constitution: A Commentary(Ottawa: February 13, 1992).

Guerin, several articles appeared advocating the thesis that the Crown owes fiduciary obligations to Indian people outside the specific situation of surrender. [30] As a result of Sparrow these authors should feel vindicated. Moreover, the analyses developed by these authors in relation to Guerin is even more applicable in a post Sparrow legal world. [31] In a co-authored article, "Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective" McMurty and Pratt wrote that "the fiduciary concept described in Guerin could be expanded through a logical analysis of its foundations into a coherent legal and political theory for viewing the Crown-Indian relationship. [32] Now the article can be amended to read that the fiduciary concept in Guerin and Sparrow provide the foundation for the analysis.

Regarding the scope of the Crown's obligations McMurty and Pratt contend that the Crown's fiduciary responsibilities should be viewed on a spectrum as a range of different obligations depending upon the relative sophistication of the parties and transactions

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[30] See: W.R. McMurty and A. Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective" (1986) 3 Canadian Native Law Reporter 19; J. Hurley, "The Crown's Fiduciary Duty and Indian Title: Guerin v. The Queen" (1985) 30 McGill Law Journal 559, Darlene Johnston, "A Theory of Crown Trust Towards Aboriginal Peoples" (1986) 12 Ottawa Law Review 307; and Donovan Waters, "The Indian Peoples and the Crown" paper presented at The International Symposium of Trust, Equity and Fiduciary Relationships, University of Victoria, Victoria, British Columbia, February 14-17, 1988.

[31] For further commentary on aboriginal people and fiduciary obligations see: R.H. Bartlett, "You Can't Trust the Crown: The Fiduciary Obligation of the Crown to the Indians: Guerin v. The Queen" (1984-84) 49 Sask. L. Rev. 367; R. H. Bartlett, "The Fiduciary Obligation of the Crown to Indians" (1989) 53 Sask. L. Rev. 301; Brian Slattery, "First Nations and the Constitution: A Question of Trust" 71 Canadian Bar Review 261.

[32] McMurty and Pratte, at 39.

involved:

> There can, in other words, be no single model of the fiduciary relationship between the Indian people and the Crown. There can however, be a general theory of shifting emphasis along a continuum between the extremes of agency and trust, with presumptions to guide courts or negotiators as to the appropriate model in a given set of facts. [33]

According to their theory the amorphous nature of the fiduciary relationship is not a constant applicable to limited and defined situations, but rather encompasses numerous obligations which apply to different First Nations in a varying manner. It is a protean entity readily assuming different shapes and features depending on the degree of experience and sophistication of the Band involved.

Like Pratt and McMurty, John Hurley argues that the fiduciary obligation is not limited to situations of surrender. Hurley views the historical foundations of the fiduciary obligation as the source of the Crown's broad responsibilities. In his view the Crown has an historic duty to act in the "best interests" of Indian people and cites the Indian Act as an example of the Crown attempting to fulfil its obligations. [34] Given the colonial mindset of the legislation and the misery often attributed to it, it is questionable whether or not legislators have been concerned about the best interests of native people. Nonetheless, the fact that the Indian Act has pervaded almost every aspect of the lives

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[33] Ibid, p. 40.

[34] John Hurley. "The Crown's Fiduciary Duty and Indian Title: Guerin v. The Queen" (1985) 30 McGill Law Journal 559, at 586.

of aboriginal people for over 120 years illustrates the historic depth and intricacies of the Crown-Aboriginal relationship.

Perhaps the most generous interpretation of the Crown-Aboriginal fiduciary relationship is found in the work of Bradford Morse. Morse sees rich possibilities flowing from the fiduciary obligation beginning with a more "pro-active obligation on the Government of Canada to deal with native concerns." [35] In a prescient moment Morse foresaw the result of Sparrow when he wrote that as a result of s. 35 the fiduciary relationship was entrenched in the Constitution. This is exactly where Sparrow places it. Regarding justiciable rights Morse speculates whether unreasonable delay because of the failure of government to expeditiously negotiate specific and comprehensive land claims would lead to a claim for breach of fiduciary duty. He also questions whether the obligation could extend to include a duty to legislate. Morse concludes his argument with the observation that although his propositions may seem unorthodox, it would be unwise to preclude such possibilities given the radical change that has occurred in Canada's "constitutional world" since 1982. [36]

Professor Errol Mendes also sees the fiduciary relationship placing a more pro-active obligation on the Government of Canada to

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[35] See: Bradford Morse, "Government Obligations, Aboriginal Peoples and Section 91(24)" in D. Hawkes (ed.) Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles (Ottawa: Carleton University Press, 1989), pp. 80-82.

[36] Morse,p. 88.

deal with native concerns. In Mendes opinion the government has an obligation to preserve any land that is subject to aboriginal territorial claims. In his testimony before the Standing Committee on Aboriginal Affairs Mendes linked the fiduciary obligation to the events at Oka and Kahnawake, Quebec. Referring to the armed stand off between Mohawk warriors and the Canadian Armed Forced over the proposed development of allegedly sacred aboriginal cites Professor Mendes stated:

> At minimum, the fiduciary relationship between the Government of Canada and the Mohawks demands that in such situations the government take preservation measure to ensure that sacred grounds such as the Pines at Oka are not destroyed or developed pending judicial or some other settlement of the land dispute. [37]

Basing his analysis on the special trust relationship created by history, treaties and legislation, Professor Mendes argued that the federal Crown failed to respect its fiduciary obligations when it failed to step into the controversy at the first signs of serious trouble and block any development plans until the territorial claims were settled.

Countering the bold assertions of Morse and Mendes are the comments of Bryan Schwartz. Schwartz sees little room for expansion of the Crown's fiduciary obligations. He precludes the fiduciary concept from ever providing Indian groups with any claims

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[37] Minutes of Proceedings and Evidence of the Standing Committee on Aboriginal Affairs Considering the Events at Kanesatake and Kahnawake during the Summer of 1990" Issue 47, p. 33.

for services or social welfare programs explaining that the "trust responsibility" does not provide a "court enforceable right to federal support." [38] However in his view an equality claim may be asserted to ensure that members of Indian communities obtain roughly the same level of public services. Schwartz denies a justiciable right to social services under the fiduciary banner and places unrealistic expectations on s. 15 of the Charter. [39] Perhaps in combining the fiduciary and equality concepts a Court would feel better positioned to extend already recognized programs to First Nations lacking them.

Three authors have put forth the view that the federal trust role is to affirm and strengthen "aboriginality" or "Indianess."[40] In the opinion of Ian Scott, David Hawkes and Alan Maslove aboriginal peoples require programs and services to preserve and strengthen their ways of life, culture and economic viability. Deterioration and disappearance of aboriginal languages emphasizes

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[38] Bryan Schwartz,. First Principles - Second Thoughts , p. 439.

[39] In Schachter, [S.C.J. No. 68, July 9, 1992] the Supreme Court recently decided that there is a limited power for judges to extend government programs to excluded groups where there is a clear violation of constitutional rights. However the Court warned that judges should hesitate to substitute their views for those of elected legislators as to who deserves social benefits. The Court imposed elaborate limiting guidelines to assist judges in choosing appropriate remedies. Extension of benefits, striking down legislation, or giving legislators time to bring laws into line are available to the courts in different circumstances.

[40] See: David Hawkes and Allan Maslove, "Fiscal Arrangements for Aboriginal Self-Government " p. 93, and Ian Scott "Respective Roles and Responsibilities of Federal and Provincial Governments Regarding the Aboriginal Peoples of Canada", p. 351. . in Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles (Ottawa: Carleton University Press, 1989).

the necessity for governments to assume responsibilities in the area of aboriginal culture. [41] The existence of government funded cultural centers on some reserves indicates that DIAND recognizes the importance of the issue. [42] However, not all First Nations have been provided with such facilities and little information is available regarding the criteria needed to qualify for cultural centre programming. According to the Standing Committee on Aboriginal Affairs areas of prime concern are those bands where language and culture is at risk of disappearing.[43] In a recent article Brian Slattery puts forth the view that the entrenchment of the trust relationship in s. 35 of the Constitution affords protection to aboriginal languages and cultures. [44]

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[41] See:"You Took My Talk" Fourth Report of the Standing Committee on Aboriginal Affairs (House of Commons, December 1990).

[42] The Indian Cultural/Educational Centres are funded and administered by the Housing and Social Services Sector of DIAND. They are developed and managed by Native People and focus on activities and programs that emphasize Native self-awareness regarding language, culture and heritage. See DIAND Information sheet, No. 27, 1990.

[43] Supra. fn 41.

[44] Brian Slattery, "First Nations and the Constitution: A Question of Trust" 71 Canadian Bar Review 261, p. 272. Also see Slattery, "Aboriginal Language Rights" in D. Schneiderman (ed.) Language and the State (Edmonton: Center for Constitutional Studies, 1989), p. 369.

(iii) COMMON LAW AND HISTORY AS FIDUCIARY REFERENCE POINTS

If Indian peoples' advocates are correct in asserting that all dealings between Natives and the Crown are clothed with a fiduciary aspect, and that the Sparrow decision, like the Guerin, decision, is only a particularization of a general fiduciary relationship, it is then evident that a considerable number of questions remain unanswered. The most obvious concerns centre around the standards that the fiduciary relationship import into Crown-First Nation relations in situations beyond Guerin-like or Sparrow-like situation? Common law and history tend to provide valuable reference points to help determine appropriate standards.

By using fiduciary language to characterize the relationship between the Crown and native people the Court has given future litigants a frame of reference in which to operate. In situations akin to Guerin litigants know that duties similar to those imposed on private law trusties will be operating, i.e., the highest possible standards. Away from that situation ensurable standards are, at best, tenuous. In order to draft persuasive pleadings a litigant will have to be familiar with both the Common Law surrounding fiduciary duties as well as the historical background of Crown-First Nation interactions.

(a) The Traditional Legal View

The common law does not offer easy and discernable answers as to what exactly a fiduciary involves. In Lac Mineral v. International Corona Resources Justice La Forest undertook a comprehensive review of the fiduciary concept. He highlighted its elusive nature stating that there are few legal concepts less conceptually certain:

> Indeed, the term fiduciary has been described as "one of the most ill-defined, if not altogether misleading terms in our law." It has been said that the fiduciary relationship is a "concept in search of a principle." Some have suggested that the principle governing fiduciary obligations may indeed by undefinable, while other have doubted whether there can be any "universal, all purpose definition of the fiduciary relationship."[45] (Citations omitted)

Given the ambiguity that surrounds the fiduciary concept, turning to the common law for guidance may prove futile.

Given such a daunting task, firm conceptual foundations must be laid. The word originates in Latin and according to The Oxford English Dictionary refers to situations of "trust or trustee(ship). Black's Law Dictionary defines the fiduciary relation in three contexts:

> 1. An expression, including both technical fiduciary relations and those informal relations which exist whenever one man [sic] trusts and relies upon another.
> 2. It exists where there is special confidence reposed in one who in equity and good

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[46] 61 D.L.R. (4th) 14 (S.C.C.) at 26.

> conscience is bound to act in good faith and with due regard to the interest of the one reposing the confidence.
> 3. A relation subsisting between two persons in regard to a business, contract, or piece of property, or in regard to the general business or state of one of them, of such a character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith. [46]

Examples of typical fiduciary relationships include those existing between a trustee and a beneficiary of a trust, an agent and principal, a direct of a company and the company, and a lawyer and client.

Academics have expended much effort in attempting to elucidate the fiduciary concept. R.M. Gaureau characterizes the fiduciary relationship as:

> ... a concept springing from an undertaking that arises from contract or a duty of care relationship. Its scope is not uniform or defined; it varies according to the nature of the undertaking like contractual duties or tort duties, only more elevated. The relationship arises out of reliance and vulnerability when one is acting in the interests of another. [47]

Members of the Supreme Court of Canada have also frequently given their views. In Guerin Dickson J. stated that a fiduciary obligation arises when the relative legal positions are such that the interests of one party are by agreement dealt with at the other

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[46] Black's Law Dictionary (5th ed.) (St. Paul: West Publishing Co., 1979), p. 564.

[47] R.M. Gaureau, "Demystifying the Fiduciary Mystique" (1989) 68 Canadian Bar Review 1, p. 20. Also see Ernest Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1; J.C. Shepherd, "Towards a Unified Concept of Fiduciary Relationships" (1981) 97 L.Q.R. 51; Mark Ellis, Fiduciary Duties in Canada (Don Mills: Richard De Boo, 1988).

party's discretion:

> ...where by statue, 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 a fiduciary's strict standard of conduct. [48]

Other, more recent Supreme Court pronouncements elaborate on the theory of fiduciary responsibility. Wilson J. in Frame. v. Smith and Smith [49] set out three common characteristics as a "rough and ready" guide to determining whether or not a fiduciary relationship exists:

> Relations in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (i) The fiduciary has scope for the exercise of some discretion or power.
> (ii) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> (iii) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. [50]

Interestingly Frame did not involve either native or commercial interests. Rather the issue raised was whether a custodial parent is a fiduciary to a non-custodial parent with regard to visitation and access rights. Justice Wilson's set of criteria should not be seen as crucial for expanding fiduciary obligations into new

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[48] Guerin v. R., [1984] 2 S.C.R. 335.

[49] Frame v. Smith and Smith, [1987] 2 S.C.R. 99.

[50] Ibid., p. 136.

territory. Dependency was not present in Sparrow, yet the Court saw fit to imbue fiduciary standards around constitutionally entrenched aboriginal rights.

Lac Minerals Ltd. v. International Coronal Resources Ltd.[51] is the Supreme Court's most recent pronouncement on the law of fiduciary obligations. Both Sopinka J. and La Forest J. adopt the characteristics enumerated by Wilson J. in Frame as a guide to recognizing fiduciary relationships. Emphasizing the elastic nature of the concept, Justice Sopinka adds the following qualification:

> It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary. [52]

By enforcing a duty beyond black letter law to uphold moral and fair dealings, the case extends the concept of fiduciary relationships. The case involved two mining companies contemplating the serious negotiation of a joint venture. Foreseeing the possibility of a partnership agreement Corona had revealed confidential information which prompted Lac Mineral to purchase gold mining property that Corona was interested in developing itself. Two members of the Court found that a deal made on a handshake between parties in accordance with mining industry standards was sufficient to establish a fiduciary relation

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[51] Supra., fn 45.

[52] Ibid., p.599.

since it created a relationship of "dependency and vulnerability."[53] Lac Mineral supports an expansive interpretation of the Crown-Aboriginal fiduciary relationship. Expansion of the common law of fiduciary duties into the area of private sector dealings encourages thinking in the aboriginal community that the Crown's obligations towards them should be no less. Since moral obligations may now be enforced by fiduciary remedies, analogously weak instances of Crown-Indian relationships should be treated in a similar way.

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[53] 61 D.L.R. (4th) 14, at 63,64.

(b) Historical Background

Historical instances have often been cited by the Courts as an enlightening source of the Crown's fiduciary responsibilities towards Native peoples. Guerin is premised on the notion that Crown obligations can be traced back to the history of British colonial policy. [54] In R. v. Taylor and Williams Justice MacKinnon saw the responsibility of government to protect the rights of Indians as arising from the special trust relations created by "history, treaty, and legislation." [55] Likewise, in Sparrow the Court stated that the "historic powers and responsibilities" assumed by the Crown constituted one of the sources of the fiduciary obligation. [56] These references confirm that the special nature of the Crown-Aboriginal relationship cannot be isolated to specific sections of the Indian Act, or the Constitution. Furthermore, it is not something that the courts created by judicial fiat. [57]

When Europeans first came to the shores of North America the continent was occupied by a large number of sovereign and independent Aboriginal peoples with their own territories, laws and

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[54] Guerin v. R. [1984] 2 S.C.R. 335.

[55] R. v. Taylor and Williams 34 O.R. (2d) 260 (Ont.C.A.) at 264.

[56] Sparrow at 1108.

[57] On the historical basis of the relationship see Guerin pp. 383-384, 348-349. Sparrow, pp. 1107-1108; and Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85, pp. 108-109, 129-131.

forms of government. [58] These nations entered into relations with incoming European nations on a basis of equality and mutual respect. During treaty negotiations in 1873, the Ojibway spokesman Mawedopenais described the positions of the Crown and aboriginal peoples as follows:

> We think it a great thing to meet you here. What we have heard yesterday, and as you represented yourself, you said the Queen sent you here, the way we understood you as a representative of the Queen. All this is our property where you have come...This is what we think, that the Great Spirit has planted us on this ground where we are, as you were where you came from. We think where we are is our property. I will tell you what he said to us when he planted us here; the rules that we should follow - us Indians - He has given us rules that we should follow to govern us rightly. [59]

France and Great Britain's dealings with aboriginal peoples on a nation to nation basis is well documented. As the Supreme Court observed in Sioui:

> The mother countries (Great Britain and France) did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations. The papers of Sir William Johnson... who was in charge of Indian affairs in British North America, demonstrate the recognition by Great Britain

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[58] For a historical overview of the period see: Ronald Wright. Stolen Continents: The New World Through Indian Eyes Since 1492 (Toronto: Viking, 1991); and Thomas Berger, A Long and Terrible Shadow (Vancouver: Douglas and McIntyre, 1991).

[59] Hon. Alexander Morris, The Treaties of Canada with the Indians of Manitoba and the North West Territories (Toronto: 1880), p. 59, quoted in Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada", (1984) Vol 32 American Journal of Comparative Law 361, at 376.

> that nation to nation relations had to be conducted with the North American Indians.[60]

After the elimination of France as a colonial rival, the principles underlying the practices of settler/aboriginal relations were ensconced in British law in the Royal Proclamation 1763.[61]

Most scholars cite the Royal Proclamation in combination with the existence of aboriginal title as the sources of the Crown-Aboriginal fiduciary relationship. [62] A reflection of the Proclamation's significance is the glowing terms in which it is often described. Justice Hall in Calder refers to the Proclamation as the "Magna Carta of Indian Rights." [63] Professor Mendes calls it the "Charter of Aboriginal Rights." [64] Citing its importance as a fundamental document, McMurty and Pratt assert that the Crown's "unilateral undertaking in the Royal Proclamation establishes one source for extending the Crown's fiduciary obligation beyond the specific surrender requirement." [65]

Generally, the Royal Proclamation outlines policy guidelines which restrict the alienation of lands reserved for Indians. The

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[60] R. v. Sioui, [1990] 1 S.C.R. 1025 at 1053.

[61] R.S.C. 1985, App. II. No.1.

[62] It should be noted that the Royal Proclamation does not create aboriginal rights but rather acknowledges their existence.

[63] [1973] 1 S.C.R. 313 at 395.

[64] Professor Errol Mendes, p. 32.

[65] W.R. McMurty and A. Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective" (1986) 3 Canadian Native Law Reporter 19.

text of the relevant provisions follows:

> And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, **that the several Nations or Tribes of Indians with whom We are connected, and who live under our protection, should not be molested or disturbed** in the Possession of such part of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds....
>
> And Whereas Great Fraud and Abuses have been committed in purchasing Lands of the Indians, to the great prejudice of our interests and to the great dissatisfaction of the said Indians; in order, therefore, to prevent such irregularities for the future, and to the end that the **Indians may be convinced of our justice and determined resolution to remove all reasonable cause of discontent**, we do with the advice of our Privy Council strictly enjoin and require, that no private person do presume to make any purchase from the said Indians of any lands reserved to the said Indians. (emphasis mine) [66]

Setting aside the issue of whether or not the Proclamation applies to all areas of Canada, in light of the language used and the terms included it is clear why Aboriginal peoples place great emphasis on the document. While the Proclamation asserted sovereignty over Aboriginal peoples it also recognized that these peoples were "nations" connected to the Crown by treaty and alliance. Further, it provided that First Nations should not be molested in their possession of unceded lands and stipulated that such lands could only be ceded to the Crown in public meetings called for that purpose. It prohibited colonial governments from granting away Aboriginal lands and ordered settlers not to invade them. In

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[66] Royal Proclamation of 1763 (reprinted in R.S.C. 1970 Appendices, pp. 123-29).

effect, the Proclamation acknowledged the retained sovereignty of Aboriginal peoples under the Crown's protection, and adopted measures to secure and protect their territorial rights. As has been stated by the Royal Commission on Aboriginal Peoples, "this arrangement is the historical basis for the enduring constitutional relationship between aboriginal nations and the Crown and provides the source of the Crown's fiduciary duties to those nations." [67]

As is clear from the Royal Proclamation the Crown's assumption of power with respect to land serves as a cornerstone for the Crown-Indian relationship. It is through the land that the special relationship between the Crown and First Nations has been sustained. Subsequent to the Proclamation, this tradition continued in the signing of pre and post Confederation treaties as well as in the creation of "Indians and lands reserved for Indians" as a head of power under s. 91(24) of the British North America Act. The enactment of the Indian Act in 1876 [68] carried on the special relationship. [69]

Section 18 of the present Act exemplifies how the Crown-Aboriginal special relationship has been codified in legislation. That section reads:

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[67] "The Right of Aboriginal Self-Government and the Constitution: A Commentary" Royal Commission on Aboriginal Peoples, February 13, 1992.

[68] S.C. 1876, c. 18.

[69] Many First Nations would disagree. Their assertion is that the legislation is an abuse of the fiduciary relationship because of its underlying philosophy of administering Indian people who were perceived as not being able to take care of themselves.

> 18(1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.[70]

It is important to remember that such Indian Act provisions do not create the unique relationship, rather, aspects of the fiduciary relationship are absorbed into the legislation. Justice Wilson makes this point clear in Roberts v. Canada where she writes:

> The obligation owed by the Crown in respect of land held for the Indians is recognized in, although not created by s. 18(1) of the Indian Act. [71]

It is a repetition of the principle first stated in Guerin.

Although land is the cornerstone of the Crown-Aboriginal fiduciary relationship, limiting the special relationship to land issues, as Minister Siddon suggests, is a shirking of government responsibility. Firstly it is contrary to the double head of power contemplated by s. 91(24) of the British North America Act, 1867.[72] Secondly, it is contrary to the pervasiveness of government influence over the lives of Indians.

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[70] R.S.C. 1952, c. 149. The section is probably best described as an anti-trust provision rather than a pro-trust fiduciary section By giving the Governor in Council discretion to decide what is for the use and benefit of the band immunizes the government from trust claims. Also see s. 37 and s. 38 of the Indian Act regarding a prohibition on the alienation, leasing or disposal of reserve lands unless surrender to the Crown has occurred.

[71] [1989] 1 S.C.R. 322, at 336.

[72] Clarification of Federal Crown responsibility for Indians separate from lands is found in the B.C. Terms of Union where the Federal Government provided for the hunting, fishing and trapping rights of Indians on all unoccupied Crown lands: British Columbia Terms of Union, R.S.C. 1985. App. II. No. 10, art. 13.

Sparrow supports the proposition that the fiduciary concept should not be confined to land related issues. The danger is that this aspect of Sparrow will be seen as either as anomaly or rhetoric. Patrick Macklem has speculated that the "borders of the Canadian legal imagination" may well prove too restrictive to accommodate such interpretations. [73] By examining past landmarks in Canadian fiduciary case law, whether or not current jurisprudence is adequate to the task of reconstructing the Crown-Aboriginal relationship becomes clearer. Section iv of this chapter is concerned with that project.

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[73] Macklem, p. 393.

(iv) CROWN-NATIVE FIDUCIARY JURISPRUDENCE

(a) Pre-Sparrow Case Law

What follows is a review of pre-Sparrow case law in relation to the Crown-Aboriginal special relationship. Four cases which contribute to a framework for expanding the scope and content of the fiduciary concept are canvassed: Guerin [74], Kruger v. R.,[75] R. v. Taylor and Williams,[76] and Ontario v. Bear island Foundation.[77] All four are needed to balance the lack of content given to the fiduciary concept by Justice Addy in Canada v. Apsassin. Taken together, the cases represent the jurisprudential climate in which conjecture about an expanded fiduciary relationship will be tested.

1. Supportive Decisions

1. Guerin

Regarding Crown-First Nation fiduciary theory Guerin is where it all began. The case must be recognized for advancing the cause of First Nations by initiating judicial review of exercises of

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[74] supra, fn. 48.

[76] 17 D.L.R. (4th) 591 (F.C.A.)

[76] supra, fn 55.

[77] [1991] 2 S.C.R. 570.

Crown authority in relation to aboriginal people. Previous to the decision the Federal Crown argued that its obligations to native people were not legally enforceable, but rather were political in nature. After Guerin, at least in relation to managing surrendered land, DIAND cannot immunize itself from liability for mismanagement by invoking a doctrine of "political trust." The case established that when the Crown deals with reserve lands on behalf of an Indian band, the Crown is under an equitable or fiduciary obligation:

> ...Where by statue, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary strict standard of conduct. [78]

One of the most important principles to take from the decision is the statement that the "categories of fiduciary, like those of negligence, should not be considered closed." [79]

The facts in Guerin involved the surrender of reserve land to the Crown for lease to a golf club in a situation where the band and band members were consulted as to the terms and conditions of the lease. The band sued the Crown for breach of its fiduciary obligations arguing that the terms obtained for use of Musqueam land were contrary to the band's conditions for lease. At the Supreme Court, eight judges agreed in the result that the Crown had

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[78] Guerin, p. 384.

[79] Ibid., p. 384.

breached its obligations. However, the Court expressed three separate opinions on the reasons for this result. Justice Estey held that the Crown was as an agent in the commercial exploitation of the band's interest. Wilson J. speaking for three members of the Court found that upon surrender a general fiduciary duty to hold reserve land for the use and benefit of the Indians became an express trust. In a decision representing one-half of the Court, Justice Dickson opined that upon the surrender a fiduciary obligation was established. He based his finding of federal liability upon the Crown's sui generis fiduciary responsibility with respect to Indian lands.

Generally, Guerin sets out the content of the fiduciary duty in the situation of surrender, but can be expanded to apply to analogous situations. Analogous situations would include expropriation, or the managing of "trust" moneys on behalf of aboriginal people. Three elements must be present in order for a Guerin type fiduciary relationship to arise: an obligation on the part of the Crown to act on behalf of aboriginal peoples (usually a statutory power), power of the Crown to affect those interests, and vulnerability of the aboriginal peoples to the exercise of that power or discretion. In these situations the elasticity of the sui generis concept allows the fiduciary obligation to stretch to include all aspects of private law fiduciary standards. Thus, the standard imposed on the fiduciary should be high requiring acts of

"utmost good faith." [80]

In Guerin Dickson, J. was of the view that the Crown would be held to the fiduciary's strict standard of conduct. The duty of the fiduciary noted Justice Dickson is that of "utmost loyalty" to the party for whose benefit it acts.[81] Unconscionability being the key, breach of this duty must be determined against the backdrop of all the circumstances. [82] In the private law situation no conflict of interest is tolerated and the fiduciary must act with utmost "faithfulness, loyalty and conformity to the instructions of the beneficiary." [83] Given the various shapes and forms of aboriginal-Crown relationships these strict standards should not be considered ubiquitously applicable. Rather, they exist at the upper end of the spectrum and are to be invoked only when the Crown-Aboriginal relationship resembles private law trust situations. Obviously, not all Crown-Aboriginal fiduciary relationship should or could embrace all aspects of private trust law.

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[80] Ellis, p. 1-2.

[81] Ibid., at 389.

[82] Ibid., p. 388.

[83] Ibid.

2. Kruger

The Federal Court of Appeal's decision in Kruger v. R. [84] provides limited support for an expanded reading of the Crown's fiduciary responsibility. At issue in Kruger was compensation sought by a B.C. Indian band because of a World War II expropriation of Indian lands by the Departments of Transport and National Defence. The land was expropriated for the purposes of constructing an airport. Ultimately the appellants were unsuccessful in establishing their allegation of breach of fiduciary duty. However in holding that the fiduciary obligation discussed in Guerin applied to the facts before them the Court established an important precedent. [85] Even though it is in a closely analogous situation, Kruger provides the first judicial recognition that the Crown stands in a fiduciary relationship with aboriginals outside of situations of surrender.

Kruger is important for several other reasons. Firstly, it raises the issue of conflict of interest and makes clear that the federal Crown's obligations to Indians is a duty owed by the Crown as a whole and not merely a responsibility of the Department of Indian and Northern Affairs:

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[84] 17 D.L.R. (4th) 591.

[85] Urie, J. Stone J. and Heald J. provided separate opinions. Justice Heald's comments are the most supportive regarding breach of fiduciary duties. Unfortunately he held that the action was statue barred because of limitation periods. Urie and Stone, JJ. saw no foundation for the breach of fiduciary duty allegations.

> This situation resulted in competing considerations. Accordingly, the federal Crown cannot default on its fiduciary obligation to the Indians through a plea of competing considerations by different departments of government. The law is 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 "Equity fashioned the rule that no man may allow his duty to conflict with his interest" On this basis, the federal Crown cannot default on its fiduciary obligation to the Indians through a plea of competing considerations by different departments of government.[86]

Further on Heald J. clarifies that it is not only DIAND which has special obligations but that Cabinet is also involved the relationship:

> The Governor in Council is not able to default in its fiduciary relationship to the Indians on the basis of other priorities and other considerations. [87]

Unfortunately, the judgment never squarely addresses the problem of having the Minister of Indian Affairs, putatively the representative of native interests, simultaneously representing the public's interest as a member of Cabinet.

Secondly, Kruger establishes a firm precedent for honesty, openness and disclosure by the Crown when dealing with First Nations. A significant factor leading to Heald J.'s finding that the Crown had breached its fiduciary obligation was the failure to disclose information which could be material to the assent of the Indians. Justice Heald adopted the following view with respect to

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[86] Ibid.,p. 608.

[87] Ibid., p.623.

the issue of informed consent:

> It seems clear that "provided the trust beneficiary acts with full knowledge of the trust affairs, a sale by him of his interest to a trustee is a valid contract." However, in these circumstances "the onus of proof is on the trustee or fiduciary to show that the beneficiary did indeed have all relevant information known to the trustee." [88]

This criteria becomes especially important in situations where the Crown enters into discussions with third parties regarding the development of Indian resources as in the development of Indian oil and gas reserves, or Indian forestry resources.

Finally Kruger is significant because it addresses the issue of taking aboriginal interests into account when making policy decisions. Heald J. makes reference to the necessity of some sort of justification process:

> If there was evidence in the record to indicate 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, I would have viewed the matter differently. [89]

References to "careful consideration and due weight" and "offers of settlement" recognize native rights and corresponding Crown duties. It is a foreshadowing of the Sparrow doctrine where attempts are made to reconcile conflicting rights and obligations.

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[88] Ibid., p. 608.

[89] Ibid., p. 623.

3. . R. v. Taylor and Williams

Justice MacKinnon's decision in Taylor and Williams [90] was adopted by the Supreme Court in Sparrow and cited as establishing one of the guiding principles for the interpretation and application of s. 35(1). [91] The decision is the source of the "honour of the crown" language which has recently been referred to by the Federal government as "underscoring all dealings with aboriginal peoples." [92]

MacKinnon J. considered charges against Chippewa First Nation members for hunting bullfrogs contrary to Ontario game and fish regulations. In undertaking an historical analysis of conditions surrounding the signing of the relevant treaty, Justice MacKinnon noted that despite ambiguous wording in the treaty Indian oral tradition established that the Indians had not intended to surrender their hunting and fishing rights. This was confirmed by contemporaneous minutes of council meetings which had occurred in preparation for the treaty signing.

Regarding the interpretation of treaties MacKinnon emphasized that the "honour of the Crown" is always involved and "no appearance of sharp dealing should be sanctioned." [93] In the

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[90] 34 O.R. (2d) 260 (Ont. C.A.)

[91] Sparrow at 1108.

[92] See: The Aboriginal Constitutional Process: An Historic Overview (Ottawa: Government of Canada, 1991).

[93] Ibid. p. 367.

Taylor and Williams situation it is implied that the omission was either an oversight or the result of deceit. For MacKinnon it would be unconscionable to deprive the Chippewa of their right to hunt and fish where the practices of the Crown were tainted or appeared to be tainted. Taylor and Williams is responsible for importing into Sparrow, and thus into the law of Crown-Aboriginal fiduciary responsibilities, the concept of a "high standard of honourable dealing with respect to aboriginal peoples." [94] "Honour" provides a safe and inoffensive word for the government to use when perhaps it is a euphemism for yet to be identified fiduciary relationships? This new doctrine of "honourable dealing" will require elaboration and refinement on a case by case approach. In order to give content to the "honour" principle a starting point is to turn to standards of ethics, reasonableness and fairness that operate in other areas of law. For example in negotiation situations, labour law standards of bargaining in good faith are applicable. In administrative situations standards of procedural fairness are appropriate.

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[94] Sparrow at 1109.

6. Temagami

In Ontario v, Bear Island Foundation, [95] the Supreme Court made obiter comments regarding fiduciary relations between the Crown and native people. Regarding treaty interpretation the Court held that any right to land claimed by the band had been extinguished by the Robinson-Huron treaty of 1850. Regarding the Crown-Indian fiduciary relationship the Court said that the Crown had breached its fiduciary obligations to the Indians by failing to comply with its treaty obligations. Temagami is evidence that surrender, expropriation and interference with aboriginal and treaty rights do not comprise the exhaustive list of fiduciary situations. A new category, non-fulfilment of treaty obligations, has been added. By implication, the list is not necessarily closed.

Notwithstanding the Supreme Court's comments with regard to breach of fiduciary duty, it's validation of the Ontario Court of Appeal's judgment is troubling.[96] No comments were made as to the specious nature of the Ontario Court of Appeal's alternative reasons which cannot be reconciled with any version of an "honourable dealings" doctrine. The Court of Appeal provided three alternative reasons as to why the aboriginal rights enjoyed by the

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[95] [1991] 2 S.C.R. 570. The decision is also known as the Temagami case after the Band and forest involved.

[96] (1989) 68 O.R. (2d) 394 (O.C.A.)

band had been extinguished. First the Court recognized evidence that the band was a signatory to the Robinson-Huron Treaty. Alternatively, the Court held that the treaty had effect because the band adhered to it by receiving annuities pursuant to the treaty and by asking for and receiving a reserve as promised in the treaty (even though delivery of the annuities were sporadic and the reserve was not delivered until many years after the treaty came into effect). Lastly, the Court recognized American jurisprudence regarding the unilateral extinguishment of aboriginal title by sovereign authority. After citing Mr. Justice Hall in Calder, himself citing the United States Supreme Court:

> "Extinguishment can take several forms; it can be effected by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise..." United States v. Santa Fe Pac R.R (314 U.S. at 347),

the Ontario Court reached the following conclusion:

> It follows, therefore, from this general proposition that a sovereign may express the intent to extinguish aboriginal rights through a treaty even though the treaty itself may be imperfect in the sense that not all of the Indian bands or tribes whose lands are involved are signatories. [97]

In the opinion of the Ontario Court of Appeal, because the Crown had the power to take Indian land, even an imperfect document could constructively effect a land transfer. Reliance on imperfect title contradicts ideals of honourable dealing.

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[87] Ibid., p. 412.

2. Unsupportive Decisions

1. Apsassin

Where some decisions provide at least limited support for an expanded reading of fiduciary responsibilities, Apsassin v. Canada[98] provides no support at all. The case centered around allegations by the Doig River and Blueberry River Indian bands that DIAND had breached its fiduciary obligations in relation to the surrender and transfer of lands and mineral rights. Justice Addy of the Federal Court Trial Division interprets Dickson J.'s findings in Guerin in the narrowest possible way:

> With the exception of any special obligations which might be created by treaty, there is no special fiduciary relationship or duty owed by the Crown with regard to reserve lands previous to surrender nor, a fortiori is there any remaining after the surrendered lands have been transferred and disposed of subsequently. ...There might indeed exist a moral, social or political obligation to take special care of the Indians and to protect them (especially those bands who are not advanced educationally, socially or politically) from the selfishness, cupidity, cunning, stratagems and trickery of the white man. That type of political obligation, unenforceable at law...would be applicable previous to surrender.[99]

Justice Addy refused to find a fiduciary obligation with respect to reserve lands prior to surrender. In his view there are no enforceable Crown obligations beyond moral or political ones. Had s. 35 and Sparrow not appeared to resurrect theories of fiduciary extension, Apsassin may well have sounded the death knell to any

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[98] [1988] 3 F.T.R. 161 (F.C.T.D.)

[99] Ibid. at 138.

future creative arguments.

A mollifying point to Addy J's restrictive interpretation is that the case may be distinguished on its facts. The surrender in Apsassin, involving the transfer of Indian lands to the Veterans Administration Department was absolute and not a lease situation as in Guerin. Consequently, Addy, J.'s comments on the narrow scope of the Crown-Aboriginal special relationship may be characterized as obiter.

(b) Post Sparrow Jurisprudence

Jurisprudence in the area of s. 35 rights is rapidly expanding. Since Sparrow provincial courts have been deluged with cases related to s. 35 aboriginal and treaty rights.[100] Generally the cases involve a simple application of the justification test to determine whether or not Fish and Game regulations infringe on aboriginal peoples' rights to hunt or fish. The bulk of cases do not involve argument with respect to extending the fiduciary relationship beyond the hunting and fishing scenario. In the wake of Sparrow four cases have gone before the courts arguing for an expansion of fiduciary categories. To date the judges concerned have evaded or been relieved of dealing directly with the issue. It may be too soon to say whether the Sparrow fiduciary doctrine is inadequate to the task of reconstructing Crown-Aboriginal relations. However, to date, under the fiduciary rubric nothing has been delivered.

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[100] See for example: R. v. Vanderpeet (1991) 58 B.C.L.R. (2d) 392; R. v. Commanda (Ontario District Court, unreported August 23, 1991); R. v. Nikal (B.C.S.C., unreported, October 24, 1990; R. v. Jack et al. (B.C. Prov. Ct.), unreported, October 22, 1990); R. v. Gladstone (B.C. Prov. Ct.) (October 3, 1990). R v. Howard (Ontario Ct. General Division, [1991] O.J. No. 548, Jan. 3. 1991; R. v. Joseph (Yukon Territorial Court), [1991] Y.J.No. 37, Feb. 7. 1991.

1. Thomas v. Minister of Indian Affairs and Northern Development[101]

In Thomas v. The Queen [102] the Plaintiffs argued that a breach of fiduciary duty arose from the administrative actions of Department of Indian and Northern Affairs officials. The facts involved the elimination of funding to support the employment of a superintendent of education for the Peguis Indian Band. Counsel for the Band relied on Sparrow and Guerin to argue that a fiduciary duty arose out of a combination of treaty provisions and statutory responsibility. Instead of deciding the case on fiduciary principles, Madame Justice Reid held that ordinary principles of contract law provided a solution.

In 1984 the Minister of Indian Affairs agreed to fund a school board superintendent's salary for a school on the Peguis reserve. A few years later the Minister changed the method of funding band operated schools, eliminating the superintendent position. The band sued the Crown alleging that the superintendent's salary should be paid over and above the amount received by the band under the new funding formula. Counsel for the Indian band argued that the facts established that the Crown breached the fiduciary obligations owed to the band. Counsel argued that the fiduciary relationship arose out of the Treaty provisions on education[103]

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[101] (1991) 42 F.T.R. 133 (F.C.T.D.)

[102] (1991) 41 F.T.R. 133 (F.C.T.D.)

[103] The relevant clause in Treaty 1 reads:
"Her majesty agrees to maintain a school on each reserve hereby made whenever the Indians of the reserve should desire it."

coupled with the Crown's statutory discretion as to how that duty will be discharged.[104]

Most interesting about Thomas is the position that a breach of the fiduciary relationship can arise from the administrative actions of officials away from dealing with surrendered or leased lands. It is an attempt to conflate principles found in Guerin and Sparrow. As in Sparrow an entrenched s. 35 right is in issue, this time however a treaty right instead of an inherent aboriginal right. In Guerin the obligation owed by the Crown in respect of lands held for Indians was recognized through s. 18 of the Indian Act. Similarly in Thomas the education obligation owed by the Crown in respect of education is recognized but not created by ss. 114-123 of the Indian Act. Thus, in Thomas both treaty and vulnerability created by statute create the scenario where a fiduciary duty is owed by the Crown. From a Guerin perspective native interests were vulnerable to Ministerial discretion. Through the Indian Act the Crown possesses discretion as to how educational obligation will be discharged. Moreover the Crown has absolute control over the exercise of that discretion. From a Sparrow perspective an entrenched treaty right was trammelled.

The facts in Thomas establish that in 1977 the content of the treaty right to education was changed. Instead of the Department operating the school it had been determined through negotiation

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[104] Section 114-123 of the Indian Act R.S.C. 1985, c. I-6 enables the Governor in Council and the Minister of Indian Affairs to fulfil the obligations owed.

that the Peguis Band would operate its own school with Ministerial funding. The band sought to secure the expertise of strong educational management personnel in order that the Band could acquire similar expertise and therefore negotiated the hiring of Mr. Thomas.[105] Originally the agreement between the Peguis Indian Band and DIAND provided that the Band would reimburse the Department for Mr. Thomas' salary. This was modified, however, since the Band did not have funds available. The Department agreed not to seek reimbursement of the salary. In the 1987-88 fiscal year DIAND changed its method of funding Indian band schools eliminating funds for superintendent positions. The new system was not developed in consultation with native groups.[106] Given that education is a treaty right and its content was established through negotiation, the unilateral alteration of the terms are contrary to Sparrow principles. No justification process was entered into to determine if infringement was permissable, nor was consultation with the affected group undertaken. In Sparrow regulations were the abrogating instrument. However this should not preclude the principles set out therein being equally applicable to an administrative decision (i.e. the refusal to fund Mr. Thomas's salary).

In deciding that she did not have to refer to fiduciary duties to decide the case Justice Reed forestalled discussion on how

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[105] Ibid., p. 134

[106] Ibid., p. 137.

Sparrow principles will be applied to fact situations where the aboriginal right moves beyond a sustenance food right, and the infringement is not by direct government regulation. In her view contractual obligations were intended. Consequently, in accordance with the 1984 agreement, the Crown had to pay the band an additional amount to cover the superintendent's salary.

2. Desjarlais

Desjarlais v. Minister of Indian Affairs and Northern Development [107] is the first of two decisions written by Justice Strayer of the Federal Court Trial Division which gives some support to the extension of Crown fiduciary obligations. Justice Strayer's decision resulted from an interlocutory motion whereby the plaintiffs, the Sandy Bay Band of Manitoba and its representatives, requested payment into court of a sum of money pending final determination of the action.

Breach of fiduciary duty was alleged where the Band had been given assurances that funding for housing construction would be available in the next fiscal year. [108] A time delay was necessary to allow the Band to issue a tender call for suppliers and contractors. When the Band was later told that the available funds had been allocated to other bands, the band sued. In an unusual digression Justice Strayer documents the shocking state of housing conditions on the reserve. He notes that there is a severe housing shortage with 30% of the houses having ten or more inhabitants. He adds that most of the houses have no running water or indoor toilets and that some presently occupied homes are

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[107]. 18 F.T.R. 316.(F.C.T.D.)

[108] The money in dispute was to provide the means for Indian bands to make available additional housing for persons who were returning to the reserve as a result of Indian Act amendments which allowed previously disenfranchised natives to regain their Indian status. See R.S.C. I-6, S.C. 1985 c. 27. For a discussion of the marrying out provisions see: Duclos, "Lessons of Difference: Feminist Theory on Cultural Diversity" (1990) 38 Buffalo Law Review 325.

uninsulated with frost on the inside walls. To quote Justice Strayer:

> These are deplorable conditions which should in my view be an embarrassment to the Department concerned and to Canadian society in general. [109]

Why this is relevant to the issues at hand is not immediately obvious. In drawing attention to the disparity between some aboriginal and non-aboriginal living conditions Strayer signals that principles of comparative equity are factored into his perception of the Crown's fiduciary responsibilities. Using the criteria appropriate to the grant of interlocutory injunctions Justice Stayer addressed the issue of whether or not a "serious question" arose as to the existence of the fiduciary obligation alleged. He commented that the nature of the fiduciary relationship gave rise to "very complex questions" and concluded that there was a "serious legal question as to whether a fiduciary relationship might be made out." [110] Relying on statements from Guerin Strayer found that it was certainly arguable that in relation to the housing money the Crown has the kind of discretionary power which give rise to a fiduciary duty. He added that it was also arguable that the duty of the Crown to act on behalf of the plaintiff is "created or reinforced" by section 61(1)

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[109] Ibid., p. 319.

[110] Ibid., p. 319.

of the Indian Act. [111]

Two possible errors are identifiable in the judgment. It is arguable that Strayer J. may have been wrong in characterizing the housing funds as "Indian moneys." [112] Secondly, instead of breach of fiduciary duty, a better view might be that the action would be more solidly founded on a tort of misrepresentation, or breach of contract. Answers to these speculations are not available as the matter was settled out of court.

For anyone attempting to build an argument for expanded fiduciary powers, most significant about the case is the importance Strayer J. attaches to allegations of breach of fiduciary duty. At the time he considered the case, all he had to guide him were pronouncements from Guerin. Bearing in mind the broad language in Sparrow, it is probable that like thinking judges presented with similar facts will be obliged to take breach of fiduciary allegations equally, if not more seriously.

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[111] Ibid., p. 319. Section 61(1) reads: Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held...

[112] For an informative discussion of the nature of "Indian moneys" and trust accounts see "Chapter 9" Report of the Special Committee on Indian Self Government , p. 125-129.

3. Bruno

It is difficult to determine whether Bruno v. The Queen [113] should be located under cases supportive or unsupportive of expanding Crown fiduciary obligations. On one hand Bruno establishes that in certain circumstances there is an obligation on the federal government to pass regulations as part of its fiduciary duties. On the other hand it is a re-entrenchment of the political trust doctrine which allows the government to get away with outrageous mismanagement.

The situation in Bruno is what Ian Binnie refers to in his case comment on Sparrow where he describes the fiduciary duty placing on Parliament a positive duty to act under 91(24). According to Binnie because of Sparrow aboriginal organizations can now argue that Parliament no longer has a mere legislative power with regard to Indians, rather it now has a power coupled with a duty. [114] Any consideration of Sparrow is noticeably absent from Strayer's reasons. Although the application was received 5 weeks before Sparrow was released, Strayer's reasons for judgment came out approximately 5 months after Sparrow.

The case arose by way of a "Special Case" [115] whereby Mr.

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[113] (1990) 39 F.T.R. 142.

[114] W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's Law Journal 217, at 220.

[116]. Rule 475, Federal Court Rules.

Justice Strayer of the Federal Court Trial Division gave judgment based on an agreed statement of facts. The Alexander Indian Band alleged that it lost one million dollars in royalty revenues because the federal government did not act to pass regulations to allow the band to profit from increased oil prices. During the time in question oil prices skyrocketed as a result of the OPEC oil embargo. According to the Band there was a duty on the Crown to take timely action to raise the royalty revenues to a level equivalent to the royalty revenues realized by other Alberta Indian bands which fell under a provincial regulatory scheme.

Following Guerin, Justice Strayer held that there is a "general fiduciary obligation owed by the Crown in right of Canada towards each Indian band in respect of the reserve land of each band." [116] He further stated that the fiduciary obligation required that the federal government exercise:

> ... governmental powers which only it has, where this may reasonably and lawfully be done to perform adequately the **specific** fiduciary obligation it owes to a given band whose Indian title has been surrendered to the Crown.[117]

Clearly Justice Strayer is indicating that the fiduciary relationship could require that legislative action be taken in order to adequately fulfil the obligation.

Despite Justice Strayer's expansive reading the plaintiffs were unsuccessful. In Justice Strayer's opinion the **general** nature

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[116] Ibid., p. 146.

[117] Ibid., p. 148.

of the regulations made judicial review for timeliness inappropriate. It is the distinction between specific fiduciary obligations and regulations of general application which is crucial:

> An examination of these regulations reveals that they apply generally to all Indian lands in Canada in respect of mineral rights, and include provisions which cover a whole range of activities in relation to the management, disposition, and exploitation of mineral rights including exploration and production. As such they involve the exercise of a general legislative power granted to the Governor General in Council which goes far beyond any possible fiduciary obligation owed by the defendant to these particular plaintiffs in the particular facts of this case. The enactment of the regulations must be seen as primarily the performance of a political duty which is not enforceable in the courts. [118]

Citing the "general nature" of the regulations Justice Strayer found that it would be inappropriate for a court to assess the timeliness of their adoption. An interesting question arises as to whether a remedy for damages would have been available had it been pleaded. Traditional fiduciary law recognizes monetary damages as a remedial category. However Strayer, J. may also have avoided delivering this remedy as well.

Nevertheless, some favourable points can be salvaged from the decision. Had the regulations not been of general application Justice Strayer would have located the Crown's activities within the realm of the sui generis Crown-Indian fiduciary relationship and forced the federal government to take legislative action. This is a strong indication regarding the activist stance some judges

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[118] Ibid., p. 148.

are prepared to take in the area of fiduciary obligations. By indirectly threatening the sanctity of parliamentary supremacy vitality is breathed into the fiduciary concept. A strong message is sent to politicians and bureaucrats as to how seriously courts consider the invocation of Crown-Aboriginal fiduciary relationship. The resulting effect is to create an atmosphere of respect around the grievances and demands of native peoples.

4. **Carrier-Sekani**

The most recent case in which an appellant raised issues around fiduciary obligations is that of Carrier-Sekani Tribal Council et al. v. Minister of the Environment et al. [119] The decision involved the development of hydro-electric and aluminum processing facilities by Alcan Aluminium Limited. Known as the Kemano Completion Project, Alcan's plans will affect the water flow in two rivers in west-central British Columbia. The Carrier-Sekani Tribal Council, the Chiefs of 11 Carrier Indian Bands and an environmental coalition known as the Save the Bulkley Society asserted that the project was proceeding illegally because it had not been subject to proper federal environmental review procedures.

The Minister of Fisheries and Oceans, Alcan and the province of British Columbia executed an agreement whereby extensive environmental studies undertaken by the aluminium company were accepted by the Minister. Despite repeated requests to be involved native and environmental groups were never consulted. At the Federal Court Trial Division the opponents sought certiorari to quash decisions respecting the agreement, and mandamus to compel federal authorities to comply with the federal Environmental Assessment and Review Process Guidelines Order. The day after the motions were filed Order in Council SOR/90-79 was passed which provided that the EARP Guidelines did not apply to the Kemano

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[119] Federal Court of Appeal, F.C.J. No. 405. May 8, 1992.

Completion Project. The appellants sought to quash the Order in Council. At the Federal Court Trial Division, Justice Walsh issued orders of certiorari and mandamus and ordered the federal government to comply with the Guidelines Order.[120]

On appeal Justice Marceau writing for the bench overturned Justice Walsh's reasons. In his view natural justice had been breached since in granting the remedies the motions judge did not provide the Appellant with full opportunity to present their case. In addition, according to Marceau J., none of the impugned ministerial actions constituted decisions capable of bringing the Alcan project within the purview of the EARP guidelines. Regarding aboriginal rights, he dismissed the cross-appeal filed by the Tribal Council alleging that Justice Walsh erred in not adding to the grounds on which he quashed the Order in Council the fact that the order breached s. 35 rights. Justice Walsh's omission was glaring. In the original application the respondents had argued that the Order be set aside because "it breached fiduciary duties the Respondents owed to the Applicants, and that it was "inconsistent with the recognition and affirmation of ...existing aboriginal rights in s. 35 of the Constitution Act, 1982."

On appeal Justice Marceau summarily dismissed any arguments dealing with s. 35 and fiduciary duties. Regarding "aboriginal and treaty rights" he held that s. 35 was irrelevant having "no bearing whatsoever" on the case. Regarding the allegation of breach of

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[120] 44 F.T.R. 273 (F.C.T.D.).

fiduciary duties Marceau, J. held that there was nothing on the record to support such a conclusion. He gave two reasons as to why it was impossible for the government to have breached its fiduciary duty towards the Carrier-Sekani. First the government would have to be aware of the precise content of that duty. Second the government would have to be satisfied that the only way to fulfil that duty would be to confirm the application of the EARP Guidelines to the project!

Marceau's dismissal of s. 35 rights is insulting. It shows a disregard for both aboriginal concerns and constitutionally entrenched rights. As Sparrow illustrates fishing rights are at the heart of many aboriginal communities. In Carrier-Sekani evidence was advanced that because of the Alcan project river water levels would be affected, and that the level of flow would affect the fisheries. However no damage had yet occurred and infringement was only speculative. Given this scenario, under Marceau's analysis there is no method of protecting threatened aboriginal rights. A huge gap in the Crown-Aboriginal fiduciary relationship scheme is exposed. In Sparrow direct infringement of aboriginal rights occurred through legislative regulation. Here infringement is indirect resulting from a third parties' actions. Does this mean that the government is not obliged to fulfil its fiduciary obligations? A prima facie case could easily be established that Alcan's development project would have a detrimental affect on aboriginal fishing rights, yet because no federal actions triggered

the application of EARP guidelines there exists no way to assess or prevent future damage.[121] Just as there is a need for an Environmental Review Process, a need also exists for watchdog guidelines to protect aboriginal rights.

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[121] The mechanics of the EARP guidelines are scrutinized in the Supreme Court decision Firends of the Oldman River Society v. Canada ,[1991] 1 S.C.R. 3.

(vi) FIDUCIARY OBLIGATIONS AND POLICY DEVELOPMENT

Sparrow can be seen as an attempt to reform Crown-Aboriginal relationships. It is a new frame of reference invoked by the Court to structure native reality. If it is a positive development then it should provide opportunities for expanding and transforming law so that it can serve as a vehicle for native empowerment. At this point it is impossible to determine whether the Sparrow doctrine can or will meet this task, however many moments of opportunity are provided. It is up to the legal imagination to seize them.

By including within the calculus of tests that comprise the justification analysis the need to consult native people affected by state regulation, the Court in Sparrow has provided a window of opportunity for native contribution to policy development. The Court established a constitutional framework for the protection of aboriginal interests which theoretically could lead to the active involvement of native people in the formation of laws and policies which govern their lives. For example, if the requirement of consultation is deepened, in future cases it could result in a constitutional requirement of an equal partnership between governments and First Nations in the drafting of laws which affect s. 35 rights.

Once it has been established that an expansive and legally enforceable fiduciary obligation exists, the next issue is to determine what standards apply in specific situations. What

follows is an attempt to sketch a framework for fiduciary standards in the area of aboriginal affairs policy development. Policy development is intended to mean the processes involved which lead to decisions with respect to budgetary allocations, design of programs, or federal government operations which affect aboriginal interests. [122] In developing the framework various sources are drawn upon including recommendations of past committees, case law, and standards of conduct associated with other areas of law.

If the relationship between the Crown and aboriginal people is "trust-like and not adversarial"[123] then mechansims must be developed to avoid repeating the history of controversies and antagonism which have plagued policy decisions taken by DIAND. The recent controversy over changes to the post-secondary education assistance program vividly illustrates the shortcomings of the aboriginal affairs policy development and consultation process. In March of 1989 the then Minister of Indian Affairs Pière Cadieux announced changes to programs intended to encourage aboriginal people to attend post-secondary educational institutions. Citing increased student demand the Minister capped the level of the government's financial commitment. The aboriginal community responded with anger organising hunger strikes and protests. In

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[122] Originally this section was intended to be an analysis of fiduciary standards in relation to one specific area of policy, such as, resource development, housing, education, or the preservation of aboriginal culture and languages. Although an in depth analysis of each of these would be a worthwhile exercise I have chosen to focus on general fiduciary policy standards rather than on narrow policy issues.

[123] Sparrow, p. 1108.

hearings before the Standing Committee on Aboriginal Affairs the Aboriginal Bar Association asserted that an aboriginal right to post-secondary education existed based on a general fiduciary obligation arising from unextinguished aboriginal title as well as Canada's special trust responsibility under s. 91(24) of the Constitution Act, 1867. [124] A second example illustrating the inadequacy of the policy making process is the controversy which resulted from the 1990 Federal Budget which cut core funding to key aboriginal groups and aboriginal media.[125]

Given the non-adversarial and sui generis nature of fiduciary standards a consensual approach to aboriginal policy development should be favoured. It must be recognized that aboriginal people are not ordinary citizens subject to the whims of budgetary cut backs, or unilateral government decision making. The unique relationship between First Nations and the Crown and the high degree of government involvement in the lives of many native people makes the need for policy input and mandatory consultation essential.

Specifics of adequate consultation processes need to be developed to fit a myriad of circumstances. Generally, consultation should mean either negotiated arrangement or joint

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[124] See: First Report of the Standing Committee on Aboriginal Affairs: Post-Secondary Education Assistance (Ottawa:House of Commons,1989), p. 37.

[125] As a result of Michael Wilson's 1990 budget $23 million was cut from Secretary of State multicultural funding, including funding aimed at native newspapers and advocacy groups. The Assembly of First Nations had its core funding cut by $592,000.00. See: Globe and Mail, March 24,1990.

policy development. It should not mean 'policy marketing' where the federal approach is largely developed and is presented to interested aboriginal groups for reaction or fine-tuning. In areas of crucial importance aboriginal groups need to be direct participants in policy development on a basis comparable in importance to departmental executive committees.

As is pointed out in the "Second Report of the Standing Committee on Aboriginal Affairs" a consensual approach to aboriginal policy development has both historical and contemporary precedent. [126] Historically, the essence of the treaty process was a consensual process of deciding the parameters of Crown-Aboriginal relations. In a contemporary sense this consensual tradition is evident in the series of Constitutional Conferences on aboriginal rights held throughout the 1980's. Although no more conferences are scheduled, section 35.1 of the Constitution Act requires that any amendments to s. 91(24) of the Constitution Act, 1867, or sections 25 or 35 of the Constitution Act, 1982 will "require the participation of representatives of aboriginal people in a constitutional conference that must be called to discuss such amendments." Following these examples it is not unreasonable to suggest that proper consultative and policy dispute resolution mechanisms are required by the fiduciary relationship.

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[126] "Unfinished Business: An Agenda for All Canadians in the 1990's" Second Report of the Standing Committee on Aboriginal Affairs (House of Commons, March 1990), p. 26.

Sparrow supports the proposition that s. 35 of the Constitution requires mandatory consultation with aboriginal groups whenever their interests are at stake. [127] The Court explicitly makes the point when it specifies that within the justification analysis one of the questions that must be addressed is "whether the aboriginal group in question has been consulted with respect to the conservation measure being implemented."[128] In the context of policy development, to ensure that meaningful consultation is possible, fiduciary standards would require the sponsorship, funding and maintenance of aboriginal associations.

Where negotiation instead of consultation is pursued it too cannot function if secure funding does not exist for organizations which represent aboriginal interests. A precedent for negotiation funding exists in the area of land claims. With respect to the comprehensive land claims process aboriginal peoples are afforded the capacity to negotiate independently of Government. This entails the employment of highly skilled negotiators, support staff, lawyers and expert consultants. A claim for breach of fiduciary duty is foreseeable where the Government does not provide aboriginal peoples with adequate resources to negotiate.[129]

In standard commercial negotiations negotiating parties often

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[127] Most recently aboriginal groups are asserting that as a third level of government their input should be sought on all Canadian issues and not just those isolated to obvious aboriginal concerns: Globe and Mail, March 13, 1992.

[128] Sparrow, at 1119.

[129] Negotiation funding is provided by way of loan, not grant. The policy means that First Nations ultimately bear the cost of the negotiations.

seek to have an information advantage over the other side. It is difficult to reconcile a non-adversarial concept of negotiating in the context of the fiduciary relationship with any federal government information advantage, or similar unsavoury tactics. As was stated in Taylor and Williams, no sharp practice will be countenanced. Thus in the fiduciary context where negotiations are pursued access to information, complete honesty and full disclosure become essential issues, as do the labour law concepts of bargaining in good faith and making genuine efforts to reach agreement.

Where the Crown is acting as an agent for a First Nation full information and disclosure are equally important. For example in order to prevent a breach of fiduciary obligations where negotiations are under way between the Crown and industry regarding the development of aboriginal natural resources the following standards would be appropriate: full disclosure of all discussions between the Crown and third parties regarding the development of Indian resources, the public advertising and tendering of all aboriginal development opportunities, and the availability of independent advice for aboriginal groups regarding the merits of any development proposal.

Administrative law concepts also provide a source for establishing standards for fiduciary obligations in the area of policy development. Procedural fairness or "due process" is applicable where policy choices affect specific individuals and

collectivities. Consider the situation of a change in budgetary allocations to a particular band. In order to be consistent with standards of administrative law the government should ensure a reasonable opportunity for the affected band to make representations to the decision makers, as well as ensuring that the Band has sufficient notice and complete disclosure of all relevant information.

When fiduciary standards are applied to the area of policy development the creation of new institutions and tribunals is also foreseeable. Where conflicts between the Federal government policies and First Nations develop an independent body is necessary to deal with contentious issues. Several suggestions have been made to meet the inadequacy of the present bureaucratic structure including the appointment of an Ombudsperson for Aboriginal Affairs, and the creation of an "Aboriginal and Treaty Rights Protection Office."[130]

In recognition of the importance of the "special trust" relationship the Penner Committee recommended the establishment of an independent officer to monitor and report to Parliament on official actions affecting First Nations. The purpose of the office would be to ensure that the Crown's responsibility to Indians would be a paramount factor in assessing any activities undertaken or

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[130] Indian Self-Government in Canada - Report of the Special 74.Committee on Indian Self-Government (Ottawa: House of Commons, 1983), p. 124.

approved by government. [131] A comparable office is the Commissioner of Official Languages who reports annually on the implementation of the Official Languages Act, or the Auditor General who reports annually to Parliament on government expenditure.

Alternatively, an Aboriginal and Treaty Rights Office could act as a watchdog to monitor both direct and indirect interference with aboriginal or treaty rights. Sparrow deals with the issue of direct legislative interference with aboriginal rights. Logically Sparrow principles should also apply to situations of indirect interference where large scale federally initiated or federally approved projects impinge on aboriginal rights. Projects such as the construction of hydro-electric dams or the construction of an airport need to be scrutinized for their potential effect on aboriginal and treaty rights. An office whose mandate is to review government projects for potential impact on aboriginal rights and to develop appropriate justification criteria would ensure that the Crown was meeting its fiduciary responsibilities to aboriginal peoples. A comparable model is the review process established under the EARP guidelines where the Federal Department of the Environment is responsible for studies to determine the environmental impact of any "initiative, undertaking or activity for which the Government of Canada has a decision making

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[131] Ibid., p. 125.

responsibility."[132]

Thinking more in line with using already established government structures, the Penner Committee envisaged transforming the role of the Minister of State of Indian Affairs. Instead of filling the role of a second class minister, or a minister in training, the Committee recommended that the Minister of State become the independent advocate and protector of First Nations' interests. [133] A comparable office is that of the Attorney General whose responsibility entails the protection of the public interest with "complete independence regardless of conflicting governmental or political pressures." [134] This suggestion would overcome the conflict of interest problems raised in Kruger where the DIAND is perceived as representing both the interests of aboriginal peoples and the interests of government. Given the competing interests with which an elected official must deal, it is difficult to envisage how a member of cabinet could adequately and single-mindedly represent aboriginal interests. Appointed positions with legislative independence make more sense.

To ensure that aboriginals have input into the policy making process an aboriginal advisory board on general or specific fiduciary issues is yet another possibility. To a certain extent

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[132] See: Environmental Assessment and Review Process Guidelines Order, SOR/84-467, June 22, 1984, made pursuant to s. 6 of the Department of the Environment Act, R.S.C. 1985, c. F-15.

[133] Ibid., p. 123.

[134] Ibid. p. 123.

the Indian Taxation Advisory Board is an example of this type of mechanism in relation to enacting band taxation by-laws. Although the Minister retains formal powers of disallowance he or she is advised by an expert aboriginal panel in making the decision. It is problematic that the Board acts as a control mechanism thereby limiting taxation powers and self-government. Regarding policy input the Taxation Advisory Board has a role in developing model by-law provisions for interested bands to follow.[135] In a fiduciary context, an analogous panel could advise the Minister on fiduciary responsibilities along the spectrum of possibilities from specific situations under the Indian Act, through interference with aboriginal Rights, to the development of self-government.

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[136] Indian and Northern Affairs Canada, Information Sheet No 23: Indian Taxation Advisory Board, 1991.

(vi) FIDUCIARY DUTIES AND SELF-GOVERNMENT

The spectre of liability created by Guerin and Sparrow have caused some to be concerned that the Department of Indian Affairs would be frozen in any of its attempts to work towards unloading programs onto self-governing First Nations.[136] The theory is that an atmosphere of "fiduciary chill" exists thereby blocking policy initiatives aimed at promoting self-government. Although Kafkaesque encounters with the bureaucratic mind may make this fear well grounded, any DIAND officials operating on this premise are misinformed as to the nature of the fiduciary obligation, and as to the luxury of resting on presently inadequate policies. Instead they must take to heart the advice of the Manitoba Aboriginal Justice Inquiry:

> The time to act is at hand. Aboriginal people will be able to find their way out of the destructive labrynth to which they have been consigned, but only if federal and provincial governments take positive actions to fulfill their historic responsibilities and obligations. In this manner governments can begin to build a new relationship with aboriginal people based upon respect understanding and good will. [137]

The bureaucratic fear is that as a fiduciary the government should maintain control over Indian assets and activities, rather than risk being found liable for fiduciary breaches in transferring

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[136] Recent constitutional developments including the entrenchment of a justiciable right to self government may make this point moot.

[137] Associate Chief Justice A.C. Hamilton, and Associate Chief Justice S.M. Sinclair, Report of the Aboriginal Justice Inquiry of Manitoba Volume 1: The Justice System. (Province of Manitoba, 1991), p. 121.

control.[138] This is a complete misinterpretation of the fiduciary principle indicating that paternalistic notions of the fiduciary as ward or guardian are still operating. Fiduciary obligations exist to protect First Nations' assets from mismanagement and abuse, not to prevent them from taking over their own affairs. If a First Nation is provided with complete information as to the decision it makes and the responsibility it is assuming, no reasonable court would allow the transfer of control over services to return to haunt the government. The key is to remember that the beneficiaries of the Crown's fiduciary duties are "competent thinking adults,"[139] and that the stated goal of the Department of Indian Affairs is to work with aboriginal peoples to develop "institutions of self-government that meet their unique requirements." [140]

Pratte & McMurty's sliding scale of Crown fiduciary responsibilities provides a workable model applicable to bands of varying levels of sophistication. They suggest that when a particular Indian band is given discretionary power "which they are

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[138] This is complicated by the paranoia of some Indian bands who feel threatened by any government initiatives. Feeling secure in their current status some bands do not trust changes in the status quo. Examples of this mind-set include those bands opposed to Bill C-31 amendments which re-enfranchised band members who had lost their Indian status. See Twinn v. Canada (1987) 12 F.T.R. 130 where an Alberta Indian band challenged Parliament's authority to amend the Indian Act to reinstate previously disenfranchised band members. Even though the federal government promised that Bands would not have to suffer financially because of increased band lists, housing moneys have not proportionally increased. For a detailed treatment of the issue see Nitya Duclos, "Lessons of Difference: Feminist Theory on Cultural Diversity" (1990) 38 Buffalo Law Review 325.

[139] See: D. Sanders, "The Implications of the Guerin Decision" (Indians and the Law II: Vancouver, B.C. January 26, 1985).

[140] See: DIAND "INFORMATION" (Ottawa: Indian and Northern Affairs, 1987)

entitled to hold and are competent to wield," the Crown's responsibility to oversee their actions and decisions is decreased in a manner proportionate to the band's independence and expertise. [141] In some situations, like management of resources and administration of moneys, the fiduciary obligation will end when responsibility is transferred to bands objectively judged competent to wield the power. In other areas like interference with aboriginal or treaty rights, the Crown's fiduciary obligations will always exist.

Furthermore, for DIAND to remain in a state of indecision as to how to proceed in the future forces First Nations to solve their disputes in the context of legal rights. This is contrary to the message sent in Sparrow where the Court stated that s. 35 "provides a solid constitutional base on which subsequent negotiations can take place." [142] Sparrow actually sends out mixed messages. On the one hand the case says that the grievances of aboriginal peoples are best defined in the political arena through negotiations. On the other hand, it says that if the government does not respond to the demands of native people the Courts are willing to take an active role in judicial policy making. If anything can be said with certainty it is that the courts might well intervene when they feel that the government has behaved badly toward aboriginal people and in such circumstances, the courts may be prepared to create new categories of legal obligations. Ian

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[141] Pratte and McMurty, p. 27-28.

[142] Sparrow, p. 1105.

Binnie captures this thought succinctly:

> The court has used the occasion to make comments seemingly designed less to clarify the law than to drive governments and Aboriginal organizations alike into negotiations for fear of what curial thunderbolts the S.C. might hurl in future s. 35 cases.[143]

If Binnie is correct then DIAND bureaucrats cannot afford to remain in a state of inertia.

Throughout this chapter I have attempted to explore the boundaries of the fiduciary concept. Is the sui generis fiduciary concept a constant discernible in a few specific situations or does it encompasses varying standards that imbue all aspects of Crown-Aboriginal interaction? Even after an extensive review no clear answers are available. At this stage, the concept of the sui generis fiduciary relationship is still embryonic. Despite a growing body of case law relatively little guidance is available as to what the limits are. Donovan Waters suggests that given the unpredictability of case law a statute would be a preferable vehicle to defining the shape and scope of the fiduciary responsibility.[144] In light of the constitutional initiatives

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[143] Binnie, p. 219. Although Binnie sees Sparrow as definitely weighted against government he perceives the decision as not being able to meet most of aboriginal people's aspirations. Thus, in Binnie's opinion, Sparrow also forces aboriginal to the bargaining table in fear of what the Courts might not do for them.

[144] Donovan Waters, "New Directions On The Employment of Equitable Doctrines: The Canadian Experience" paper presented at The International Symposium of Trust, Equity and Fiduciary Relationships, University of Victoria, Victoria, British Columbia, February 14-17, 1988.

presently confronting Canada's layers of governments that prospect seems improbable and unmanageable. Consequently the courts are once again left as policy makers, responsible for elaborating or refining the fiduciary concept on a case by case basis.

The fiduciary concept has been referred to as both "the sleeping giant"[145] and "the dreaded F-word." [146] A burgeoning jurisprudence indicates that native groups are attempting to wake a potential giant. As for Crown representatives, their sensitive ears are not likely to get any rest. An expanded fiduciary concept is supported by Sparrow, related case law, historical background, and the Common Law. Despite these influences there still remains no certainty as to how far the fiduciary relationship extends or how the federal government should carry out its obligations. For First Nations and the courts the future is ripe with possibilities. Whether or not the prevailing system of liberal legalism can effectively metabolize the many possibilities, silences, ambiguities and inconsistencies inherent in the Sparrow doctrine remains to be seen. It is to that topic I now turn.

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[145] Mark Ellis, preface.

[146] Globe and Mail, September 11, 1991.

CHAPTER 3

THE FIDUCIARY CONCEPT: EXISTING LIMITATIONS

As a result of the Supreme Court's decision in R. v. Sparrow [1] the fiduciary obligation doctrine has been significantly expanded. On its facts the decision is limited to legislative interference with fishing rights, however the principles enunciated in the case can be extrapolated to create a general fiduciary duty to cover a myriad of Crown-aboriginal relationships. The Supreme Court's affiliation with the fiduciary concept began in 1984 when through Guerin v. R. [2] the Court enunciated the principle that there is a Crown-aboriginal fiduciary category in the area of government administration of surrendered reserve land. In 1990 the Supreme Court through Sparrow extended the fiduciary category to interference with entrenched aboriginal rights. Based on this expansion it is arguable that native groups have been given an important legal tool which can be used to address their grievances. However the observations of Audre Lorde, as referred to in the introductory chapter, should not be forgotten. In relation to the law reform projects of liberal feminists Lorde writes:

> What does it mean when the tools of a racist patriarchy are used to examine the fruits of that same patriarchy? It means only the most narrow perimeters

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[1] [1990] 1 S.C.R. 1075.

[2] [1984] 2 S.C.R. 335.

of change are possible and allowable.[3]

The fiduciary concept hails from the tradition of equity and is increasingly becoming a standard legal tool in many areas of law apart from law affecting aboriginal people.[4] Following Lorde's thinking, few positive results should be anticipated if a traditional legal concept like "fiduciary" is adopted as a means for social change. As she poignantly writes, "The master's tools will never dismantle the master's house." [5]

The purpose of this chapter is to adopt a more critical approach to the court created fiduciary obligations and explore the possible limitations of reliance on the concept as a strategy for social change. In Canada aboriginal people often face shocking social inequality. In the past the legal system has provided a forum for pursuing social justice as native groups have been extremely litigious in an attempt to settle their grievances. Traditional legal concepts and mechanisms have been utilized to advance social change. For example, a discourse of aboriginal rights and aboriginal title has provided some qualified victories but also staggering defeats. [6] In his

[3] Audre Lorde, "The Master's Tools Will Never Dismantle the Master's House" in A. Lorde Sister Outsider (Trumansburg, New York: The Crossing Press, 1984)., p. 110.

[4] Most recently the Supreme Court extended fiduciary categories to include moral business dealings between two mining companies. See Lac Minerals Ltd. v. International Coronal Resources Ltd. 61 D.L.R. (4th) 14.

[6] Ibid., p. 112.

[6] Calder et al. v. Attorney General of B.C., [1973] 1 S.C.R. 313, is generally considered a victory yet the recognition of aboriginal title is adopted by only three members of the court. Recognition of aboriginal title was a political decision rather than a court imposed decision. Delgamuukw v. A.G. of British Columbia 79 D.L.R. (4th) 185, exemplifies the failure of the

book The Charter of Rights and the Legalization of Politics in Canada, Michael Mandel argues that law has failed as an instrument to advance the position of natives from the bottom-most level of the social hierarchy.[7] One wonders whether the fiduciary concept can break this pattern. If not, why not?

In attempting to answer the preceding question this chapter explores three ideas: the limitations inherent in the Sparrow decision; the relationship of law and politics; and the relationship between law and ideology. Part I of this Chapter focuses on the Sparrow decision in order to expose some of the restrictions built into the text. Part II and Part III examine where these restrictions originate focusing on law and politics and law and ideology. In the law and politics section the Delgamuukw decision is presented as an example of how the fiduciary concept may be manipulated to meet a particular judge's agenda.

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legal system to meet aboriginal demands.

[7] Michael Mandell, The Charter of Rights and the Legalization of Politics in Canada (Toronto: Wall and Thompson, 1989), p. 253.

(i) Unjustifiable Limitations

At first glance the language and concepts used in Sparrow appear to provide unlimited possibilities. Intriguing language like "holding the Crown to a high standard of honourable dealing" [8] and "sensitivity and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians," [9] raises expectations that the fiduciary concept may be able to resolve aboriginal grievances and fulfil aboriginal expectations. From a critical perspective the Court's progressive utterings ring hollow. The effect of Sparrow, and particularly the justification test, facilitates yet another infiltration of government control into the lives of aboriginal Canadians. Firstly the fiduciary concept is the means by which the Court signals the appropriateness of limiting aboriginal rights. Secondly by using fiduciary language to restrain s. 35 rights, the Court camouflages the conferring of power on the federal government in salubrious language. Instead of restraining the federal government from interfering with native issues the effect is to make the further empowerment of the federal government appear like a necessary and good development.

One particular sweeping statement found in Sparrow provides the richest source for speculating about the breadth of

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[8] Sparrow, p. 1110.

[9] Ibid., p. 1119.

fiduciary responsibilities:

> ...the Government has the responsibility to act in a fiduciary capacity with regard to aboriginal peoples. The relationship between the Government and aboriginal is trust-like rather than adversarial and *contemporary recognition and affirmation of aboriginal rights* must be defined in light of this historic relationship. [10]

The highlighted words can be perceived as the 'fill in the blanks' section, and the message received by First Nations is 'replace with Crown-Indian relationship of choice.' As attractive and plausible as this option may appear, a closer analysis reveals that the judiciary have already closed several windows of opportunity.

Given that an excess of restrictions accompany the fiduciary concept, it is inaccurate to describe Sparrow as providing a carte blanche, or 'wish list' for aboriginal peoples. The phrase: "To give with one hand and take with the other," best describes the Court's actions. By adopting a justification analysis the Court imported into s. 35 the concept that treaty and aboriginal rights are not absolute:

> 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 reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. [11]

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[10] Sparrow, p. 1108.

[11] Ibid. , p. 1109.

This limiting approach follows the lead of the British Columbia Court of Appeal in Sparrow, [12] and the Ontario Court in Agawa [13]. In those decisions the courts opined that s. 35 rights could not be divorced from the realities of life in present day Canada but must be balanced against competing societal interests.

In a case comment on Sparrow Thomas Berger attempts to uncover the origins of the limitations. He points out that s. 35 rights do not come within the Charter, and therefore are not subject to sections 1 or 33. In his view the Court unjustifiably invented the limitations "out of thin air." [14] He further points out that reading compelling state interests into s. 35 rights inappropriately tracks American jurisprudence. In American case law even though the American Bill of Rights has no equivalent to s. 1 of the Charter, limits are often imposed on the rights entrenched under the U.S. Constitution. According to Berger it is un-Canadian to import the countervailing state interest test into s. 35 where so doing appears contrary to Constitutional textual interpretation. [15]

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[12] (1986) 36 D.L.R. (4th).

[13] (1988) 65 O.R. (2d) 505.

[14] Thomas Berger, "R. v. Sparrow: Case Comment" 23 U.B.C. Law Review 606.

[15]. Ian Binnie directs similar and more extensive criticism at the Court in his article,"The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's Law Journal 217.Also see: Elliot, David. "In the Wake of Sparrow: A New Department of Fisheries?" 40 University of New Brunswick Law Journal 23. For a rationalisation of why Courts should impose limitations on aboriginal and treaty rights see Bryan Schwartz, First Principles - Second Thoughts (Montreal, Institute for Research on Public Policy, 1986), pp. 359-360.

(ii) Law and Politics

By linking government responsibilities to the fiduciary concept the Supreme Court has utilized one of the most amorphous and flexible concepts known to law. On the subject of fiduciary obligations the words of Justice La Forest as found in Lac Mineral v. International Corona Resources are worth repeating:

> Indeed, the term fiduciary has been described as "one of the most ill-defined, if not altogether misleading terms in our law." It has been said that the fiduciary relationship is a "concept in search of a principle." Some have suggested that the principle governing fiduciary obligations may indeed by undefinable, while other have doubted whether there can be any "universal, all purpose definition of the fiduciary relationship." [16] (Citations omitted)

There would appear to be few legal concepts less conceptually certain, yet as a result of Sparrow such imprecision now lays at the heart of the law concerning aboriginal and treaty rights.

Just as the sui generis aboriginal title concept is solely a creation of the Supreme Court by relying on fiduciary to define Crown-aboriginal relationships, the Court has created another empty concept which judges can fill with what they please.[17] Instead of calling it a "fiduciary relationship," the

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[16] 61 D.L.R. (4th) 14 (S.C.C.) at 26.

[17] The sui generis concept is a Supreme Court favourite. In Guerin aboriginal title was characterized as sui generis. In Simon v. The Queen [1985] 2 S.C.R. 3877, Crown-aboriginal treaties were so labelled. Sparrow continues the tradition connecting the concept to both aboriginal rights and

Court might as well have called the concept "judicial product 146D", because, like the changing content of rights values, the content of the fiduciary relationship may sway in relation to prevailing values or the political leanings of the bench.

Regarding the convergence of law and politics much can be learned from those academics who have studied the indeterminacy of Charter values. Petter and Hutchinson have analyzed cases concerned with equality, freedom of association and freedom of expression to illustrate that when rights are before the court their interpretation is a masked political struggle:

> They are contested concepts whose interpretation is a major and elusive preoccupation of political debate. They are like empty sacks that cannot stand up on their own until they have been filled with political content. [18]

In a similar vein Michael Mandel argues that the indeterminacy of Charter rights entrenches "legalized politics" and renders the Charter incapable of redressing the balance of power but rather legitimates it. [19] Comparisons to the fiduciary concept are striking. Like the content of Charter rights, the content of fiduciary standards is anything but clear. It is a malleable concept prone to judicial manipulation. Judicial

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the Crown-aboriginal fiduciary relationship. A Latin term, the phrase refers to a thing that is "of its own kind or class; peculiar" Black's Law Dictionary, p. 1286.

[18] Andrew Petter and Allan Hutchinson, "Rights in Conflict: The Dilemma of Charter Legitimacy" Vol. 23:3 U.B.C. Law Review 531, p. 537.

[19] Michael Mandel, The Charter of Rights and the Legalization of Politics in Canada (Toronto: Wall and Thompson, 1989), p. 253.

interpretation of individual rights has been a site of convergence of law and politics, a recent decision out of the British Columbia Supreme Court indicates that the fiduciary relationship unfortunately follows suit.

How drastically the fiduciary concept can be affected by judicial temperment is illustrated by Chief Justice McEachern's decision in Delgamuukw v. R.. [20] Although generally thought of as a land claims case, Justice McEachern also considered whether or not any fiduciary obligation could be imposed upon the Crown. In his now infamous decision, the Chief Justice decided that all of the aboriginal rights of the plaintiff had been extinguished. Surprisingly he then found that the Crown was subject to fiduciary duties by virtue of the relationship between the Crown and the Indians during the colonial period:

> The unilateral extinguishment of aboriginal interests accompanied by the Crown's promise and the general obligation of the Crown to care for its aboriginal peoples created a legally enforceable fiduciary or trust like duty or obligation upon the Crown to ensure there will be no arbitrary interference with aboriginals.[21]

The Chief Justice derived the fiduciary duty from the promise made by those who, in the name of the Crown, told aboriginal people "that they might freely exercise and enjoy the rights of fishing the lakes and rivers and of hunting over all unoccupied

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[20] 79 D.L.R. (4th) 185.

[21] Ibid., at 482.

lands in the colony." [22] In drawing an analogy between the effect of extinguishment of aboriginal rights in British Columbia to the surrender requirement from Guerin, McEachern, J. concluded that a unilateral extinguishment of a legal right accompanied by a promise could "hardly be less effective than a surrender as a basis for fiduciary obligation." [23] He does not locate the source of the fiduciary obligation in the matrix of history and legislation as does the Supreme Court in Sparrow, but rather requires a triggering device to invoke government responsibilites.. Thus, Justice McEachern's interpretation is hostile to any interpretation of the fiduciary relationship as constantly present but with elastic standards.

To summarize, McEachern J. held that the unilateral extinguishment of aboriginal interests accompanied by the Crown's promise and the general obligation of the Crown to care for its aboriginal peoples created a legally enforceable fiduciary or trust-like duty upon the Crown to ensure that there will be no arbitrary interference with aboriginal sustenance practices in the Territory under dispute. The honour of the Crown imposes an obligation of fair dealing upon the province which is enforceable by law. Accordingly, the Plaintiffs were entitled to a Declaration confirming their legal right to use vacant Crown land for aboriginal sustenance purposes subject to the general laws of the province.

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[22] Ibid., p. 479.

[23] Ibid., p. 482.

For anyone attempting to expand the scope of fiduciary duties Chief Justice McEachern's decision is partially positive in that he envisages a fiduciary obligation existing independently outside the confines of the Indian Act, and outside s. 35 of the Constitution. Lamentably he is unprepared to give the obligation any meaningful content. He restricts aboriginal use of land to subsistence or cultural purposes only, and only "until such time as the land is dedicated to another purpose." [24] Under his version of the fiduciary relationship the government must always retain the right to alienate land on which the First Nation has hunting and collecting rights. However if the land reverts to the Crown the First Nation can once again use it. His example is bleak:

> As aboriginal rights were capable of modernisation, so should the obligations and benefits of this duty be flexible to meet changing conditions. Land that is conveyed away but later returned to the Crown, becomes again useable by Indians. Crown lands that are leased or licences, such as for clearcut logging, to use an extreme example, becomes useable again after logging operations are completed or abandoned.[25]

It is impossible to conceive how clearcut land could be useful to any aboriginal group.

In an uncharacteristic moment of judicial accommodation Justice McEachern states that government action that removes land from aboriginal use should not be done "arbitrarily" but

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[24] Ibid.

[25] Ibid., p. 482.

rather only in accordance with the fiduciary relationship.[26] He then outlines six propositions to guide the Crown in living up to its fiduciary duties. They can be summarized as follows:

> - the province has the legal right to alienate interests in the territory where aboriginal interests continue
> - when legislating or implementing policy vis à vis Indian territory aboriginal interests should be kept in mind. Reasonable consultation is expected but consultation does not include a native veto
> -where interference with sustenance and cultural activities is inevitable suitable alternative arrangements should be made
> - when aboriginal interests are interfered with a balancing of interests representing all citizens and the Indians should be equally considered
> -regarding sustenance activities priority to Indians should generally, but not always occur.

Finally, he concludes by warning that Natives should not bring legal proceedings to challenge Crown activities which interfere with their sustenance and cultural rights. [27]

In effect, McEachern, C.J. has gutted the concept of Crown fiduciary responsibility. Any laudable points are rendered inconsequential by the addition of qualifications. The extent of his campaign is evident in his attempt to deprive future plaintiffs of any justiciable remedy. As Petter and Hutchinson might say, McEachern has taken an "empty sack that cannot stand up on its own" and filled it with his personal "political content." [28] Future litigation involving Crown-aboriginal fiduciary relationships will depend on two key questions: "who

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[26] Ibid.

[27] Ibid., pp. 488-491.

[28] Petter and Hutchinson, p. 537.

fills it?" and "with what?"

(iii) Expanded Judicial Discretion: Homogeneity, Cultural Difference and Balancing Tests

As a result of the extraordinarily subjective collection of criteria which comprise the justification test a myriad of opportunities for the abuse judicial discretion has been unleashed by the Sparrow decision. Through a complicated series of mandatory considerations the Supreme Court has expanded the judiciaries discretionary power. As David Elliot writes, the Court has created for itself a "new and questionable role as a constitutional department of fisheries." [29] Elliot worries that the Court is moving into fields that require administrative expertise and negotiated arrangements, something the courts cannot provide. The list of consideration which the Court has fashioned for itself seems endless: What are the criteria to determine if legislative objectives which infringe aboriginal rights are valid? Are conservation and management objectives automatically valid? What level of state conservation is required? The court held that the "public interest" was too vague to be workable. How then will the Court assess the validity of infringing regulations? What about consultation? How will it be determined if there has been adequate consultation with the aboriginal group in question? Do all conservation measure require consultation? What amounts to an

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[29] David Elliot. "In the Wake of Sparrow: A New Department of Fisheries?" 40 University of New Brunswick Law Journal 23, p. 42.

"unreasonable" limitation of an aboriginal right? How does a court measure undue hardship? With these and other discretionary issues the Supreme Court has opened the door for an expanded role for the courts in complex issues which touch the lives of aboriginal peoples.

Given the greatly expanded role of the courts and the amount of justiciable regulation which can be expected, two issues must be considered. First is the problem of the uniformity of the judiciary and expectations that courts will be able to competently balance aboriginal rights against government responsibilities. Section 35's ultimate impact (including constitutionally entrenched fiduciary standards) is dependent upon the political nature of the judicial system that is charged with its interpretation. A second issue centres around the degree to which courts are prepared to recognize cultural difference within the context of s. 35.

It is unclear why we should trust and privilege the value judgments of an elite group of predominantly white, upper middle-class, male judges. Peter Hogg explains why we should not:

> The judiciary's background is not broadly representative of the population: they are recruited exclusively from the small class of successful; middle-aged lawyers, they do not necessarily have much knowledge of or expertise in public affairs, and after appointment they are expected to remain aloof from most public issues. [30]

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[30] P.W. Hogg, "Is the Supreme Court of Canada Biased in Constitutional Cases? (1979) 57 Canadian Bar Review 721, at 722.

Given their homogeneity and the institutional ethos in which they work, it seems doubtful that the judiciary is trustworthy to balance aboriginal rights against government responsibilities and to give meaningful content to either.

The ultimate impact of the fiduciary concept will depend upon the beliefs and politics of a judicial system which is charged with its interpretation. Andrew Petter has pointed out that because of their personal attributes and institutional ethos judges cannot but reinforce dominant cultural norms.[31] There are judicial decisions which are on their face progressive, however on a deeper level it seems a virtual impossibility for judges to transcend the influences of class, race, education and profession which they have received. Beliefs are not chosen they are held; to realize this and escape the consequences takes incredible effort. As S. Fish has written an "interpreter is embedded in a structure of beliefs of which his judgments are an extension." [32] There is nothing about the Canadian judiciary to suggest that they possess the experience the training or the disposition to comprehend the social impact of claims made to them under the head of fiduciary responsibilities, let alone to resolve those claims in ways that

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[31] Andrew Petter, "The Politics of the Charter" (1986) Sup. Ct. Law Rev. 473. Also see P. Monahan and A. Petter, ""Developments in Constitutional Law" (1987) 9 Supreme Court Law Review 76.

[32] S. Fish. "Wrong Again" (1983) 62 Texas Law Review 200 at 312.

promote or even protect the interests of aboriginal groups.[33]

A related issue to the homogeneity of the judiciary is the degree to which courts are prepared to recognize cultural difference within the context of s. 35. In an article dealing with the cultural authority of judges Chris Tennant asks, "Who has given judges authority to be social critics of aboriginal societies?"[34] With s. 35, as with the rights enumerated in the Canadian Charter of Rights and Freedoms, judges are called upon to be social critics in interpreting an enumerated set of rights. Through the political process of entrenching the Charter the judiciary was given the authority to review laws which were not consistent with Charter values. In the context of s. 1 the judiciary was also given the role of arbiter between rights and freedoms and the interests of society as a whole. Thus in constitutional disputes the role of the judge is to articulate competing interests, balance these against one another, and then decide which interest ought to prevail. Generally there is little reason to trust judges' determinations of what are reasonable or fair solutions to controversial, public policy, balancing of interests issues. In relation to

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[33] For further discussions of judicial bias see Mahoney and Martin (eds.) Equality and Judicial Neutrality (Toronto: Carswell. 1987); Michael Mandel, The Charter of Rights and the Legalization of Politics in Canada (Toronto: Wall and Thompson, 1989); Kairys, David (ed.). The Politics of Law: A Progressive Critique (Revised edition)(New York: Pantheon Books, 1990); Joel Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall Law Journal 123.

[34] Chris Tennant, "Justification and Cultural Authority in s. 35(1) of the Constitution Act, 1982: R. v. Sparrow" (1991) 14 Dalhousie Law Journal 372, p. 384.

aboriginal rights and aboriginal societies the legitimacy of judicial review becomes especially suspect.

In Sparrow the Court acknowledges the danger of non-aboriginal judges misunderstanding aboriginal culture by advising that aboriginal rights cannot be subsumed within traditional common law concepts:

> Fishing rights are not traditional property rights... Courts must be careful to avoid the application of traditional common law concepts of property...it is possible, and indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. [35]

Clearly this is a genuine attempt at cultural sensitivity, yet whether or not it is possible for judges to understand aboriginal culture in anything other than the dominant society's terms remains a controversial issue. Mary Ellen Turpell argues they cannot:

> Can a judge know a value which is part of an Aboriginal culture and not of her own? The extent to which anyone can know the basic differences as opposed to identifying difference, especially when functioning in an institutional role defined as deciding the supreme law of a state is a fundamental problem for constitutional analysis. This is especially the case with respect to choices regarding different cultural systems because the knowledge structures valued by the Canadian judicial system are fundamentally different from the knowledge structures embraced by Aboriginal peoples. [36]

Of course a larger number of aboriginal judges would help remedy

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[35] Sparrow, p. 1112.

[36] Mary Ellen, Turpell, "Aboriginal Peoples and the Canadian Charter Interpretive Monopolies, Cultural Differences" (1989/90) 6 Canadian Human Rights Yearbook 3 at p. 24.

the problem. For non-aboriginal judges a partial answer is for the judiciary to resist the tendency to interpret aboriginal culture through the reference points of the dominant society. Not all judges have failed in the attempt to provide a place for the perspective of First Nations in Canadian law. A genuine accommodation of difference can be found in the minority reasons of Justice O'Sullivan in Dumont v. A.G. Canada [37]. In determining whether the Manitoba Métis had standing to pursue their claims against the Canadian government Justice O'Sullivan engages in a remarkable discussion of the conflict between individual rights and collective rights and the legal system's inability to provide accommodations. A similar accommodation of differing worldviews is found in R. v. Ashini [38] where Justice Igloliorte of the Newfoundland Provincial Courts rejects the common law viewpoint of land as personal property and refuses to convict Innu protestors charged with trespassing.

Unfortunately not all judges are inclined to divest themselves of their cultural authority. In their article "The Cultural Effects of Judicial Bias". J. Ryan, and B. Ominayak document a series of judgements handed down in response to actions commenced by the Lubicon Lake Cree of northern Alberta to stop oil and gas development on what they referred to as their traditional territories. In their view the Crees court

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[37] 52 Manitoba Reports (2d) 291 (C.A.).

[38] R. v. Ashini et al. (1989) Atlantic Provincial Reports 318. (Nfld. Prov. Ct.)

loss was caused by the judges inability to understand the importance of the Cree's traditional lifestyle. Using a non-aboriginal value system the Courts determined that it was in the greater public interest that substantial economic activity proceed and the loss of the plaintiff's culture and society was not significant compared to the gains of industry and government.[39]

Sparrow is comparable to the Lubicon cases in that the justification test sets the stage for the judicial balancing, or pitting, of aboriginal rights against the rights of the population as a whole. By establishing a "compelling and substantial legislative objective" test the Court has made it almost impossible to know what level of justification will be accepted by Courts in any particular case. Too many overlapping and conflicting interests are bound to come into play. This point was made by the British Columbia Court of Appeal:

> Any definition of the existing right must take into account that it exists in the context of an industrial society with all of its complexities and competing interests. The existing right in 1982 was one which had long been subject to regulation by the federal government. It must continue to be so because only government can regulate with due regard to the interests of all.[40]

By constructing a justification test the Supreme Court has tipped the balance against the often holistic values of native

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[39] B. Ominayak and J. Ryan, "The Cultural Effects of Judicial Bias" in S. Martin and K. Mahoney (eds.) Equality and Judicial Neutrality (Toronto: Carswell, 1987), p. 346.

[40] 36 D.L.R. (4th) 246 (B.C.C.A.) at 272.

culture. Yet, in the legal form the process will appear neutral and objective. David Kairys' observation is trenchant:

> Balancing tests where judges decided which of two or more conflicting policies or interests will predominate are presented and applied as if there were objective and neutral answers, as if it were possible to perform such a balance independent of political, social and personal values that vary among our people and to a less extent among our judges. [41]

When aboriginal rights are pitted against a complex industrial society the results are all too predictable. As the judiciary is presently constituted (i.e. predominantly white male, vested and upper middle class) it is probable that most judges will perceive too many conflicting political and economic interests to broadly interpret aboriginal rights or expansive Crown obligations. To hand the judiciary another opportunity to balance rights is to create an uneven playing field. Ian Binnie makes the point well:

> The Court will have to balance airports against gathering rights, jobs against caribou, oil self-sufficiency against qualitative changes in a traditional way of life.[42]

The standards applied will be those which reflect the biases of a judiciary steeped in the ideologies of capitalism, progress and development. As Chris Tennant points out, given the knowledge structures valued by the Canadian judiciary, aboriginal culture will be understood through tropes like "noble

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[41] Kairys, p. 2.

[42] Binnie, 232.

savage," "traditional lifestyle" "civilization" and "modernization." [43] In his book Liberalism, Community and Culture, Will Kymlicka further develops the theme of imbalance asking how the judiciary can weigh competing interests "when the equities do not occur on the same plane." [44] He gives the example of a First Nation which has a way of life that requires that a large section of land, valued by many groups in society, be set aside and left undeveloped, even though the utility of this can only be measured according to First Nation values. According to Kymlicka it would be unfair to ask aboriginal people to formulate their lifestyles with a view to the costs imposed on others as measured by the market. As the results of Delgamuukw illustrate Kymlicka's hypothesis is not far fetched. Chief Justice McEachern's interpretation of the fiduciary concept reveals that in his view development trumps any competing aboriginal interest. Furthermore, his judgment illustrates the malleability of the fiduciary concept and the danger of the judiciary transforming it into an ineffectual

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[43] The problems associated with judging aboriginal culture in the terms of dominant cultural perspectives was recently emphasized in Delgamuukw where C.J. McEachern's commented on traditional Git'ksan and Wet'suwet'en lifestyles:

> ...it would not be accurate to assume that...pre-contact existence in the territory was in the least bit idyllic....The plaintiffs had no written language, no horses or wheeled vehicles, slavery and starvation was not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbes that aboriginal life in the territory was, at best, "nasty, brutish and short."

[44] Will Kymlicka, Liberalism, Community and Culture (Oxford: Clarendon Press, 1989), p. 187.

conceptual tool.

A final limitation accompanying the fiduciary concept is the likelihood that the judiciary will be reluctant to read important aboriginal rights into s. 35. Given the minimal case law in the area it is not yet clear if limits on treaty and aboriginal rights will be set through restrictive definition, or through judicial regulation. In Sparrow the court appears to take aboriginal and treaty rights seriously and imposes a rigorous test when such rights are infringed. However, it must be remembered that in Sparrow the government's fiduciary obligations are in relation to sustenance food rights, nothing more. The Supreme Court restricted its analysis to food fishing, even though, as Binnie points out, it was the Musqueam expansion from a food fishery to a commercial fishery that led to the confrontation between the band and the fishery authorities in the first place.[45] What happens when the rights asserted are economically more valuable? The aboriginal position is that aboriginal rights are not limited to just gathering, hunting and fishing but rather include rights to determine their own political, cultural, economic and social order. As a result of Sparrow considerable responsibilities are placed on governments when an aboriginal right is in question. The judiciary may be inclined to place onerous burdens on governments when the subject matter is relatively innocuous, but a different set of factors may operate when the rights concern commercial or

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[45] Binnie, p. 236.

economic support systems. If, for example, a right to gaming was asserted, the Court may refuse to read it into s. 35, and the burden of the Sparrow test will be a factor in the refusal. [46]

Ironically, the limitations described above operate in the context of a "purposive" interpretation of s. 35 rights. [47] In Sparrow the Court wrote that when the purposes of the affirmation of aboriginal rights are considered, it is clear "that a generous, liberal interpretation of the words in the constitutional provision is demanded." [48] Can it truly be said that the introduction of a "reasonable limit" into a section of the Constitution formerly immune from it is a generous reading of section 35? Further, is it generous to limit aboriginal rights to sustenance rights? It depends on who is defining generosity.

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[46] By gaming I mean the right to conduct gambling on Indian reserves as a means of producing revenue. Gaming can be characterized as the contemporary exercise of traditional aboriginal right to participate in games of chance.

[47] In its early Charter decisions the Supreme Court insisted that purposive reasoning was the appropriate technique for applying fundamental rights and freedoms. A strict construction approach was to be avoided, and instead "broad liberal and purposive" interpretations were to be engaged. See: Law Society of Upper Canada v. Skapinker (1984) 9 D.L.R. (4th) 161 at 168.; Hunter v. Southam (1984), 11 D.L.R. (4th) 641 at 649.

[48] Sparrow, p. 1106.

(iv) Law and Ideology

Where do the limitations found in Sparrow originate? Part of the answer can be found in the operation of law as ideology. The problem with Crown-Aboriginal fiduciary obligations is not simply that it is an empty concept into which both progressive and regressive forces can insert content. Rather, it is also a problem of dominant ideologies that tend to operate giving substance to concepts. By studying ideological influences it is possible to anticipate what form the Crown-Aboriginal fiduciary relationship will take once it has gone through the judicial system.

The concept of ideology derives from the Marxist idea that refers to systems of thought that serve the interests of dominant classes.[49] According to academics who have explored the ideological function of law, the legal system produces and reproduces ideologies that reinforce the marginalization of historically excluded groups. [50] Sumner explains that through ideology the law functions to legitimate the existing order:

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[49] The Italian Marxist Antonio Gramsci expanded the concept by focusing on hegemony and counter-hegemony as processes through which ideological dominance is secured within civil society. See E. Greer, "Antonio Gramsci and Legal Hegemony" in D. Kairys (ed.) The Politics of Law (New York: Pantheon Books, 1982), p. 304.

[50] See: Alan Hunt, "The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law" Law and Society Review 19 (1985) 1; S. Gavigan, "Law Gender and Ideology" in A. Bayefsky, (ed.) Legal Theory Meets Legal Practice (Edmonton: Academic Printing and Publishing, 1988). Colin Sumner, Reading Ideologies: An Investigation into the Marxist Theory of Ideology and Law (London:Academic Press, 1979).

> The generic social function of law is to express, regulate and maintain the general nature of the dominant social relations of a social formation. It is therefore only natural that it does this through the discourse of general ideologies necessitated by the general forms of social relations. [51]

For Sumner law entrenches inequality and domination in subtle and impenetrable ways:

> The law lies hidden beneath a heavy shroud of discourse, ritual and magic which proclaim the Wisdom and Justice of the Law. Once this shroud is torn into tatters that hegemonic bloc of classes and class fractions which sustain the rule of capital is in trouble because inequality and domination can only be justified mystically and that is precisely the ideological function of law. [52]

Studying the ideological nature of law provides a sharper analytic tool, useful in the attempt to understand why law reform or ostensibly progressive doctrinal developments often do not produce the expected results.[53] In the field of aboriginal people and the law this means that when a new concept like "fiduciary responsibilities" is introduced into the legal lexicon constraining ideological influences should not be ignored. The danger is that the legal system will absorb any

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[51] Sumner, p. 272.

[52] Ibid., p. 277.

[53] Regarding the social inequality facing women, Carol Smart, a leading British feminist scholar, has pointed out the need to engage with law as discourse and ideology, in order "to expose law's pretensions to truth and thus to undermine its power." For Smart real social change cannot occur until law is exposed as both a site of ideological struggle as well as an instrument for the construction of dominant ideologies. See: Carol Smart, Feminism and the Power of Law (London: Routledge, 1989). Alan Hutchinson echoes Smart's thesis arguing that academics and practitioners should stop thinking about the legal process in instrumental terms and instead start to appreciate its discursive and ideological dimensions. See: Allan Hutchinson, "Telling Tales (Or Putting the Plural in Pluralism)" (1985) Osgoode Hall Law Journal 681.

progressive potential attached to the fiduciary concept and turn it into a means to perpetuate the continued marginalization of First Nation peoples.

Shelly Gavigan has developed an analytical framework to explore how law and ideology interact:

> There are two levels of inquiry, which may be coextensive. The first is a question of identifying the ideological nature of the legal doctrine and principles: "equality," "best interests of the child," "community standards" and so on. The second, equally important, inquiry involves identifying the extent to which the judiciary itself employs ideological thought (which is formally external to the law) but which is then incorporated into legal doctrine and becomes virtually unassailable. [54]

Thus, ideological analysis must be understood as operating at both conceptual and empirical levels. Gavigan's framework breaks down ideologies into the conceptual level (dominant ideologies) and the empirical level (judicial ideologies). "Dominant ideology" refers to systems or currents of generally accepted ideas about society and its character, including rights and responsibilities, law and morality, which are presented as natural, necessary, inevitable and unassailable. It is the "common sense" or "received wisdom" that is inculcated into society's members by knowledge producing institutions like schools, universities, mass media, law and religion. [55] An easily grasped example is the almost universal acceptance of the

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[54] Gavigan, p. 87.

[55] See: Joel Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" in R. Devlin ed.) Canadian Perspectives on Legal Theory (Toronto: Edmond Montgomery Publications, 1991), p. 445.

nuclear family as the unquestioned unit on which society is built.[56] Judicial ideology refers to the process by which the judiciary absorbs ideological thought and through the adjudicative process merges it with legal doctrine. When the authoritative voice of law speaks in legal principles, and therein incorporates ideological thought the result is to make the ideology almost unassailable.

Traditionally, in typical fiduciary relationships there has always been the empowered and disempowered party. Consequenlty, when the term "fiduciary" is used a set of ideological baggage inevitably travels along. It is almost impossible to escape the notions of dependency, vulnerability and hierarchy that accompany such typical fiduciary relationships as trustee and a beneficiary of a trust, agent and principal, director of a company and the company, and a lawyer and client. Tests for recognizing the presence of a fiduciary relationship dwell on points of vulnerability and dependency. [57] The fiduciary is clearly the power holder, while the beneficiary remains disempowered and extremely vulnerable to the fiduciary's actions. When the principle is imposed onto Crown-aboriginal relationships the image of the Crown standing to aboriginal

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[56] Feminist legal scholars and gay and lesbian legal scholars have recently started to develop analyses which point to the ideological construction of family as a site which perpetuates both sexism and homophobia. See: Didi Herman, "Are We Family? Lesbian Rights and Women's Liberation" (1990) 28 Osgoode Hall Law Journal 789.

[57] See especially Justice Wilson's enumerated tests in Frame v. Smith and Smith, [1987] 2 S.C.R. 99., at 136.

peoples as a guardian towards a ward dominates. This was the view expressed by Marshall C.J. of the United States Supreme Court in Cherokee Nations v. Georgia where he characterized Indian tribes as "domestic dependent nations" which were "in a state of pupillage" and stated that their relation to the government "resembles that of a ward to a guardian." [58]

Clearly, the fiduciary concept is steeped in notions of power, vulnerability, and inequality. Central to the notion is the idea that the fiduciary has power over the interests of another and that the beneficiary is peculiarly vulnerable to or "at the mercy" of the fiduciary holding the discretion or power.[59] Although this certainly may be true of many present Crown-Indian relationships it is not the goal of aboriginal self-government initiatives.

Native groups have shown that they are aware of the importance of language and discourse in relation to the ideological construction of knowledge. In the recent round of Constitutional negotiations, Native groups were opposed to the idea of the dominant society "granting" self government and instead demanded a "recognition of the inherent right" to self

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[58] Cherokee Nation v. Georgia (1831) 30 U.S. (5 Pet.) 1 reprinted in Getches and Wilkinson, Federal Indian Law (St. Paul, Minnesota: West Publishing, 1986), p. 46, at 47.

[59] In his article "First Nation Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill Law Journal 382, Patrick Macklem examines how the nature of property, contract, sovereignty and constitutional right establish and maintain a hierarchical relationship between native people and the Canadian state. In his view the Sparrow doctrine perpetuates this status quo.

government. [60] Language choice was an issue of crucial importance. "Granting" implied recognition by a superior political power and therefore was unacceptable. "Acknowledgement" was preferred because it recognized an equality of sovereignties. Bearing in mind the connotations of dependency and vulnerability associated with the fiduciary concept, Native groups should be equally cautious with regard to its entry into legal discourse.

From an ideological perspective, the historical perception of the special trust relationship is another significant factor as to whether or not a positive framework for the fiduciary concept can be developed. The relationship is grounded in historical practices that emerged from dealings between the British Crown and aboriginal nations during the founding of colonies in the early 1600's to the fall of New France in 1760. [61] The principles underlying these practices were reflected in The Royal Proclamation of 1763 [62] Generally, the Royal Proclamation outlines policy guidelines which restrict the alienation of lands reserved for Indians. For convenience the text of the relevant provisions are repeated below:

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[60] See: "The Aboriginal Constitutional Process:" An Historic Overview" (Ottawa: Government of Canada, 1991). For a discussion of the difference between the inherent as opposed to the contingent aboriginal rights approach see Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" (1991) 22 (2) Alberta Law Review 498.

[61] See: M.A. Donohue, "Aboriginal Land Rights in Canada: A Historical Perspective of the Fiduciary Relationship" (1990) 15 American Indian Law Review 369.

[62] R.S.C. 1985, App. II. No.1.

> And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, **that the several Nations or Tribes of Indians with whom We are connected, and who live under our protection, should not be molested or disturbed** in the Possession of such part of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds....
>
> And Whereas Great Fraud and Abuses have been committed in purchasing Lands of the Indians, to the great prejudice of our interests and to the great dissatisfaction of the said Indians; in order, therefore, to prevent such irregularities for the future, and to the end that the **Indians may be convinced of our justice and determined resolution to remove all reasonable cause of discontent**, we do with the advice of our Privy Council strictly enjoin and require, that no private person do presume to make any purchase from the said Indians of any lands reserved to the said Indians. (emphasis mine) [63]

Conceptually (ideologically), there exist two competing visions as to the significance of the document. First, the Proclamation connotes that Indian people are like children or "wards of the state." Alternatively, the Proclamation refers to solemn promises made between nations that must be honoured. As a member of the dominant society it is easy to slip into the notion that the Proclamation provided for the "protection" of unsophisticated, child-like dependents. This removes from history the idea that the document was entered into in order to prevent hostilities from breaking out between Indian nations and settlers. Furthermore, the colonial history of Crown and First Nations interacting as political equals on the basis of consent and equality is also made invisible. In order for the fiduciary

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[63] R.S.C. 1985, Appendix II, No. 1.

concept to meet the aspirations of aboriginal peoples an ideology of respect for First Nations needs to be fostered. Distorted, paternalistic notions about the "protection" of Indian people must be discarded.

The work of Michel Foucault sheds light on how those with power construct knowledge. [64] The "fiduciary relationship" illustrates his thesis. For Foucault meaning, and what is perceived as truth, is constructed through discourse constructed by institutional structures like law. The struggle to control meaning and reconstruct discourse must be fought in every location. This involves thinking about law not just in instrumental terms but in appreciating its discursive and ideological dimension. Foucault's message to marginalized groups is to attempt to rescript the stories that have been forced upon them. [65] Resistance is advanced through the deconstruction of dominant meaning and bringing into awareness suppressed alternate meanings which are subversive to the established order.[66] An example of resistance to dominant ideological thought occurred in 1983 during the hearings which resulted in the Penner Report into Indian Self-Government. In an attempt to

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[64] See: Michel Foucault, Colin Gordon (editor) Power/Knowledge: Selected Interviews and Other Writings (New York: Pantheon Books,1980); The Foucault Reader, Paul Rabonow (ed.) (New York: Pantheon Books, 1984); Foucault, Michel.Politics, Philosophy, Culture: Interviews and Other Writings: 1977-1984, Lawrence Kritzman (ed.) (New York: Routledge, 1988).

[65] As Foucault writes, "The target to day is not to discover who we are but to refuse who we are." Foucault Reader, p. 22.

[66] To use Foucault's words, "an insurrection of subjugated knowledges" must occur. See: Foucault. Power and Knowledge, p. 81, 82.

counter prevailing ideas and discourse the aboriginal community called for a "renewal of the special relationship" by discarding cultural baggage based on "ideas of hierarchy and inequality." [67] As fiduciary language enters the legal discourse surrounding aboriginal rights and Crown-aboriginal relationships, there is a risk it will perpetuate aspects of victimization and marginalisation often associated with Native peoples. [68]

Gavigan's second branch of inquiry into ideology involves identifying the extent to which the judiciary itself employs ideological thought (which is formally external to the law) but which is then incorporated into legal doctrine and becomes virtually unassailable. In Sparrow this phenomenon occurs when the Supreme Court builds its analysis on the assumption that Canada has sovereign authority over its indigenous populations. Without any discussion the Court accepts the thesis that aboriginal sovereignty was extinguished by the assertion of Crown sovereignty. As stated in the judgment:

It is worth recalling that while British policy

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[67] See: Indian Self-Government in Canada - Report of the Special Committee on Indian Self Government (Ottawa: House of Commons, 1983), pp. 119-121.

[68] In two recent articles Patrick Macklem and Brian Slattery have attempted to cast the Crown's trust responsibility in a new light. Slattery argues that the fiduciary relationship between Aboriginal peoples and the Crown is a special instance of a general doctrine of collective trust that animates the Canadian Constitution as a whole. He eschews the idea that the theoretical basis of the fiduciary concept assumes that the Crown stands to Aboriginal peoples as a guardian towards a ward. Rather he sees fiduciary as more compatible with the federal structure of Canada. Macklem sees the fiduciary concept as a "moment of possibility for the expansions and transformation of the law so that it can serve as an instrument of native empowerment." See: Brian Slattery, "First Nations and the Constitution: A Question of Trust" 71 Canadian Bar Review 261; Patrick Macklem, "First Nation Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill Law Journal 382.

> towards the native population was based on respect for their right to occupy their traditional lands,...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 [69]

This view of sovereignty is only acceptable where land was previously unoccupied.[70] Otherwise it is based on racist notions touting the inherent superiority of discovering nations. For settler groups to deny recognition to aboriginal sovereignty is to assume that the original inhabitants were too primitive to possess a form of sovereignty that deserved to be recognized by a more "advanced" settler society.[71]

In popular culture and in law the legitimacy of the assertion of sovereignty by the discovering nations over the indigenous population at the time of settlement is an ideology that is rarely questioned. Sparrow is an indication that the judiciary is content to perpetuate such an underlying assumption. To be fair, there is much that is laudable about the Sparrow judgement. Caution is necessary though, for as Hunt points out, for ideology to work effectively "something real or

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[69] Sparrow, p. 1103.

[70] "Western Sahara Case" (International Court of Justice Report, 1975) as discussed in Maureen Davies, "Aspects of Aboriginal Rights in International Law" in Bradford Morse (ed.) Aboriginal People and the Law (Ottawa: Carleton University Press, 1989), p. 66.

[71] For a discussion of whether or not the Lil'Wat Nation surrendered its sovereignty see B.C.(A.G.) v. Mount Currie Band (1991) 54 B.C.L.R. 129 (S.Ct.). At issue were contempt charges laid against two native men who breached court injunctions prohibiting the blocking of a logging road. Central to the lawyers arguments was the idea that the Lil'Wat Nation exists on an equal footing to British/colonial governments, with the former never ceding their territorial sovereignty.

beneficial is gained or reflected in it." [72] This reflects Antonio Gramsci's notion of "hegemony", i.e. that the most effective kind of domination takes place where ideologies cater in some ways to the interests of those who are dominated. [73] In Sparrow the fiduciary relationship is presented as a positive and natural development in the common law of aboriginal rights. On the positive side, legislation which affect s. 35 rights will now undergo strict scrutiny. However, Parliament's ultimate jurisdiction over First Nations remains unquestioned and, indeed, is further entrenched. [74]

One does not need to look too far to discover further examples of ideological thought informing Justice Dickson's and Justice La Forest's reasons. Why is it that the Court cannot imagine aboriginal or treaty rights as unlimited? As a result of the Court's experience with Charter interpretation, and especially s.1, [75] the judiciary is steeped in the notion that few rights are absolutely guaranteed and cannot be infringed.

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[72] Hunt, p. 292.

[73] See: E. Greer, "Antonio Gramsci and Legal Hegemony" in D. Kairys (ed.) The Politics of Law (New York: Pantheon Books, 1982), p. 304; A. Gramsci, Selections From The Prison Notebooks (Howe and Nowell Smith (eds.)(London: Lawrence and Wishart, 1971).

[74] For a further discussion of First Nations and the unquestioned acceptance of Canadian sovereignty see Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" (1991) 22 (2) Alberta Law Review 498;and Bruce Clark, Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self Government in Canada (Montreal: McGill-Queen's University Press, 1990).

[75] Section 1 reads: The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. See R. v. Oakes, [1986] 1 S.C.R. 102.

But what if aboriginal rights are different and not based on the individual rights tradition familiar to the common law? Just compensation paid to third parties affected by the recognition of unimpaired aboriginal rights is not unimaginable. Yet the Court refused to entertain a scenario where no "safety valves" existed." [76] Again the Court's reasoning is based on the assumption that First Nations do not possess inherent sovereignty and inherent aboriginal rights. It is not suggested that the Court consciously subscribes to this view. On its face the judgment strongly suggests the opposite. However, decisions which do not openly question the legitimacy of limiting rights reproduce dependency in a new form. The use of the fiduciary obligation to limit aboriginal rights perpetuates a legal relationship of inequality. In Sparrow, although the judiciary gave some content to s. 35 rights, underlying ideologies required circumscribing limits. Since no "safety valves" exist to limit the content, the judiciary could not comprehend a situation where aboriginal rights and aboriginals were beyond state control.

From one perspective it is a positive development that Parliament in exercising its legislative power in relation to Indians and land reserved for Indians now does so limited by a fiduciary duty to Aboriginal peoples. However, behind the recognition of s. 35 rights is a state power grab cloaked in the

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[76] The notion of no "safety valves" in the text of s. 35(1) is taken from Schwartz, Bryan, First Principles - Second Thoughts (Montreal, Institute for Research on Public Policy, 1986), pp. 359-360.

form of fiduciary obligations. The state acknowledges some rights, claims they are not unlimited, and then sets up a fiduciary scheme to structure the limitations. Thus, the court is complicit in further circumscribing the lives of aboriginal peoples without their consent.

Judicial ideology is also operating when aboriginal rights are confined to the relatively innocuous area of a sustenance food rights. Even though commercial fishing rights were argued at trial, on appeal only food fishing rights were at issue. The popular culture stereotype of Natives as passive hunters and gathers, uninterested and unentitled to more commercial enterprises is absorbed and perpetuated.[77] When this assumption is the starting point, it is relatively painless for judges to impose state fiduciary obligations since they extend into areas where the consequences are not too costly. Adoption of the Sparrow doctrine may thus result in confining the scope and content of s. 35 rights to traditional cultural activities characteristic of subsistence economies.

As Hunt has observed "ideology is a "difficult, slippery and ambiguous concept, yet handled with care it provides an indispensable and irreplaceable tool of analysis." [78] In

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[77] For a slowly emerging contrary position see R. v. Vanderpeet (1991) 58 B.C.L.R. (2d) 392 (B.C. S.C.) where the right to commercial fishing was acknowledged, and Justice Wilson's dissenting opinion in R. v. Horseman.,[1990] 1 S.C.R. 901, where Justice Wilson refused to find that the selling of hides to buy food was not sale for commercial profit.

[78] Hunt, p. 31. Although Foucault often referred to operating ideologies he believed that the concept could not be used without "circumspection." See: Foucault, Power and Knowledge, p. 118.

interpreting s. 35 of the Constitution the Supreme Court has exerted an ideological influence over Crown-aboriginal relationships. The fiduciary concept fortifies the legitimacy of an entrenched position of authority for the Crown. It is not a blatant attempt at native disempowerment but rather a subtle process by which legal doctrine and judicial interpretation reproduce and reinforce the subordination of aboriginal peoples.

CHAPTER 4

TOWARDS A PROGRAMME OF STRATEGY

Prior to the emergence of a fiduciary discourse the world of aboriginal politics was dominated by rights discourse: the right to self-government, the right to title of land, the right to equality, the right to social services.[1] As a result of Sparrow, Aboriginal groups no longer have to couch their grievances, claims and aspirations in rights terms, they now can wrap their interests around the fiduciary concept. In her article, "Aboriginal Peoples and the Canadian Charter Interpretive Monopolies, Cultural Differences" Mary Ellen Turpell analyzes how the Charter and the conception of rights in Canadian law must be situated culturally. [2] Her insights into the strategy of using rights discourse raise parallel issues that must be considered if fiduciary discourse is to be used together with rights discourse.

In Turpell's view, because the western culture on which rights discourse is based is not shared by aboriginal people the application of rights to aboriginal peoples is suspect:

> The rights paradigm is a legal structure with profound political implications for Aboriginal peoples. Yet it is a paradigm largely insensitive to

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[1] For a similar point see: Mary Ellen Turpell, "Aboriginal Peoples and the Canadian Charter Interpretive Monopolies, Cultural Differences" (1989/90) 6 Canadian Human Rights Yearbook 3, p. 31.

[2] Ibid., p. 5.

> its own particular cultural self-image. To reverse this legal scholarship one has to start to question fundamentally its grounding. [3]

For Turpell a contradiction is at work when aboriginal advocates rely on rights strategies. On the one hand they advocate that Aboriginal peoples be recognized as distinct people, yet on the other hand they are required to express that distinctness through concepts defined by Canadian law and given content by courts whose process and members reflect a different cultural system. Sherene Razack echoes Turpell's concerns. Writing from a feminist perspective Razack claims that "when women and other oppressed groups articulate the problems of our daily lives using the concept of rights and all that it entails, we are consciously or unconsciously squeezing our lived experience into a pre-ordained mould." [4] She points out that such a project can place limits on a community's "seeing and knowing."[5]

Are similar forces at work when Aboriginal peoples make fiduciary claims? Turpell's thinking urges us to ask whether the fiduciary framework is simply another example of a concept that was "thought up and imposed" on Aboriginal peoples by the

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[3] Ibid., p. 26.

[4] Sherene Razack. Canadian Feminism and the Law: The Women's Legal Education and Action Fund that the Pursuit of Equality(Toronto: Second Story Press, 1991.), p. 13.

[6] Ibid. In a detailed history of the litigation pursued by the Women's Legal Education Fund Razack attempts to show the falsity of the rationale that if women only convey their point of view to the judiciary they will create a system of justice that reduces social inequality. Razack concludes that getting the legal system to work for women requires more than reworking old concepts.

same culture that created individual rights discourse? Is it another in a long line of strange expressions to be added to the likes of "usufructuary," "sui generis." "aboriginal title,", "referential incorporation", and "extinguishment?" If Turpell's analysis is followed the inevitable conclusion is that the fiduciary concept is an importation from an external culture and is incommensurable with the cultural system of Aboriginal people. Moreover, just as previous legal tools have contributed little to ending the social inequalities between aboriginal and non-aboriginal people, little should be expected from the newest addition. As Delgamuukw, Thomas, Desjarlais, Bruno and Carrier-Sekani illustrate, "fiduciary" is not off to a momentous start.

On the other hand, the association between the discourse surrounding the Crown-aboriginal fiduciary relationship and negative thinking about rights discourse is open to challenge. At present parts of the legal academic community are engaged in a heated debate over the usefulness of rights to achieve social change. In response to those academics who have critiqued the ethnocentrism and de-politicizing nature or rights, [6] are those academics who focus on the symbolic value of rights struggles. In separate articles Elizabeth Schneider and Patricia Williams comment on the empowering nature of rights victories for those groups who have a history of

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[6] See: Peter Gabel, "The Phenemology of Rights-Consciousness and the Pact of the Withdrawn Selves" (1984) 62 Texas Law Review 1563; Mark Tushnet, "An Essay on Rights" (1984) 62 Texas Law Review 1363.

exclusion and disadvantage.[7] A similar point is made by Robert Williams who urges minority groups to "take rights aggressively" and to use them as strategic and instrumental weapons to "beat the system" or win a "tangible benefit." [8]

The relevance of this debate to the issues surrounding fiduciary litigation should be apparent. On one hand, there is an increased reliance on the fiduciary concept as a strategy for securing tangible benefits, yet nothing has been delivered. On the other hand, the fiduciary concept is a site of mobilization around which a new wave of demands can be made. Indeed, it is a symbolic victory for the Crown-Aboriginal relationship to be constitutionally entrenched under s. 35 as recognized in Sparrow. Thus, like rights discourse, it does not appear to be a question of enthusiastic acceptance or total rejection of the fiduciary concept. Formal recognition of the special nature of the Crown-Aboriginal relationship may be a necessary pre-condition for more substantial and fundamental change. At the same time it is essential to remain hyper-sensitive to the pitfalls attached to fiduciary discourse, particularly when it is merged into the political and ideological dimensions of the

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[7] Elizabeth Schneider, "The Dialectics of Rights and Politics: Perspectives from the Women's Movement" (1986) New York University Law Review 599; Patricia Williams, "Alchemical Notes: Reconstructing Ideals From Deconstructed Rights" (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 323.

[8] Robert Williams, "Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Colour" (1987) 5 Law and Inequality 103, at 125-126.

legal system.

At the beginning of this work several questions were raised: What is the role and function of law in progressive politics? Can the law be used to achieve significant social change? If so, how? If not, why not? After this extensive review of the fiduciary relationship some answers are starting to emerge. It is far too facile to issue a blanket condemnation of the legal system or the fiduciary concept as it relates to disputes involving native people. Generally, Aboriginal Canadians have accomplished great strides in the legal sphere. Like many dominated and oppressed groups they perceived their grievance in legal terms and articulated their needs and interests in terms thought to be promised or owed by law. [9] Calder, Guerin and Sparrow are examples of how legal decisions serve to initiate political and legal reform. As a result of Calder the federal government initiated a land claims program.[10] In Guerin the Supreme Court forced DIAND towards a new form of legal accountability on the part of the Crown in its dealings with reserve land. As explicitly directed by the Supreme Court in Sparrow, s. 35 provides a

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[9] In Whigs and Hunters E.P. Thompson's makes this point well. In his study of the notorious British Black Act of 1763 Thompson exposes both the retrogressive character of the law and its ability to provide a "moral basis for resistance to injustice." For Thompson, to treat law as mere sham is to dishonour centuries of struggle in which the poor and oppressed attempted "to fill the law with human content, to hold the law to its own pretensions to justice." E.P. Thompson, Whigs and Hunters: Origins of the Black Act (New York: Pantheon Books, 1975).

[10] See: In All Fairness: A Native Claims Policy - Comprehensive Claims (Ottawa: Queen's Printer, 1981).

"solid constitutional base upon which subsequent negotiations can take place."[11] These are laudable achievements, yet when one becomes aware of the operation of dominant ideologies and the conservative nature of the legal system it is necessary to re-evaluate the usefulness of promoting legal change (either through reform or the Common Law) as a method of resisting the oppression of native people.

In response to the question, "should disadvantaged groups go to court?" some academics have responded, "yes, but cautiously." Michael Mandel, writing of the legalization of politics under the Charter, makes the argument that since the Charter "leaves the hoards of power and power itself untouched," women and others who use the courts as a route to change cannot expect much in the way of change in group status. Mandel gives this advice:

> The Charter has to be handled with care, something like nitroglycerine. To think of it as just another strategy, or worse yet, a preferred strategy, can be disastrous. [12]

Similarly, native litigation is at stage where a cautious approach must be adopted. Hard questions of political choice and strategy can no longer be avoided. Tradition will pressure lawyers into litigating even though little change in prevailing conditions of social and economic inequality between native and non-native Canadians reveals the limits of

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[11] Sparrow , p. 1105.

[12] Michael Mandel, The Charter of rights and the Legalization of Politics in Canada (Toronto: Wall and Thompson, 1989), p. 309.

this strategy. In addition the development of analyses of law and ideology reveals the central role of law in entrenching and reproducing the oppression faced by native Canadians. Native litigants and lawyers involved with aboriginal rights must scrutinize the fiduciary arguments they advance to determine whether or not they will reinforce ideological constructions of the relationships between First Nations and the dominant society.

When rushing to court, it is too easy to forget the lessons of law and politics and law and ideology and overlook the ease by which putatively progressive developments are absorbed by the legal system and further legitimate balances of power. As the preceding chapters have established underlying both the Sparrow and Guerin doctrines is the assumption of a hierarchical relationship between the Crown and First Nations in the context of property entitlement. The Court's reliance on the idea that the Crown bears fiduciary responsibilities toward native peoples indicates that the Court is not willing to move away from a hierarchical vision of the relationship between First Nations and the Canadian state in the realm of constitutional jurisprudence. Sparrow exhibits the best reformist impulses offered by the Supreme Court of Canada. However, if the judgment does not openly question the legitimacy of an entrenched position of authority for the Crown, it simply reproduces dependency in a new form.

Yet, to repeat, law is not always a villain. It can be

both a site of social struggle and an instrument of social change. While highly critical of liberal legalism Cornell West argues that serious and committed work within the legal system "remains indispensable if progressive politics is to have any future at all." [13] The majority of legal work, writes Cornell, cannot but be defensive in nature in that it provides a context for resistance to injustice. He does leave some room for lawyers to link their work to grass roots movements involved in "credible progressive projects." [14] His suggestion is that a lawyer's role is to demystify the power relations operating in legal decisions. In order to facilitate the development of appropriate legal strategies West urges lawyers and academics to develop empowering analyses that cast light on how legal doctrine contributes to the maintenance of existing social and power relations. By having a rigorous analysis to explain why 'the more things change the more they stay the same' lawyers and academics can mitigate the crushing effects of incremental or hollow gains after long legal struggles. By exposing how law has both impeded and impelled struggles for justice grassroots movements will be better prepared to know how and when to engage with law. Still as Hunt advises, "Resort to the courts

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[13] Cornell West, "The Role of Law In Progressive Politics" in Kairys, David (ed.). The Politics of Law: A Progressive Critique (Revised edition)(New York: Pantheon Books, 1990) 468, at 469.

[14] Ibid., p. 469.

can only be a pragmatic and occasional strategy for change."[15] Law can be used defensively but it also can be a forum for articulating alternative visions and accounts. Law can provide a a focal point for alternative discourses to be heard.

Hutchinson has written that "if we really want to change society we must stop thinking about the legal process in instrumental terms and start to appreciate its discursive and ideological dimension. [16] In his view, as in the view of Robert Gordon the law contributes to a knowledge/power system that is built piece by interlocking piece. Gordon identifies law as a belief system that has the effects of making both doctrine and social relations seem natural and inevitable:

> Law, like religion...is one of these clusters of belief - and it ties in with a lot of other non-legal but similar clusters - that convince people that all the many hierarchical relations in which they live and work are natural and necessary.[17]

Gordon's thinking leads him to include the Foucauldian ideas of power and knowledge into his analysis. [18] For as Foucault suggested the whole legitimating power of a legal system is not built upon coercive instrumental force but rather on smaller more insidious instances ("micro-levels") which allow

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[16] Alan Hunt, "The Big Fear: Law Confronts Postmodernism" (1990) 35 McGill Law Journal 507, at 537.

[16] Allan Hutchinson, "Telling Tales (Or Putting the Plural in Pluralism)" (1985) Osgoode Hall Law Journal 681, p. 689.

[17] Robert Gordon, "New Developments in Legal Theory" in Kairys, David (ed.). The Politics of Law: A Progressive Critique (Revised edition)(New York: Pantheon Books, 1990) 413, at p. 418.

[18] Ibid., p. 421,422.

power imbalances to be perpetuated. As we have seen in Chapter 3 the fiduciary concept is one of the interlocking pieces contributing to the power imbalance between aboriginal and non-aboriginal Canadians.

Foucault advised that for the deconstruction of dominant power systems previously subjugated knowledge systems must be freed. In a small way the work has begun to attempt to reclaim fiduciary law so that it can serve as an instrument of native empowerment. Patrick Macklem's article "First Nation Self-Government and the Borders of the Canadian legal Imagination" is an attempt to reconceptualize doctrinal principles in order to transcend the hierarchical relationship between native peoples and the Canadian State. [19] Similarly, by focusing on "the general doctrine of collective trust that animates the Canadian Constitution," Brian Slattery's article "First Nations and the Constitution: A Question of Trust" attempts to place the fiduciary relationship in a more positive light. [20] In Chapter 2 we have seen how the fiduciary concept could be used to facilitate a meaningful role for aboriginals in the area of policy development. However, if the fiduciary concept is to play a facilitative role in the restructuring of Crown-aboriginal relationships,

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[19] Patrick Macklem, "First Nation Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill Law Journal 382.

[20] Brian Slattery, "First Nations and the Constitution: A Question of Trust" 71 Canadian Bar Review 261.

the Canadian legal imagination must be rethought and adapted so that the law does not perpetuate the continued imposition of liberal legal norms and values onto native reality. As Macklem advises, "Native interests and needs cannot be accommodated within current categories of legal understanding, as the necessary changes require more than the simple embrace of those interests and needs into already existing and accepted ways of understanding the world." [21]

In addition, the lessons of postmodern thought and Feminism should not be forgotten: to include previously excluded groups the reformation of legal thought requires a remaking of the conceptual map by which the law structures and makes sense of reality. To avoid further perpetuating the status quo the fiduciary relationship must be reconceptualized so as to reshape the law's relation to native people. Current ways of knowing (i.e., fiduciary equals hierarchy, assumptions regarding First Nation sovereignty, etc.) are part of the problem. True reform requires the creation of new ways of legal understanding that embraces native difference. [22]

One of the great achievement of postmodern legal scholarship has been the ability to successfully discard the view that law and legal decision making are ahistorical and

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[21] Macklem, p. 395.

[22] The recognition of the inherent right to self government within Canada in the text of the Concensus Report on the Constitution (The Charlottetown Accord, 1992) indicates that native difference is entering legal discourse in a meaningful way. See: "Concensus Report on the Constitution " (Unedited text) Globe and Mail, Saturday, October 3, 1992, A-6 - A-8.

apolitical.[23] Any notion that the correctness of a legal decision is somehow preordained by text and rationality has been debunked. Instead postmodernism has allowed us to conceive of law as a set of practices and forms that constitute economic, social, cultural and political relations among groups and individuals.

As the often hostile resistance to the Critical Legal Studies movement in legal academia illustrates, many feel threatened by the decentering of the privileged position accorded to law. The extent of the uneasiness is illustrated in a group of articles which interpret the decentering of law as heralding the end of law itself. [24] For these authors an embracing of postmodern principles inexorably leads towards a loss of belief in the prevailing social order. In the tradition of the best fearmongerers, these critics melodramatically suggest that if faith in democratic touchstones like the "rule of law" are undermined, fascism cannot be far behind.

Others are overwhelmed by the moral relativity that postmodernism presents. Their argument is that if there are

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[23] While it is true that postmodernism offers a powerful critique of law it cannot be considered original. As Hunt points out postmodernism's themes are represented by a range of critical traditions including American legal realism, the law and sociology movement, Marxism, and especially critical legal studies. See: Hunt, "The Big Fear: Law Confronts Post-Modernism" (1990) 35 McGill Law Journal 507, at 522.

[24] Two of the most outspoken criticisms of the postmodern influence on law include: Fiss, "The Death of Law" (1986) 72 Cornell Law Review 1; Rubin, "Does Law Matter: A Judge's Response to the Critical Legal Studies Movement" (1987) 37 Journal of legal Education 307.

no fixed reference points and if meaning is unstable and contingent then there are no grounds for choosing one theoretical or political strategy over another. Allan Hunt is especially articulate in his description of the moral relativists's dilemma:

> ...any concession to contingency or any retreat from the objectivity of knowledge claims leads, via the associated imagery of the "slippery slope" unwittingly but unavoidably towards the abyss of relativism and its even more dangerous associate nihilism....Nihilism is conceived as catastrophic because it seems to deny the possibility of cognitive, ethical or moral judgement as anything more than subjective preference or conventional consensus. If "one opinion is as good as another: the project of scholarship itself seems to be doomed if the opinion of the fool is as valuable as that resulting from painstaking study. If "anything goes" it becomes impossible to distinguish between a moral judgment and self-interest. [25]

In effect the acknowledgement that there exists no firm ground in which knowledge or law can be rooted unnerves those who claim access to reality, truth and objectivty.

For those interested in the law and social change postmodernism's emphasis on indeterminacy and contingency should be a cause for hope not despair. Critical legal analysis exposes legal decision making as a function of extraneous and intangible factors. It is a freeing realization. When law fails to improve the conditions of native peoples, women, gays and lesbians or other disadvantaged groups, it is not a function of the intrinsic rationality of law, or the inherent logic of the legal form,

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[26] Hunt, p. 524.

but rather a lack of will, a political choice, a simple failure to act. Postmodernism does not ask for the impeachment of judges on the basis that any judgment is nothing more than subjective preference, rather it demands that judges justify their choices "without hiding behind the discourses of truth and objectivity" which serves to "obscure responsibility" for the choices made. [26]

To conclude, as an instrument for native empowerment the fiduciary concept has potential. However it should be used pragmatically with full knowledge that there are deeper contingencies than mere positivistic law at work. A realistic approach to using the law for social change should be adopted. It must be realized that the law can be both a site of oppression, and, at times, an instrument for resisting oppression. Advancing legal claims should not be abandoned for they provide an organizing point for political struggle. Legal victories can be inspiring for the group concerned, and legal defeats can be a catalyst for more radical action. However, when it is realized that law operates as ideology; that law and politics are often conflated; and that even the most sweeping positive decisions already have limitations built into them, litigation must be seen as only one front of action. Joel Bakan has written that it is "naive" to think social and political change will happen by merely approaching the courts with refined legal arguments. He advises against

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[26] Ibid.

solely relying on the Courts for the realization of an egalitarian and just society. Instead he advocates a coordination of litigation with other forms of political strategy. [27]

Law is not the only factor which contributes to the construction of native reality. Government inaction, ideological factors, economic considerations and historical treatment all contribute to the socio-economic conditions in which native people find themselves. Even though law is only partially responsible for the current status of native people, this alone is sufficient justification for exploring the complex ways in which law perpetuates, entrenches and, at times, mitigates forms of oppression. Complex patterns of interaction determine how law and the aforementioned factors influence each other. To understand these patterns, analyses of how law contributes to native reality must be developed. For meaningful change to occur political strategies must also be developed along the following fronts : fiscal policy, public information and education programs, health care, child welfare, criminal justice, policing, resource management and economic development. Most are issues which self-government initiatives address.

Law is deeply reflective of political and ideological

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[27] Joel Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What you Want (Nor What You Need) in R. Devlin (ed.) Canadian Perspectives on Legal Theory (Toronto: Edmond Montgomery Publications, 1991) at 445.

conflicts. That realization makes the choices of when and how to engage with law easier. Depending on the situation law can be used offensively (alone or alongside other strategies) or defensively. At times it should be avoided. In light of this analysis, there exists a role for an expanded fiduciary concept in future litigation. However, it should be approached with caution and realism, and not false optimism about any sweeping changes it might bring.

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