ANALYSIS OF THE FUNCTION AND APPLICATION OF THE DOCTRINE OF FIDUCIARY OBLIGATION

Illustrated by An Assessment of Obligations Owed by Canada to Canadian Indians

by

Gerald Donegan

A Thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements of the degree of master of laws.

Institute of Comparative Law
M[c]Gill University
Montréal

August, 1996

ABSTRACT

This thesis contains an analysis of the function and application of the doctrine of fiduciary obligation, illustrated by an examination of obligations Canada owes to Indians regarding reserve land transactions.

Chapters I and II describe the origin and development of the doctrine and the way in which fiduciary obligations are formulated. Chapters III and IV describe the Crown/Indian relationship and suggest how officials might estimate Crown obligations. The thesis concludes that the doctrine is legislative and that its function is to extend juridical protection to otherwise inadequately regulated relationships of social or economic importance. Rules developed to govern the trustee/beneficiary relationship are adapted and applied to useful relationships to prevent victimization through the use of inherent opportunities for exploitation. Acceptance by Indians of representative decision-making is critical to stable reconciliation of Indian and non-Indian interests. Pursuit of this objective informs the Crown/Indian relationship and shapes the content of Crown obligations.

SOMMAIRE

Cette thèse présente une analyse de la fonction et de l'application de la doctrine de l'obligation fiduciaire illustrée par l'examen des obligations du Canada envers ses Autochtones en matière d'opérations foncières portant sur des terres de réserve.

Les Chapitres I et II décrivent l'origine et le développement de cette doctrine et s'intéressent à la formulation des obligations fiduciaires. Les Chapitres III et IV décrivent la relation existant entre la Couronne et les Autochtones et montrent comment les agents responsables peuvent estimer les obligations de la Couronne. La thèse énonce en conclusion que cette doctrine est de nature législative et a pour fonction d'assurer une protection juridique à des relations de portée sociale ou économique qui, autrement, seraient mal réglementées. Les règles régissant les rapports fiduciaire/bénéficiaire sont adaptées et appliquées à de telles relations afin d'éviter toute victimisation découlant d'occasions d'exploitation que ces relations pourraient susciter. L'acceptation par les Autochtones d'un processus décisionnel représentatif est essentiel pour rapprocher de manière stable les intérêts des Autochtones et des Non-Autochtones. La poursuite de cet objectif établit des relations entre la Couronne et les Autochtones et façonne le contenu des obligations de la Couronne.

ACKNOWLEDGMENTS

I would like to express my gratitude to Dean Stephen Toope for taking time from a busy schedule to supervise this project. His criticism and suggestions improved the end product immeasurably, and the patient and courteous manner in which they were offered made our interviews a pleasure. I also want to acknowledge the support and encouragement which I received from the Department of Justice, and its former Deputy Minister, John Tait, Q.C. Without this assistance I would not have been able to return to school to finish my studies. I hasten to add, however, that the opinions expressed herein are my own and they do not necessarily represent the views of the Government of Canada or any of its administrative subdivisions or any of its officials.

My wife, Julie, and our children Christopher and Eleanor, put aside plans of their own in order to provide me with time to study and prepare this thesis. They have each paid a lot for this project and I owe them more than I can say.

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INTRODUCTION

In the *Guerin* case,[1] the Supreme Court of Canada held that the relationship between the Crown and native peoples imposed equitable obligations on the Crown which could be enforced through the courts. Individual members of the panel disagreed about the juridical basis of this relationship and about the time that enforceable obligations first arose, but most of the judges said that, at some point, the Crown came to stand in a fiduciary relationship to Indians.[2] This characterization of the Crown/native relationship was later employed by the entire Court in the *Sparrow* decision[3] to define duties created by the Crown's constitutional undertaking to recognize and affirm aboriginal and treaty rights.[4] Lower courts have since made use of fiduciary concepts to regulate dealings between the Crown and aboriginal groups in circumstances other than those which occurred in *Guerin* or *Sparrow*.[5]

It has been argued that the doctrine of fiduciary obligation is capable of providing the foundation for a coherent theory of mutual legal and political rights and obligations applicable to Canada and its provinces, on the one hand, and aboriginal peoples, on the other.[6] Commentators

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[1] *Guerin* v. *R.*, [1984] 2 S.C.R. 335 [hereinafter *Guerin*].

[2] The individual opinions are examined in detail in chapter 3.

[3] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*].

[4] *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[5] See, e.g., *Kruger* v. *R.* (1985), [1986] 1 F.C. 3 (F.C.A.) [hereinafter *Kruger*]; *Delgamuukw* v. *R.* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.); *Lower Kootenay Indian Band* v. *R.* (1991), 42 F.T.R. 241 (F.C.T.D.) [hereinafter *Lower Kootenay*]; *Blueberry River Indian Band* v. *Canada (Dept. of Indian Affairs & Northern Development)*, [1995] 4 S.C.R. 344 [hereinafter *Blueberry River*].

[6] W.R. McMurtry & A. Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective" [1986] 3 C.N.L.R. 19 at 20 & 37-42 [hereinafter "Fiduciary Concept"].

generally agree that the doctrine has potential. Many argue, however, that the duties imposed by its application are uncertain, and that further judicial guidance is needed before it can serve as a reliable tool for the regulation of this relationship.[7]

In this thesis, I examine the concept of the fiduciary relationship in terms of its juridical functions, and I present a method for determining the content of the fiduciary obligations likely to be imposed by the courts for the purpose of regulating the conduct of the parties to a given relationship. I show how this method could be applied in respect of the relationship between the federal Crown and status Indians to describe federal responsibilities with respect to certain dealings in unsurrendered reserve land.

The first chapter contains an analysis of the functions of the doctrine as traditionally applied by the courts, without reference to government/native relations. Here, I argue that "fiduciary law" is not a discrete branch of the law but a purely remedial doctrine in a broad sense—a rationalization for judicial intervention.

Fiduciary duties are imposed for the purpose of preventing the victimization of parties to relationships of social or economic utility which

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[7] J.D. Hurley, "The Crown's Fiduciary Duty and Indian Title: *Guerin* v. *The Queen*" (1985) 30 McGill L.J. 559 at 391, 392, 595 & 599 [hereinafter "Fiduciary Duty & Indian Title"]; "Fiduciary Concept", *supra*, note 6 at 42; D.M. Johnston, "A Theory of Crown Trust Towards Aboriginal Peoples" (1986) 18 Ottawa L. Rev. 307 at 307, 308 & 330 [hereinafter "Crown Trust"]; R.H Bartlett, "The Fiduciary Obligation of the Crown to the Indians" (1989) 53 Sask. L. Rev. 301 at 324 [hereinafter "Fiduciary Obligation of the Crown"]; D.W.M. Waters, "New Directions in the Employment of Equitable Doctrines: The Canadian Experience" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 411 at 423-425 [hereinafter "New Directions" & *Equity '89*, respectively]; M.J. Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law" (1993) 27 U.B.C. L. Rev. 19 at 21 & 22 [hereinafter "Crown-Aboriginal Relationships"].

contain, as an inherent and otherwise unregulated feature, an opportunity for one party to exploit the other. The overall policy of the doctrine is to guarantee the social and economic benefits which flow from the relationship by maintaining its integrity.[8] Fiduciary duties are imposed where the exploitative conduct can be remedied by requiring the exploiter[9] to observe an actual or constructive undertaking to prefer the interests of the victim[10] to other interests, including his own.[11] Fiduciary duties are thus designed to hold the fiduciary to a notional obligation of loyalty which is said to characterize the relationship. Inevitably, a decision as to whether a given relationship is of sufficient social or economic importance to warrant the imposition of fiduciary obligations is subjective. Such a decision would take into account such considerations as the importance to the victim of the interests promoted by the relationship, the degree to which failure to provide adequate protection would undermine essential

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[8] E.J. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1 at 15 (as applied to commercial relationships) [hereinafter "Fiduciary Obligation"]; P.D. Finn, "The Fiduciary Principle" in *Equity '89, supra,* note 7, 1 at 27 & 42 [hereinafter "Fiduciary Principle"]. See also, *Hitchcock* v. *Sykes* (1914), 49 S.C.R. 403 at 408 "The principle [that a fiduciary must disclose conflicts of interest to his beneficiary] has its justification in the necessity of protecting these confidential relationships .... " per Duff, J, and *Hodgkinson* v. *Simms*, [1994] 3 S.C.R. 377 at 422, *per* La Forest, J.:

> The desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout fiduciary law. The reason for this desire is that the law has recognized the importance of instilling in our social institutions and enterprises some recognition that not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules. By instilling this kind of flexibility into our regulation of social institutions and enterprises, the law therefore helps to strengthen them.

[9] Hereinafter fiduciary.

[10] Hereinafter beneficiary.

[11] In partnerships, however, each fiduciary/partner is under an obligation to prefer the joint interests of all partners, including himself.

social institutions and the frequency with which the relationship is replicated. It is not possible to provide a comprehensive list of characteristics which will enable us to tell whether a given relationship will be held to be fiduciary in advance of a declaration in an authoritative judicial decision or legislative enactment. It is possible, however, to use criteria derived from an analysis of the functions of the doctrine to eliminate cases to which the doctrine will not be applied.

Applying such criteria involves a three-step analysis. First, the application of the doctrine can be ruled out in cases in which the impugned conduct does not take advantage of an opportunity for exploitation which is inherent in the relationship and inimical to the social or economic benefits for which it was created. Secondly, the doctrine will not be applied where the exploitative conduct cannot be effectively remedied by holding the fiduciary to an undertaking to prefer the interests of the beneficiary. Finally, fiduciary obligations will not be imposed in cases in which the impugned conduct can adequately be regulated by the application of a doctrine based on explicit juridical principles. In these cases, the latter doctrine will be employed in preference to the doctrine of fiduciary obligation. In the sense used here, an opportunity for exploitation is inherent if the relationship could not produce the benefits for which it was established unless such an opportunity existed. By exploitation, I am referring to the imposition of a detriment upon the beneficiary to which he did not agree, and which is disproportionate to the benefits which he reasonably expected to gain by reason of his participation in the relationship. A relationship, for the purposes of the application of the doctrine of fiduciary obligation, exists where one or more parties depend for the enjoyment of important legal or praetical interests upon the conduct of another or others, and where the dependent

parties are driven to accept the judgment of those upon whom they depend as to what should be done to advance their interests.

A brief explanation of the subsidiary role played by the doctrine may be in order here, although it will be dealt with in greater detail in chapter 1. Fiduciary obligations are imposed on the basis of judicial perceptions of the requirements of public policy.[12] They are not necessarily logical extensions of the explicit juridical principles generally accepted as providing the legal structure for the relationships to which they are applied. Disposing of individual disputes on the basis of an intuitive understanding of the requirements of fair dealing and honesty may satisfy the needs of particular litigants for a just resolution of their dispute, but it may also create uncertainty as to the liability of parties in similar but not identical circumstances, and it may not provide adequate guidance for future dealings.[13] Replicability of the process of judicial reasoning is one of the foundational principles of our law,[14] and juridical doctrines which cannot be explained on the basis of explicit principles tend to give way to doctrines which can.[15] It is not that the former are juridically subordinate; they simply become redundant.

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[12] *Allcard* v. *Skinner* (1887), 36 Ch.D. 145 at 171 (Cotton, L.J.), 182 (Lindley, L.J.) & 190 (Bowen, L.J.) (C.A.).

[13] See, with respect to the application of the doctrine of fiduciary obligation to Crown/native relationships, "New Directions," *supra*, note 7 at 420–425.

[14] M.A. Eisenberg, *The Nature of the Common Law* (Cambridge, Mass: Harvard University Press, 1988) at 10–12.

[15] This process is illustrated by the development of the common law of duress. By the middle of this century, equitable principles had supplemented the minimal protection then available through the common law to the point where duress had become an equitable doctrine for all practical purposes (see, e.g., W.H.D. Winder, "Undue Influence and Coercion" (1939) 3 M.L.R. 97 at 108). In recent years, however, courts have extended the principles of the common law doctrine of duress so that they now provide the protection formerly only

While this analysis will help us determine whether fiduciary duties will be imposed at all, it does not define their content. A declaration that a relationship is a fiduciary relationship really amounts to an affirmation that the relationship is of social or economic importance and that its integrity must be maintained by the imposition of fiduciary duties. In the second chapter of this thesis, I describe a method which I argue can be used to determine which fiduciary obligations will be imposed to expand judicial regulation of a given relationship.

The doctrine of fiduciary obligation is interstitial.[16] As an instrument for the regulation of human relationships, the doctrine consists of an assortment of obligations fashioned by the courts for application on an *ad hoc* basis in order to extend judicial regulation of relationships of social or economic value. In some relationships, it is the unregulated exploitative conduct which defines the content of the fiduciary duties. Here, the fiduciary will be found to have a duty not to engage in the otherwise unregulated conduct which threatens to destroy such relationships. In other relationships, fiduciary obligations are designed to induce fiduciaries to disclose circumstances likely to tempt them to depart from the standard of conduct required to generate the benefits for which the relationship was established, and to confirm or terminate the relationship, or re-negotiate the basis upon which it is to continue. In a given class of relationships, the scope of the fiduciary duties will be coextensive with the unregulated

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available through recourse to equity's supplementary jurisdiction. See, e.g., *Barton* v. *Armstrong* (1973), [1976] A.C. 104 at 118–120 (P.C.) and *Universe Tankships Inc. of Monrovia* v. *International Transport Workers Federation* (1982), [1983] 1 A.C. 366 at 384 (H.L.). I would argue that this development is explained by the fact that the corresponding equitable doctrine lacked explicit principles which could be used as a basis for private ordering.

[16] D.A. DeMott, "Beyond Metaphor: An Analysis of Fiduciary Obligation" (1988) Duke L.J. 879 at 880-882 [hereinafter "Beyond Metaphor"].

opportunities for exploitation. Determining the content of these obligations requires analysis of the manner in which the opportunity for exploitation arises. Fiduciary obligations are aimed at neutralizing the fiduciary's exploitative advantage inherent in the relationship. The Identification of regulatory lacunae which imperil the integrity of useful relationships requires familiarity with the field under investigation, a knowledge of the limitations of existing sources of regulation and an eye for a potential for exploitation. Fiduciary obligations will be imposed where the most effective way of foreclosing exploitative opportunities is the importation, adaptation and imposition of duties of fidelity, diligence, prudence, impartiality borrowed from the code developed to regulate the conduct of trustees. It then remains to specify the degree of fidelity, diligence, prudence and impartiality required by the circumstances. Here, we can look to the decided cases for inspiration.

Happily, variations in human greed are not nearly as numerous as instances of its effects. Reported cases offer an extensive roster of mechanisms which the courts have brought to bear for the purpose of providing a remedy for those victimized by the misuse of discretionary power. Consequently, one can, by analogy from existing decisions, predict with a fair degree of confidence which of these mechanisms will be adopted to deal with a given type of exploitative conduct. The most effective mechanism will, at least in the long run, specify the standard to which the fiduciary must conform.

In the third chapter, I describe the essential features of the Crown/Indian relationship, in so far as this relationship is relevant to reserve land transactions. In terms of my analysis of the prerequisites for the application of the doctrine of fiduciary obligation, these are the features of the relationship which must be protected if its integrity is to be

maintained, and if the social and economic benefits for which it was created are to continue.

From the mid 1600s to the present, the Crown has acted as intermediary between aboriginal peoples, on the one hand, and the non-native community, on the other. Its objective has been the reconciliation of native and non-native demands. This was also its historical role, first formally assumed during the mid-18th century when the maintenance of peaceful relations with North American natives was seen by the Imperial government as essential to British interests. The government's vision of how best to mediate the conflicting interests of these communities has changed dramatically over the years.

From the mid-1600s to the late 1700s, Imperial policy called for the physical separation of the native and non-native communities. From the early 1800s to the beginning of the 20th century, government efforts were directed towards the cultural and economic adaptation of native peoples to the ways of the non-native majority. The government had clearly abandoned its attempts at cultural modification by the middle of this century. Lately, the Crown has sought to identify a political and economic structure acceptable to both communities which will reconcile aboriginal aspirations for cultural autonomy and economic self-sufficiency with non-native insistence that any such objectives be accomplished without encroachment on established economic rights or overall political sovereignty.

Pending the development of a formula for reconciling the interests of the two communities, the Crown has assumed the role of custodian of the title to Indian lands and protector of Indian land rights. I argue that the degree of protection undertaken by the Crown can be deduced from the

provisions of the *Indian Act*. Analysis suggests that the Crown's role is not to direct the use or disposition of the land, but to prevent the acquisition by non-natives of interests in reserve land unless it appears that the proposed use or disposition represents the voluntary act of the Indian occupiers made with a full appreciation of its impact on their cultural and economic aspirations.

The rights which Indians possess in relation to their reserves bear little resemblance to aboriginal land rights. Through the legal mechanisms of the *Indian Act*, Parliament gave to status Indians the opportunity to use reserve lands or to have them disposed of on their behalf as if they held the maximum interest that the civil or common law allowed.[17] When the *Guerin* panel spoke of the Crown's historical commitment to protect Indian interests, it was the protection of this opportunity to which they referred.

For status Indians, reserves are the sites within which Indian societies are segregated, and at least in theory, protected, from interference by non-natives. They also constitute the main, sometimes the only, capital asset of the band for whose use and benefit they were set apart. From the Indian perspective, decisions affecting the use or disposition of reserve land have to balance these two, often competing, requirements. Determining whether a given disposition of reserve lands is beneficial to native interests involves an assessment of the degree to which the proposed transaction promotes or is inimical to the maintenance of Indian cultural autonomy, on the one hand, and the extent to which the Band's economic circumstances require its implementation, on the other. Where there is a conflict between these two objectives, only the band can resolve it. Only

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[17] It is for this reason that a juridical description of aboriginal rights in reserve land is *unnecessary*, as well as being potentially misleading: see *Guerin*, *supra*, note 1 at 382.

the band has the moral authority to determine whether the maintenance of the cultural values of its members outweighs the financial benefits which a given transaction is likely to generate. Any action by government aimed at bringing about a result which it alone believes, however honestly, to be in the best interests of the band represents an unwarranted interference in the decision-making process.

The Crown/Indian relationship contains an inherent opportunity for the exploitation of natives by the Crown. The opportunity exists because performance of the Crown's historical commitment of protection requires that the government have a discretionary power to prevent what it considers improvident uses or dispositions of reserve lands by the occupying band or its council. This discretionary power is created by the legislation enacted to regulate the relationship between the Crown and status Indians, chiefly, the *Indian Act* and the regulations made pursuant to it. Neither the legislation itself nor any common law doctrine, provides a means of controlling the Crown's use of this discretionary power. The effect of these extraordinary provisions is to put into the hands of the government sweeping powers of control over the use and disposition of reserve land. The extent of this discretion is summed up in section 18(1), which empowers the Crown to decide for itself whether a proposed use of reserve land is for the benefit of the occupying band.

The government's overriding legal right to determine for itself whether a given use of reserve lands is for the benefit of the band is not intended to enable Indian Affairs officials to substitute their own plans for reserve development for those of the Indians for whom the reserve is set apart. Such extraordinary power can only be justified if it is limited to ensuring that band decisions respecting reserve lands genuinely represent

the considered judgment of the Indian decision-makers. It is in this sense only that the Crown is the protector of Indian interests.

In *Guerin*, the Supreme Court held that the Crown had an obligation to prefer the band's demand for a revenue-producing golf course lease over Indian Affairs' vision of a loss leader centerpiece for its up-market housing estate. The Court declared that the lease was not in the best interests of the band not because it was a bad idea, but because the band had been given to expect something else. The majority held that, when the Crown barreled ahead with its own plans without band approval it violated its historical commitment to protect native interests. Thus, the panel was able to characterize as *disloyalty* officials' conduct in leasing the surrendered land on terms inconsistent with the understanding upon which the land had been surrendered. As *Guerin* illustrates, the exercise by the Crown of its discretionary power over Indian lands must be regulated by the imposition of a duty of loyalty on government officials. No other doctrine was available to restore the Band to the position in which it would have been had the government used its power for the purpose for which it was intended.

In chapter four, I apply the method developed in the preceding chapters to describe fiduciary obligations likely to be imposed on the Crown in respect of the management and disposition of reserve lands. The most common opportunity for exploitation lies in the hands of a party who has been given a discretionary power to affect the legal or practical interests of another, thereby rendering the latter peculiarly vulnerable to the exercise of that power.[18] The Indian Act contains many examples of

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[18] In *Frame* v. *Smith*, [1987] 2 S.C.R. 99 at 136, Madam Justice Wilson suggested that these circumstances alone "provided a rough and ready guide" for detecting the existence of a fiduciary relationship.

such powers. In chapter 4, I restrict my analysis of the fiduciary aspects of the Crown/Indian relationship to an examination of the discretion conferred upon the Crown to interfere with Indian decision-making in connection with the allotment of unsurrendered reserve land to band members and the grant of leases of parcels of allotted land to non-members.

An examination of the discretionary powers conferred by the *Indian Act* does not, of course, provide an exhaustive list of the opportunities for exploitation which are inherent in the Crown/Indian relationship and which may affect reserve land transactions. The mediatory role of the Crown and the lack of experience of certain bands with the non-native economy imparted to many Indian Affairs officials an ability to exercise a powerful influence over Indian decisions. Court records contain disturbing allegations of oppressive conduct by public servants aimed at bringing about dispositions of reserve land which, in retrospect, are difficult to justify on the basis that they were primarily intended to benefit Indians. In fact, some seem disproportionately beneficial to the non-native community. In these cases, the relationship is likely best protected through the application of the doctrine of undue influence.

CHAPTER I

THE FIDUCIARY RELATIONSHIP

1. Introduction

The word "fiduciary" first came into common use in the vocabulary of British law about 1850. By that time, it had become desirable to distinguish between trusts of property, on the one hand, and a variety of trust-like relationships—all regulated by Equity—on the other. All of these relationships had formerly been referred to as trusts or as relations of confidence, but from the time that the word trust came to be reserved for the formal trust of property, the remainder were, and still are, usually called fiduciary relationships.[19]

Repeated judicial references to the fiduciary relationship as the foundation of enforceable obligations no doubt gave rise to the belief that such relationships shared common characteristics which could be used to explain the nature and scope of fiduciary obligations. Beginning in the 1940s, commentators set out to produce the definitive formulation of the elements of the fiduciary relationship. Over the past 50 years, at least a dozen proposals have been put forward, all subject to varying degrees of criticism.[20] So far, only Professor Weinrib's analysis has received honourable mention by our Supreme Court.[21]

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[19] L.S. Sealy, "Fiduciary Relationships" [1962] Cambridge L.J. 69 at 71 & 72 [hereinafter "Fiduciary Relationships"].

[20] Most of the pre-1981 hopefuls are arrayed in J.C. Shepherd, "Towards a Unified Concept of Fiduciary Relationships" (1981) 97 L.Q.R. 51 and, in greater detail, in J.C. Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1981), where they are systematically dispatched by the author, one by one. Suspected survivors are given the *coup de grâce* in "Beyond Metaphor," *supra*, note 16 at 908-915. Mr. Shepherd's own synthesis of the best of each (the "transfer of encumbered power"

Lately, the judiciary has also had a go.[22] For a while, Wilson, J.'s three-element test of *power* to affect the interests of another, *discretion* as to the manner in which the power should be exercised and *vulnerability*, an admittedly "rough and ready" formula which she presented in her dissenting judgement in *Frame*, had a decided edge.[23] Now, even that formulation has been demoted to " ... indicia that help recognise a fiduciary relationship rather than ingredients that define it."[24]

Why is it so difficult to develop a comprehensive description of such a common relationship? The answer is that the doctrine of fiduciary obligation

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theory) was criticized in J.R.F. Lehane, Book Review of *The Law of Fiduciaries* by J.C. Shepherd (1984) 7 U.N.S.W. L.J. 396. Recent suggestions include D.S.K. Ong, "Fiduciaries: Identification and Remedies" (1986) 8 University of Tasmania L. Rev. 311 (the "implied dependence" theory) and R. Flannigan, "The Fiduciary Obligation" (1989) 9 Oxford J. of Legal Studies 285 [hereinafter "Flannigan, 'Fiduciary Obligation'"] and "Fiduciary Obligation in the Supreme Court" (1990) 54 Sask. L. Rev. 45 (the "access to assets" theory). Law & Economics analyses are to be found in R. Cooter & B.J. Freedman, "The Fiduciary Relationship: Its Economic Character and Legal Consequences" (1991) 66 N.Y.University L. Rev. 1045 [hereinafter "Economic Character"], and F.H. Easterbrook & D.R. Fischel, "Contract and Fiduciary Duty" (1993) 36 J. of Law & Economics 425 [hereinafter "Contract & Fiduciary Duty"]. Recent articles stress the need for yet further examination of the conceptual basis of the doctrine: "Beyond Metaphor", *supra*, note 16 at 908-910, and "Crown-Aboriginal Relationships", *supra*, note 7 at 48 & 49.

[21] "Fiduciary Obligation", *supra*, note 8 at 4, where the author argues that the fiduciary relationship is one " ... in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him." This analysis was quoted with guarded approval by Dickson, J. in *Guerin*, *supra*, note 1 at 384.

[22] *Frame*, *supra*, note 18.

[23] In *Frame*, the majority did not disagree with Wilson, J.'s formulation of the test, and other panels have made use of it in discussions of fiduciary law: *Lac Minerals Ltd* v. *International Corona Resources Ltd*, [1989] 2 S.C.R. 574 at 598-601 & 668, *Canson Enterprises Ltd* v. *Boughton & Company*, [1991] 3 S.C.R. 534 at 543-545; *Norberg* v. *Wynrib*, [1992] 2 S.C.R. 226 at 274-281 (McLachlin & L'Heureux-Dubé, JJ.); *M.(K.)* v. *M.(H.)*, [1992] 3 S.C.R. 6 at 63-66.

[24] *Hodgkinson*, *supra*, note 8 at 409.

is a technique of judicial intervention—a means of adapting existing law to meet the exigencies of changes in social and economic circumstances. A declaration that a relationship is fiduciary is nothing more than the rationalisation for the imposition of fiduciary obligations. It is the need for the imposition of fiduciary obligations which determines whether the relationship which requires them is fiduciary; not the other way around.[25]

The doctrine of fiduciary obligation is a creature of the system of equity.[26] It represents the application, to a variety of relationships, of obligations which Equity had originally developed to regulate the conduct of trustees under an express trust of property.[27] The circumstances which make it appropriate to apply the doctrine to relationships other than that of trustee and beneficiary are those seen by the courts as analogous, in some important way, to the circumstances which require the application of similar obligations to the relationship of trustee and beneficiary.[28]

What judges mean when they say that a given relationship is analogous to that of trustee and beneficiary is that both relationships contain an opportunity for the exploitation of one party by another which is inherent in the relationship and inimical to its integrity, and that the technique used to provide a remedy to a beneficiary for exploitative conduct by his trustee must

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[25] P.D. Finn, *Fiduciary Obligations* (Sydney: Law Book Co, 1977) at 2 [hereinafter *Fiduciary Obligations*] and "Beyond Metaphor", *supra*, note 16 at 915.

[26] D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at 31 [hereinafter *Trusts in Canada*].

[27] D.W.M. Waters, "Banks, Fiduciary Obligations and Unconscionable Transactions" (1986) 65 Can. Bar Rev. 37 at 52 & 53 [hereinafter "Unconscionable Transactions"]; "Fiduciary Relationships", *supra*, note 19 at 72 & 73.

[28] "Fiduciary Relationships", *supra*, note 19 at 71; "Beyond Metaphor", *supra*, note 16 at 879.

also be used to provide a remedy to the aggrieved party to the relationship under consideration.

The jurisdiction to develop juridical doctrine by providing remedies custom designed to close off specific, unavoidable, but potentially destructive, features of useful human relationships was established by equity during the 15th century. At that time, it was used to regulate permanent trusts of real property. The technique proved so successful that it was later extended to regulate other relationships which had little or nothing in common with the relationship of trustee and beneficiary other than the existence of an inherent opportunity for exploitation and the need for a certain type of equitable regulation. This "beneficial jurisdiction"[29] is still claimed by our courts, 500 years after its *début*, and its features can best be seen from an examination of its origins, and the method used to extend its scope.

2. The Technique of Equitable Intervention

a. Origins

The concept of the fiduciary was developed by equity to describe the juridical relationship between settlor and beneficiaries, on the one hand, and trustees, on the other, under express trusts of property.[30] The earliest express trust of property was the permanent trust or use. It consisted of a formal conveyance of real property to two or more joint tenants and their heirs (the feoffees to use, or trustees).[31] In general, these conveyances

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[29] *Dent* v. *Bennett* (1839), 4 My. & Cr. 269; 41 E.R. 205, per Ld. Cottenham.

[30] *Trusts in Canada, supra,* note 26 at 31 & 32.

[31] A.D. Hargreaves, *An Introduction to the Principles of Land Law*, 3rd ed. (London: Sweet & Maxwell, 1952) at 93 [hereinafter *Land Law*].

provided that the grantees were to permit the grantor and his heirs (the cestuis que use, or beneficiaries) to receive the profits from the property, to transfer interests in the land at the direction of the beneficiaries and, if disseised, to recover possession of the land for the beneficiaries and at their expense.[32]

By the beginning of the 15th century, most of the land in England was held by way of permanent trust.[33] There were two main reasons for the popularity of this device. The first was that it enabled landowners to give directions as to entitlement to their real property which would continue to be respected after their death; the second was that it enabled them to avoid feudal dues.[34] In both cases, the necessity for the establishment of permanent trusts arose out of the inability of the common law to adapt to the changing requirements of British society:

> The doctrine of tenure and its corollary the doctrine of estates provided an adequate basis for the land law of the early Middle Ages. They were the legal interpretation of the existing facts of feudalism. But when the feudal organization of society began to disappear, ... the feudalized law began to lose its contact with the requirements of the life of the people. ... [T]he incidents of feudal tenure [rapidly degenerated] into their ultimate form of financial extortion; and their existence, together with the consequent refusal of the common law to recognize the validity of a devise of land by will, provided an ever-growing incentive to escape from the meshes of an antiquated jurisprudence.[35]

The main drawback of early permanent trusts was that their efficacy depended entirely on the honesty of trustees. The common law did not

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[32] G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, vol. 1 (London: Stevens & Norton, 1846) at 448 [hereinafter *Equitable Jurisdiction*].

[33] *Equitable Jurisdiction*, *supra*, note 32 at 441, note (c).

[34] F.W. Maitland, *Equity: A Course of Lectures*, 2nd ed. by J. Brunyate (Cambridge: Cambridge University Press, 1936) at 25–29 [hereinafter *Equity*].

[35] *Land Law*, *supra*, note 31 at 92.

provide beneficiaries with a remedy for the violation of the terms upon which trustees or their predecessors had accepted the legal title to the land.[36] The failure of the common law to recognize the interests of the settlor and beneficiaries left them vulnerable to exploitation by the trustees, who, as holders of the legal title, were thus able to vindicate legal rights before the courts without regard to the undertakings by which they had acquired that title. Such a widely-used institution demanded the protection of the law and, by the beginning of the 15th century, the Chancellor had begun to direct the performance by trustees, at the suit of beneficiaries, of undertakings upon which title had been conveyed. Within fifty years, this jurisdiction came to be exercised by the Court of Chancery and the formation of an equitable jurisprudence with respect to the regulation of express trusts of real property had begun.[37] The significance of these developments, for the purposes of this chapter, lies not so much in the rules formulated to govern the conduct of trustees, but in the jurisdiction which gave rise to them.

b. The legislative character of equitable jurisdiction

One of the most striking features of the jurisdiction invoked to regulate early trustee/beneficiary relationships was its legislative character.[38] By the 15th century, the common law of real property had come to reflect so closely the social structure of medieval Britain that its doctrines were incapable of adaptation when the basis of social relationships changed. British monarchs could not be expected to support changes which, like the permanent trust, had the purpose and effect of

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[36] *Equitable Jurisdiction, supra*, note 32 at 442.

[37] *Equitable Jurisdiction, supra*, note 32 at 349 & 443-446.

[38] *Equitable Jurisdiction, supra*, note 32 at 418, 419 & 435.

decreasing royal revenues by eliminating the incidents of tenure. It is significant that early opposition to equitable intervention came from Parliament,[39] since it was a legislative jurisdiction which the Chancellor had usurped.

The extent to which equity's jurisdiction was legislative is apparent from the history of the judicial enforcement of the permanent trust:

> ... for not only, in virtue of a law created for private convenience and independent of the common law, was the person legally entitled, deprived of all the beneficial incidents of property; but a distinct title to the enjoyment was introduced, not only unknown to, but at first repudiated by the law: the legal title indeed was not directly affected, yet the legal owner was compelled to exercise his legal rights, so as only to be subservient to the protection and enjoyment of this equitable interest; although by this means as regarded the real owner of the estate, the legal rights of third persons, including the crown, were defeated, which indeed was one of the palpable objects for which trusts were introduced. [Citation omitted.][40]

The need for the assumption of legislative power by the judiciary on that scale no longer exists in major common law jurisdictions. Parliamentary jurisdiction to enact substantive law is well established and, in general, clearly defined. Modern governments are far more responsive to requirements for changes in the law, and tend to intervene with corrective enactments where a clear course of action becomes apparent. In addition, courts exercising equitable jurisdiction have, for many years, made a effort to confine their interventions to cases clearly covered by established principles.[41] The need for this jurisdiction did not, however, disappear entirely. As and when analogous opportunities for its exercise

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[39] *Equitable Jurisdiction, supra*, note 32 at 348-350.

[40] *Equitable Jurisdiction, supra*, note 32 at 435 & 436.

[41] D. Browne, *Ashburner's Principles of Equity*, 2nd ed., (London: Butterworths, 1933) at 34-39 [hereinafter *Principles of Equity*].

arose, courts of equity and later, courts of combined common law and equitable jurisdiction, resorted to its application. In so doing, the judiciary responded, in its way, to the same stimuli which generate legislative change—examples of manifest injustice, seemingly irremediable through the application of existing juridical principles. Lacking the legitimacy of an explicit mandate to effect substantive changes in the law, judges were driven to justifying their interventions on the basis of their perception of generally accepted principles of public morality,[42] variously referred to as "the chancellor's conscience," "the king's conscience," "the conscience of the realm," "the honor of the Crown," and, as befits secular democracies, "public policy".

The technique of equitable intervention provided a formal method of adapting existing doctrine to meet juridical requirements generated by social and economic change. The selection of the relationships to which custom-made obligations were to be applied was a matter of policy, the formulation of which is normally a characteristic of a legislative jurisdiction. Equity arrogated this jurisdiction to itself from an early date. Ultimately, this initiative received legislative sanction in the judicature acts, by which the ascendancy of equitable doctrine was assured.[43] From time to time, specific applications the doctrine of fiduciary obligation have been approved by elected lawmakers through legislation bestowing upon the

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[42] W.T. Allen, "Professor Scheppele's Middle Way: On Minimizing Normativity and Economics in Securities Law" (1993) 56 Law & Contemporary Problems 175 at 183.

[43] *(Supreme Court of) Judicature Act, 1873* (U.K.), 36 & 37 Vic., c. 66, esp. s. 25. For an example of Canadian legislation of similar intent, see *Law and Equity Act*, R.S.B.C. 1979, c. 224, esp. s. 41.

courts the power to regulate incrementally the relationships specified in the enactment.[44]

c. The remedial objective of equitable intervention

The second feature of equity's jurisdiction which is important for present purposes is its remedial objective. Equitable doctrines, and common law doctrines for that matter, are remedial in a narrow sense. Both provide specific relief for claimants wronged at the hands of defendants who have acted contrary to normative standards enforced by the courts. Most equitable doctrines are also remedial in a broader sense. They are aimed at repairing gaps in the regulatory net cast by other sources of law. Equity itself was conceived as a remedial branch of our law; unlike common law, it is not a self-sufficient system.[45] From its inception, equity assumed the existence of the common law, and aimed at supplementing

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[44] See, e.g., the U.S. *Employee Retirement Income Security Act* 29 U.S.C. § 1001—1461 [hereinafter "*ERISA*"] where the jurisdiction is explicitly incorporated into the provisions of the legislation, the *Canada Business Corporations Act*, R.S.C. 1985, c. C–44, ss. 122(1)(a) [hereinafter *Canada Business Corporations Act*] (directors are bound to act honestly and in good faith with a view to the best interests of the corporation) and statutes such as the *Municipal Act*, R.S.B.C. 1979, c. 290, s. 225(4)–(9), (elected officials whose interest in a specific transaction conflicts with the interests of residents as a whole must declare their interest and refrain from voting on that issue). The doctrine of fiduciary obligation is not imported explicitly into the relationship between status Indians and the federal government by the terms of the *Indian Act*, R.S.C. 1985, c. I-5 [hereinafter *Indian Act*]. Section s. 18, which provides that " ... reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart ... " does, however, suggest what Parliament intended the juridical nature of the relationship to be, at least in so far as dealings in reserve land are concerned. Generally speaking, however, the nature of the Indian–Crown relationship must be implied from the legal framework provided by the Act and the history of the dealings between native peoples and Canada's governments. I will discuss this in greater detail in chapters 3 and 4.

[45] *Equity, supra*, note 34 at 19.

and fulfilling it.[46] Equity's limited remedial objective is illustrated by the manner in which it used its jurisdiction over dealings in real property. The acquisition of this jurisdiction did not lead to a wholesale reform of the law of real property as it might have done. Instead, once equity had provided beneficiaries with an effective remedies against abuse of power by their trustees, the courts proceeded to formulate a doctrine of equitable estates modeled very closely upon the doctrine of estates developed by the common law.[47]

This feature of equity's jurisdiction has important implications for studies, like this one, which attempt to predict the nature and scope of the obligations which equity will impose. The remedial objective of equity's jurisdiction diverted the focus of doctrinal development in equity away from the search for logical extensions of legal principles held to be incontestable, and moved it towards an analysis of the juridical requirements of the relationships which required protection. Thus, the remedial quality of equitable doctrines makes it virtually impossible for us to deduce, from a study of the doctrines themselves, whether and how they will be applied in situations not already covered by judicial authority or enactment.[48] The justification for the imposition of equitable obligations in respect of a given relationship, and the content of those obligations, are governed by the social or economic policy which mandates juridical protection of the relationship,[49] and by the extent to which an adequate

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[46] *Equity, supra*, note 34 at 17-19.

[47] *Equity, supra*, note 34 at 31-33 & 107-109. There were, however, some exceptions. Maitland argues that their limited number illustrates the very considerable extent to which equitable estates and interests were modeled on common law concepts. See, *Equity, supra*, note 34 at 32, 109 & 110.

[48] "Fiduciary Obligation," *supra*, note 8 at 1-2 (as applied to the doctrine of fiduciary obligation).

[49] "Fiduciary Obligation," *supra*, note 8 at 11-13.

alternative source of regulation is unavailable to do the job. The only way in which we can predict whether and how equity will intervene to enhance the regulation of a given relationship is by determining the legal policy which supports it, and by identifying regulatory lacunae which threaten to frustrate that policy and which can be filled by the imposition of equitable obligations.

d. The subsidiarity of equitable doctrine

The legislative scope and remedial role of equitable doctrines dictates their subsidiarity. They are not subordinate to common law doctrines in the sense that the common law replaces them where the two conflict. In theory, at least, the opposite is true.[50] Instead, the remedial nature of equitable doctrines makes them redundant as regulatory devices if and to the extent that satisfactory alternatives are available or develop.[51] A given alternative will be satisfactory and will be applied in place of its equitable equivalent to the extent to which it provides the needed regulation and is based on explicit juridical principles. The judicial preference for doctrines supported by explicit principles reflects one of the

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[50] Provision for the ascendancy of equitable doctrines is contained in the judicature legislation of most of Canada's common-law provinces and territories. See, e.g., B.C.'s *Law and Equity Act, supra*, note 43.

[51] Hence, the Supreme Court's reluctance to employ the doctrine of fiduciary obligation where another source of law would provide adequate regulation: In *Frame, supra*, note 18 at 114-116, the majority held that adequate protection was provided by statute. In *Norberg, supra*, note 23, a majority of the panel declined to apply the doctrine because the torts of assault & battery (La Forest, Cory & Gonthier, JJ.), or breach of contract (Sopinka, J.), provided an adequate remedy. In *Lac, supra*, note 23, relief was given on the basis of breach of confidence rather than breach of fiduciary obligation. In *Jirna Ltd* v. *Mister Donut of Canada Ltd* (1973), [1975] 1 S.C.R. 2, the opportunity for private ordering excluded the imposition of fiduciary liability. All of these cases might also have been disposed of in the same way by the application of the doctrine of fiduciary obligation.

basic requirements for judge-made law—the requirement that judicial reasoning be replicable by the legal profession.[52] Replicability is important because the vast majority of legal problems must be resolved by private ordering—by avoiding exposure to liability in doubtful cases, by identifying and fulfilling likely obligations, by negotiating compromises of claims based on an assessment of the risk of liability. If the legal profession cannot predict with reasonable certainty how the courts would dispose of the thousands of legal disputes daily brought to it for resolution, much planning and dispute-settlement would, for all practical purposes, become impossible.[53] The judicial preference for doctrines based on explicit principles is important to my thesis because it almost invariably determines which of two competing doctrines will be selected to regulate a given relationship. It may be useful, at this point, to refer to recent case law which illustrates this phenomenon.

A comparison of the Supreme Court's judgments in *McInerney* v. *MacDonald*[54] and *Norberg* v. *Wynrib*[55] illustrates the degree to which courts avoid the application of the doctrine of fiduciary obligation in cases in which a remedy can be granted on the basis of a doctrine supported by explicit juridical principles. The two judgments were handed down in the Summer of 1992, within a week of one another. Three of the judges [56]sat on both panels. In both cases, an appellant patient called for the

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[52] *The Nature of the Common Law, supra*, note 14 at 10–12.

[53] See, generally, *The Nature of the Common Law, supra*, note 14 at 10–12. The difficulties in applying the doctrine to the relationship between Canada's native peoples and the Crown are described in "New Directions," *supra*, note 7 at 421–425.

[54] *McInerney* v. *MacDonald*, [1992] 2 S.C.R. 138.

[55] *Norberg, supra*, note 23.

[56] La Forest, Gonthier and L'Heureux-Dubé, JJ.

imposition of fiduciary obligations upon the respondent physician which, it was alleged were necessary to protect the integrity of the doctor-patient relationship, a relationship long held to be fiduciary.[57] In *McInerney*, the doctor was held to have violated a fiduciary obligation to her patient by failing to comply with the patient's request for copies of all material contained in her medical file so that the patient could assess the quality of the treatment ordered by her previous physicians. In *Wynrib*, the doctor was held[58] not to have violated a fiduciary obligation by bartering prescriptions for an addictive drug in exchange for sexual favors by the patient.

The *McInerney* case arose out of a request by a patient, Mrs. Margaret MacDonald, to her physician, Dr. Elizabeth McInerney, for copies of her medical file. For some years prior to consulting Dr. McInerney, doctors treating Mrs. MacDonald had prescribed a course of thyroid pills. Dr. McInerney advised Mrs. MacDonald to cease taking this medication, which she did. Mrs. MacDonald then became concerned that the treatment which she had received from other physicians may actually have done her harm. As a first step towards investigating the matter, Mrs. MacDonald asked Dr. McInerney for a copy of her complete medical file, including documents prepared or obtained by her previous physicians. Dr. McInerney gave Mrs. MacDonald copies of the notes and reports which she had prepared, but refused to provide copies of material supplied by other doctors unless they consented.

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[57] E. Vinter, *A Treatise on the History and Law of Fiduciary Relationship and Resulting Trusts*, 3rd ed. (Cambridge: W. Heffer & Sons, 1955) at 76-85 [hereinafter *Fiduciary Relationship & Resulting Trusts*]; L.A. Sheridan, *Fraud in Equity: A Study in English and Irish Law* (London: Sir Isaac Pitman & Sons, 1957) at 93 [hereinafter *Fraud in Equity*].

[58] McLachlin & L'Heureux-Dubé, JJ. dissenting.

Mrs. MacDonald obtained a court order giving her the right to inspect and make copies of the whole file. By the time the case got to the Supreme Court of Canada, Mrs. MacDonald had obtained all of the copies she needed. The Court proceeded to hear the appeal, however, because of the importance of the issues raised. In a unanimous judgment, the Court held that Mrs. MacDonald had a right to inspect all medical records prepared in relation to her request for medical advice and services, and to have copies made of any or all of them.

The issue arose because a request for the disclosure of a patient's medical records involves a consideration of two sets of contradictory requirements of social policy. The first appears to mandate strict control of the records by the physician to the point where even the patient may be denied access. Patients may misinterpret the results of tests and pronounce themselves cured in cases in which an informed analysis of the results would dictate continued treatment and careful monitoring. If patients were entitled to unrestricted access to their doctors' notes, doctors might refrain from including observations which may be used as the basis of a suit for professional negligence or in disciplinary proceedings, thereby leaving an incomplete medical record for practitioners called in to overcome the effects of negligent advice or treatment. Patients themselves may withhold information vital to a correct diagnosis out of fear that the information might be disclosed to government agencies or third parties. Medical files may contain information about a third party which, though important to those treating the patient, ought to remain confidential to protect the third party's right of privacy.

The second of these conflicting requirements appears to mandate the disclosure of medical records, at least to the patient and, occasionally, to persons who not parties to the relationship. Doctors should be able to

communicate information required for the protection of third parties or for public safety. Because disclosure of material in medical files may be compelled for insurance purposes or for legal proceedings, a patient has an interest in satisfying himself that the records are accurate. Doctors should not be allowed to withhold production patient's medical records for the purpose of preventing the patient from investigating the adequacy of the advice and treatment given to him.

The Supreme Court held that a patient's medical records are the property of the doctor, hospital or clinic responsible for their preparation. While ownership of the records gives these parties the right to their custody and control, those rights are not absolute. A patient is entitled to see and make copies of his medical file, unless there is good reason to deny him access. The onus of justifying a denial of access is to be borne by the doctor. The Supreme Court assigned the judiciary a "superintending jurisdiction" for the resolution of doubtful cases.[59] The Court justified its decision on the basis of the fiduciary relationship which exists between patient and doctor. The doctor's obligation to provide the patient with access to his medical file is a fiduciary obligation.[60]

In *McInerney*, there was no other juridical doctrine which would give the patient a right of access to her file and, at the same time, allow the doctor to restrict or permit access as the best interests of the patient and the public may require. An analysis based exclusively on property rights would not have given the non-owner the rights of access or control needed to protect all interests. As it could not be said with certainty that Dr. McInerney would have agreed at the outset that Mrs. MacDonald should be

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[59] *McInerney, supra,* note 54 at 159.

[60] *McInerney, supra,* note 54 at 154 & 155.

entitled to inspect and make copies of her medical records, the dispute could not be resolved by implying a right of access into the contract for medical services.[61]

In the result, the Court declared that the physician was under a fiduciary obligation to act "with utmost good faith and loyalty towards his patient."[62] Good faith and loyalty required that the physician afford his patient an opportunity to inspect and copy his own medical records on request, but this right of access could be restricted or denied by the physician for good reason. One good reason might be the protection of the patient or of third parties. There might be others as well. In the final analysis, the judiciary granted itself jurisdiction to declare what they were. This is a clear piece of judicial legislation enacted under the guise of enforcing a fiduciary obligation. The scope of this new fiduciary obligation to provide access to medical records is clearly prospective. It is aimed at regulating the medical profession's response to requests by other patients rather than simply providing Mrs. MacDonald with a copy of her file.[63]

In *Norberg* v. *Wynrib*,[64] the plaintiff, a young woman addicted to pain-killing drugs, sought to obtain supplies to feed her addiction from the defendant medical practitioner on the pretense that she needed the drugs to cope with physical injuries. The defendant soon realized the real reason for which his patient wanted drugs. Instead of prescribing treatment aimed at helping her to deal with her addiction, however, the defendant exploited her dependency by providing her with drugs or prescriptions in exchange

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[61] *McInerney, supra,* note 54 at 143 & 146.

[62] *McInerney, supra,* note 54 at 152.

[63] Mrs. MacDonald already had the records at the time the case was heard.

[64] *Norberg, supra*, note 23.

for sexual favors. She sued for damages for battery, negligence, breach of the contract for medical advice and treatment, and breach of fiduciary obligation. The Supreme Court panel which heard the case unanimously agreed that the plaintiff was entitled to damages, but individual members disagreed about the basis of liability.

Mr. Justice La Forest[65] held that the plaintiff had a valid claim for damages for the tort of battery. Madam Justice McLachlin[66] held that the defendant had violated a fiduciary obligation to prefer the physical well-being of his patient to his own sexual needs. Mr. Justice Sopinka ruled that the defendant was liable for breach of contract and in tort because of his failure to treat the Plaintiff's drug addiction in accordance with the standards of his profession.[67]

While it may be true to say, in general, that patients repose trust and confidence in their physicians and rely on medical advisers to put the patient's interests above their own, this was not a fair description of the relationship which existed between Ms. Norberg and Dr. Wynrib. Ms. Norberg did not really consult Dr. Wynrib for medical advice or treatment, but to get drugs to support her addiction. At first, she lied about her medical condition in order to get pain killers. Once Dr. Wynrib realized why she was asking for the drugs, he confronted her with her addiction and offered to trade prescriptions for sexual favors. Initially, Ms. Norberg refused, and obtained prescriptions from other doctors, or bought drugs from traffickers. Only when she could not get enough drugs from these sources did she return to Dr. Wynrib. She knew when she went back to

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[65] Gonthier & Cory, JJ., concurring.

[66] L'Heureux-Dubé J., concurring.

[67] *Norberg, supra*, note 23 at 313-316.

Wynrib's office what she would have to do to get further prescriptions from him. She submitted to his sexual advances in exchange for drugs or prescriptions.

If Dr. Wynrib betrayed anyone's trust, it was the trust which the public reposed in him when it gave him authority to authorize the purchase of addictive drugs for therapeutic purposes. The public expected him to use this authority exclusively for the treatment of his patients. The general public is prohibited from purchasing such drugs freely because of their potentially addictive nature. Medical practitioners may authorize sales to their patients because their knowledge and training enables them to ensure that patients obtain the beneficial effect of the drugs without unduly exposing them to their undesirable side effects. In this case, Dr. Wynrib used his authority to prescribe potentially addictive drugs for the purpose of satisfying his own sexual needs.

There are a number of cases in which the doctrine of fiduciary obligation has been invoked to punish violation of a public trust. Some of them were relied on by Madam Justice McLachlin in support of her judgment that the doctrine should be applied in *Norberg*.[68] Her vision of the legislative scope of the doctrine is apparent from the following extract from her reasons for judgment:

> The case at bar is not concerned with the protection of what has traditionally been regarded as a legal interest. It is, however, concerned with the protection of interests, both societal and personal, of the highest importance. Society has an abiding interest in ensuring that the power entrusted to physicians by us, both collectively and individually, not be used in corrupt ways, to borrow the language of *Reading* v. *Attorney-General* .... On the other side of the coin, the plaintiff, as indeed does every one of us when we put ourselves in the hands of a physician, has a striking personal interest in obtaining professional medical care free of exploitation for the

[68] *Norberg, supra*, note 23 at 275–277.

> physician's private purposes. These are not collateral duties and rights created at the whim of an aggrieved patient. They are duties universally recognized as essential to the physician-patient relationship.[69] [Citation omitted.]

The difficulty with applying the doctrine of fiduciary obligation so broadly is that it appears to open the entire relationship of doctor and patient to regulation according to rules based on indeterminate notions such as loyalty and good faith. It would also cast into doubt the juridical basis of other relationships involving professional advisers who have been granted discretionary authority for the benefit of their clients.[70] As Mr. Justice Sopinka put it, "fiduciary obligation 'must be reserved for situations that are truly in need of the special protection that equity affords.'"[71]

The majority rationalized their decision according to the doctrine of battery. Dr. Wynrib had physically abused Ms. Norberg and, as a result, was liable for general and aggravated damages. Ms. Norberg's apparent consent did not provide Dr. Wynrib with a defense because it was not voluntarily given. The applicability of the doctrine of battery made it unnecessary for the majority to consider negligence, breach of contract or breach of fiduciary duty.[72]

In *Norberg*, the disagreement among members of the Supreme Court centered around the doctrine to be applied in granting relief, rather than whether the relief claimed should be granted at all. The use of the doctrine of fiduciary obligation to regulate the relationship of doctrine and patient,

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[69] *Norberg, supra*, note 23 at 276 & 277.

[70] This is, of course, exactly what McLachlin, J. had in mind: " ... physicians, and all those in positions of trust, must be warned that society will not condone abuse of the trust placed in them" (*Norberg, supra*, note 23 at 301).

[71] *Norberg, supra*, note 23 at 312, quoting from his own judgment in *Lac.*

[72] *Norberg, supra*, note 23 at 246, although it did require importing the concept of undue pressure from contract law.

and its application to punish breaches of a public trust, were sanctioned by previous authority and were consistent with the decision, one week earlier, in *McInerney* v. *MacDonald*.[73] What made the difference was that there was an alternative doctrine available to resolve the problem in *Norberg*, but not in *McInerney*.

e. Discretion and trust as essential characteristics

Fiduciary relationships are often said to share the essential elements of the relationship of trustee and beneficiary. This is the reason for which the Courts regard the relationship of trustee and beneficiary as a sort of paradigm. Judges compare a given relationship to that of trustee and beneficiary and impose on the fiduciary some or all of the obligations which equity imposes on trustees. The similarity of the obligations varies directly with the degree of similarity between the two relationships, or so the argument goes. Before leaving the subject of permanent trusts, it may be useful to examine the validity of this thesis.

The relationship between the settlor and the beneficiaries, on the one hand, and the trustees on the other, can be seen in its simplest form in the permanent trust. Here, the settlor had to convey the legal title to his property to the trustees if the arrangement was to confer upon the settlor's descendants or creditors the benefits for which it was created. At the same time as the settlor transferred his property to his trustees, however, he also surrendered his ability to hold them to the undertakings upon which they had accepted the title, since the common law of the day would not enforce these promises. Possession of the legal title to the settlor's property and

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[73] See, e.g., "Unconscionable Transactions," *supra*, note 27 at 53 & 54, where Professor Waters suggests that the imposition of fiduciary liability would be appropriate to regulate the relationship between a patient and a medical practitioner found "abusing the intimacy of his position for personal gain."

the lack of a suitable enforcement mechanism gave trustees the opportunity to exploit the interests of those who depended upon them to fulfill their promises. Left unregulated, this opportunity would have destroyed what had become a useful and economically important institution. Moreover, the opportunity was inherent in the relationship of trustee, settlor and beneficiary in the permanent trust of property. That is, the permanent trust could not have achieved its objective without an absolute transfer of ownership to trustees, and with it, the power to control the disposition of the property which formed the subject–matter of the trust, a power which the common law reserved exclusively to the holders of the legal title.

Trustees appointed under permanent trusts undoubtedly had power to affect the legal interests of the beneficiaries. The question that arises is whether that power was discretionary in the normal sense of the word. Unlike trustees appointed to administer active trusts—trusts which imposed obligations to manage property, invest income, sell assets, and so forth—trustees appointed under permanent trusts were merely the puppets of the settlor and his beneficiaries. Their sole function was to ensure that there was there was always a living person seized of the property.[74] Their title was purely nominal, and their only obligations were to hold the title to the property, and deal with the land in accordance with the directions of the settlor and the beneficiaries. Thus, the discretion often said to be the hallmark of the fiduciary relationship[75] was largely

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[74] The practice was for the settlor to make a grant to a number of persons as joint tenants. When one trustee resigned or died another would be appointed in his place. Transfers of title from one joint tenant to another did not attract feudal dues or subject the land to the possibility of escheat. See *Land Law*, *supra*, note 31 at 93.

[75] "Fiduciary Obligation," *supra*, note 8 at 4–7.

lacking in the relationship of trustee and beneficiary in the permanent trust, the first "fiduciary" relationship.

Another element often associated with fiduciary relationships is a personal conviction of trust or confidence which beneficiaries are said to feel towards their fiduciaries. Some writers argue that a fiduciary relationship exists wherever such feelings have, to the knowledge of the fiduciary, induced a beneficiary to permit a trusted person to exercise, in his stead, powers possessed by the beneficiary.[76] Under this vision of the fiduciary relationship, the imposition of fiduciary obligations is nothing more than the judicial enforcement of the legitimate expectations of the beneficiary. The beneficiary is, to the knowledge of the fiduciary, given to believe that, if the fiduciary acts at all, he will always act, in certain or all matters touching the beneficiary's interests, in a manner aimed at promoting those interests to the exclusion of all other interests, even those of the fiduciary himself. Feelings of trust and confidence are often stressed in the analysis of undue influence cases, where the fiduciary's influence over the beneficiary's decisions actually does arise out of the beneficiary's conviction that the fiduciary will devote his activities exclusively to the promotion of the beneficiary's interests.

Undoubtedly, settlors would be most unlikely to grant property in trust unless they had confidence that the grantees would carry out the obligations set forth in the trust instrument. It was not, however, necessary for a petitioner who sought equitable relief against his trustees to show that he, himself, actually trusted them to carry out their undertakings in the same sense that the claimant in an undue influence case had to show that he trusted his fiduciary to act in his best interests. One of the major

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[76] *Fiduciary Relationship & Resulting Trusts, supra*, note 57 at 9 & 10.

functions of permanent trusts was to allow landowners to settle property on their descendants in a manner different from that provided for by the common law of descent.[77] The settlor would only know personally the original trustees to whom he had conveyed the title to his land. In many cases, the beneficiaries would be in their minority or not yet born at the time the trust was established and would have had no hand in appointing the trustees.[78] The trustees themselves were expected to arrange for their own succession. Following the death or resignation of the first trustees, both the settlor and the beneficiaries would have to make do with successors selected by the trustees themselves. When courts of equity spoke of this relationship as a relationship of "trust" or "confidence," they were not referring to the state of mind of the settlor or of his beneficiaries, but to a role created by a set of juridical rules devised to guarantee the result for which the arrangement had been made in the first place:

> [The duties of permanent trustees] became, as it were, part of the Public Law, quite independent of contract; and they were enforced partly on public principles, to secure the enjoyment of property in the only way that uses and trusts could be rendered effectual.[79]

3. The Application of the Technique to Analogous Relationships

The technique established for the regulation of permanent trusts was a spectacular success, and the courts were quick to recognize its regulatory potential. Over the next 500 years, equity applied the same technique over

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[77] The common law denied landowners the power to devise property by will. The laws of descent often prevented landowners from settling property on second or subsequent children or daughters.

[78] Professor Weinrib makes the point that actual trust or confidence is not a necessary prerequisite for a fiduciary relationship in modern law. See, "Fiduciary Obligation," *supra*, note 8 at 5.

[79] *Equitable Jurisdiction*, *supra*, note 32 at 449.

and over again to regulate other relationships. Principal and agent, parent and child, solicitor and client, director and shareholder, teacher and pupil, doctor and patient, priest and penitent, would all come to be characterized as fiduciary relationships and all would, at least to some extent, be regulated by rules which equity had devised to guarantee the integrity of the relationship of trustee and beneficiary under the express trust of property.

The rules devised for the regulation of the diverse relationships to which the doctrine of fiduciary obligation is applied vary widely from one to the other, but the technique of judicial intervention used to impose them remains true to its 15th century model. Fiduciary obligations are imposed where the relationship at risk is of social or economic importance, where the relationship contains, as an inherent feature, an opportunity for one party to exploit the interests of another, where the existence of the opportunity for exploitation threatens the integrity of the relationship, where no other equally effective source of regulation exists, and where victimization can be remedied by the imposition of obligations designed to align the interests of potential victimizers with those of potential victims.

In this section, I will skip 400 years of legal history and examine the application of the doctrine of fiduciary obligation to the regulation of a truly *sui generis*[80] relationship—the relationship between human stake holders in a business enterprise and the corporate legal fiction invented as

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[80] J.H. Gross, *Company Promoters* (Tel Aviv: Tel Aviv University, 1972) at 69 & 70, quoting M^{c}Clung, J. in *O'Rorke* v. *Geary*, 56 A. 541 (1903). A *Sui generis* relationship, in the sense used here, refers to the fact that common law principles do not provide adequate protection to parties who depend upon such relationships for the enjoyment of legal or practical interests. The relationship between the Crown and Canadian native peoples is certainly constitutes a *sui generis* relationship in this sense. See, *Guerin*, *supra*, note 1 at 387.

a shield against unlimited financial liability and as a medium for the ordering of their disparate interests. I will concentrate on one aspect of this relationship, the point at which the legal fiction acquires the assets to operate the joint enterprise on behalf of its human associates. I have chosen this relationship to demonstrate the extension of the doctrine of fiduciary obligation beyond the trustee/beneficiary relationship because it best illustrates the basis upon which the courts find other relationships to be *analogous* to that of trustee and beneficiary. In my view, the basis for this analogy is as close to a definition of the fiduciary relationship as we are likely to get.

a. The regulation of company promoters

By the late 1800s, British company law had well defined expectations as to how a corporation was to operate once it had an independent board of directors and members with a financial stake in its future. Individual investors, mobilised by enlightened self-interest and restrained by the requirements of shareholder democracy,[81] were to ensure that the best interests of the members as a whole were considered and promoted in their company's commercial dealings. How the business was to get to this Hobbesian nirvana in the first place—how the enterprise was to pass from proprietorship or partnership control to corporate control—was not provided for by the legislation, nor, for that matter, by the common law.

Before the public would buy shares, the company had to have an undertaking which people could be convinced was worth investing in. Company promoters were more than willing to assemble and sell complete business enterprises, but setting a fair price required arm's length negotiations. Embryonic 19th century corporations, whose first directors

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[81] Conveniently outlined in Table A.

often seemed to consist of the promoter, his confederates and, occasionally, a few credulous notables recruited for cosmetic effect,[82] were not likely to engage in the nose–to–nose bargaining required to get the best deal for prospective investors. As in all situations in which one party gets to bargain with himself over someone else's money, abuses were common and costly.[83] The years preceding effective regulation of corporate securities transactions provided dishonest promoters with golden opportunities for fleecing investors. The usual method was for the promoter to sell assets to his nascent corporation for more than they were worth, take payment in shares, sell his newly acquired stock before the asset transfer was examined too closely,[84] and run. To contain the damage, the courts formulated standards to govern the conduct of promoters in transferring the enterprise to the corporation. As a first step, the courts declared that a fiduciary relationship existed between the promoter and his company.[85]

The promoter was said to be under a fiduciary obligation to his company to disclose the fact that he had an interest in the property that was being sold,[86] or that he stood to receive a commission on the sale.[87]

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[82] This, of course, assumes that the history of British company law can be accurately inferred from the reasons for judgment recorded in the Law Reports.

[83] J. Gold, "The Liability of Promoters for Secret Profits in English Law" (1943) 5 U.T.L.J. 21 at 21-25 [hereinafter "Secret Profits"].

[84] In fairness, it should be added that even an honest promoter might have been driven to overprice assets sold to his corporation because of his inability to secure fair compensation for his services by lawful means: W.J. Brockelbank, "The Compensation of Promoters" (1934) 13 Oregon L. Rev. 195 at 201-204.

[85] N. Isaacs, "The Promoter: A Legislative Problem" (1925) 38 Harvard L. Rev. 887 at 893 & 894.

[86] *Erlanger* v. *The New Sombrero Phosphate Company* (1878), 3 App. Cas. 1218 at 1229, 1236, 1255, 1260, 1269,1273 & 1284 (H.L.).

[87] *Emma Silver Mining Company (Limited)* v. *Lewis* (1879), 40 L.T.R. 749 at 751 (C.A.).

Disclosure could be made in one of three ways. It could always be made directly to a board of directors who were independent of the promoter.[88] In cases where no further distribution of shares was intended, it could also be made directly to all parties who then held shares.[89] In cases in which further distribution was contemplated, constructive disclosure could also be made to future shareholders by means of a prospectus or similar public document.[90]

Where the promoter had failed to make the required disclosure, the contract of sale could be set aside at the instance of the company.[91] Where the company elected to keep the property, or was unable to obtain rescission, it could recover secret commissions,[92] and, in most cases, secret profits.[93]

Today, most of the major problems of this type have been addressed by legislation,[94] or by changes in commercial practice,[95] the latter being

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[88] *Erlanger, supra*, note 86; *Re Hess Manufacturing Company* (1894), 23 S.C.R. 644 at 668.

[89] *Salomon* v. *A. Salomon and Company, Limited* (1896), [1897] A.C. 22 at 57 (H.L.); *Canada (A.G.)* v. *Standard Trust Company of New York*, [1911] A.C. 498 at 505 (P.C.).

[90] *Gluckstein* v. *Barnes*, [1900] A.C. 240 at 254 (H.L.).

[91] Provided the company could still make restitution: *Lagunas Nitrate Company* v. *Lagunas Syndicate*, [1899] 2 Ch. 392 at 434 (C.A.).

[92] *Lydney and Wigpool Iron Ore Company* v. *Bird* (1886), 33 Ch.D. 85 at 94 (C.A.).

[93] Secret profits could only be recovered if the promotion had started *before* the promoters acquired the property: "Secret Profits", *supra*, note 83 at 29-31.

[94] Fiduciary law is still left to regulate promoters' duties of disclosure in cases in which exemptions are granted from prospectus requirements: F.H. Buckley, *Corporations: Principles and Policies*, 2nd ed. (Toronto: Edmond Montgomery, 1988) at 236, and in the case of private companies: J.H. Farrar, *Company Law* (London: Butterworths, 1985) at 38.

[95] Farrar, *supra*, note 94 at 38.

induced, perhaps, by the establishment of effective systems for licensing and regulating securities dealers. Companies may now adopt written pre-incorporation contracts.[96] Legislation regulating securities transactions now requires extensive disclosure of dealings between the company and its promoter,[97] and provides shareholders with rights to bring civil damage actions directly against promoters, amongst others, for breach of the disclosure requirements.[98]

For present purposes, what is important is not so much the content of the rules used to regulate the relationship between the promoter and his company, but why fiduciary law was seen to be a suitable tool for the job and how it was used to fix the problems. As formulated by the courts, the problem posed by promoter cases was similar to that presented by undue influence cases. The corporation was unable to reach a decision independently of the self-interest of its promoter just as the servient party was unable to form a judgement independently of the influence exercised by the dominant party.[99] Thanks to this analysis, the courts concluded that they could deal with problems with promoters in the same way that they had dealt with problems of presumed undue influence: the party seeking to uphold the transaction was to be required to justify it, otherwise, it would be

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[96] For example, *Canada Business Corporations Act*, *supra*, note 44, s. 14. The rule that only *written* contracts can be adopted is intended to encourage disclosure by promoters: R.W.V. Dickerson, J.L. Howard & L. Getz, *Proposals for a New Business Corporations Law for Canada*, Vol. 1 (Ottawa: Information Canada, 1971) at 23 & 24.

[97] See, e.g., Ontario's *Securities Act*, R.S.O. 1990, c. S.5, ss 53(1), 56(1), 58 & 61; Regulation 29 & Form 12 (Item 15).

[98] See, e.g., Ontario's *Securities Act*, *supra*, note 97, ss 2 ("misrepresentation") & 130. Roughly comparable legislation has existed since the turn of the century. See, e.g., 8 Edw. 7, c. 69, s. 84.

[99] Or at least, at the dominant party's disposal.

set aside at the instance of the party whose interests it prejudiced.[100] What the promoter had to do to justify the transaction was to show that the company or its shareholders had exercised "an independent and intelligent judgement" in agreeing to the promoter's terms.[101]

The precise conduct required to bring about the state of informed self-interest which the law seemed to favour in both situations was dictated by the circumstances characteristic of each type of case. Independent advice was usually required to free an unduly influenced person from the ensnarement of his ill-advised trust or disequilibrating preoccupation. As for the world of commerce—the world of rational maximisers of utility—mere disclosure of a conflict of interest to a responsible manager or to a prospective investor would usually bring him out of any torpor induced by a promoter's soothing patter.[102]

Fiduciary law's treatment of the promoter, on the one hand, and the dominant party in undue influence cases, on the other, differed in another

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[100] The analogy drawn by the courts between these two types of case can be clearly seen in the judgment of Lord Penzance, who went so far as to say that the principles needed to regulate the relationship of promoter and company were analogous to those applied in regulating the relationship of, amongst others, priest and penitent: *Erlanger, supra*, note 86 at 1230. This analogy is discussed in *Fiduciary Relationship and Resulting Trusts, supra*, note 57 at 142.

[101] *Erlanger, supra*, note 86 at 1236; Cf. *Zamet* v. *Hyman*, [1961] 3 All E.R. 933 at 938 (C.A.), where it was held that, in presumed undue influence cases, the defendant had to prove that the servient party had consented to the transaction after "full, free and informed thought about it."

[102] In the absence of specific undertakings to investigate and advise, equity's disclosure requirements are aimed at putting beneficiaries in a position in which they can evaluate the orientation of the parties upon whose advice or services they depend. As suggested above, the information required to make this evaluation depends largely on the ability of the beneficiaries to distance themselves from their fiduciary's influence. Each class of beneficiaries has unique requirements. I will discuss the requirements of native groups in chapter 4.

respect. A presumption of undue influence did not arise where the impugned transaction was initially beneficial to the servient party.[103] In promoter cases, failure to disclose would render a sale voidable at the instance of the company even though the transaction was, at the outset, beneficial to the company.[104] The latter rule might make it possible for a company to get out of a transaction that seemed like a good idea at the time, but subsequently turned out to be uneconomical. This result illustrates prospective purpose in decisions in promoter cases. This type of financial penalty is to be contrasted with the stern lecture from the bench or perhaps a requirement to pay costs, which were the ultimate judicial rebuffs meted out in particularly blatant undue influence cases. The harsher treatment reserved for dishonest promoters is certainly explained by the gravity of the threat to the British economy which would inevitably follow from a loss of confidence in the integrity of the corporate medium of commercial and industrial enterprise.

In the case of sales at an overvaluation to a promoter-owned company, the party wronged as a result of a promoter's secret commissions or profits could not logically have been the corporation itself. As long as the promoter and his nominees were its only shareholders and directors, it would not have mattered that the company had become obliged to buy at an overvaluation.[105] The true market value of the overpriced assets would only have been reflected in the value of the shares held by those who committed their company to the transaction in the first place.

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[103] *National Westminster Bank Plc* v. *Morgan*, [1985] 1 A.C. 686 at 704, 707 & 709 (H.L.). Cf. *C.I.B.C. Mortgages Plc* v. *Pitt* (1993), [1994] 1 A.C. 200 at 209 (H.L.).

[104] *Beck* v. *Kantorowicz* (1857), 3 K. & J. 230; 69 E.R. 1093 at 1100 (V.C.).

[105] Except to creditors, who, it seems, could look after themselves: D.L. Dodd, *Stock Watering* (New York: Columbia University, 1930) at 20 & 21.

A problem would arise, however, when somebody bought shares believing that the price the company was required to pay for the undertaking reflected the market value of the assets. The investor who bought shares before the company had established any record of earnings was most likely to be hurt by an inflated book value put on the company's assets.[106] From 1867 on, such investors had, and still have, a statutory right of action against promoters and directors for misrepresentations in the prospectus.[107]

It was, nevertheless, thought necessary to give the company a right to recover secret commissions or profits, or to rescind asset sale contracts, or both. In order to afford the company a right of rescission, the courts treated promoters as outsiders and declared that the company had been deceived by its promoter and directors. This finding led the courts into a preposterous exercise in corporate psychoanalysis. The majority of the minds that constituted the company's decision-making faculty were clearly bent on concealment and fraud, and were not for a moment fooled by their own skulduggery. Separating the corporate *pensée* from that of its directors required the courts to select from the wrongdoers' store of information only those facts which were suitable for the delicate sensibilities of an ingenuous corporation and to declare that that was all that the company knew of the transaction. The rest of the knowledge, especially the bit about the fraud, had to be rejected as information which the promoter and his cronies would not pass on to the company for fear disclosure would torpedo their secret–

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[106] Dodd, *supra*, note 105 at 5.

[107] See 30 & 31 Vict., c. 131, s. 38. The right was initially restricted to allottees of shares: *Peek* v. *Gurney* (1873), [1861-73] All E.R. Rep. 116 at 127, 133 & 134. Under current legislation, subscribers who buy during a distribution period (when they are most likely to be affected adversely by misrepresentations in the prospectus) may recover damages for losses occasioned by reliance on material omissions or false statements. See note 105.

profit–making scheme.[108] The whole exercise was, of course, a thinly veiled rationalisation for a judicially enacted set of regulations aimed at preserving the integrity of the corporate medium.

b. The basis of the analogy of fiduciary relationships to trusts

The judicial regulation of corporate promotion by the imposition of fiduciary obligations points to the circumstances in which a given relationship will be held to be analogous to the relationship of trustee and beneficiary, and consequently, a suitable candidate for fiduciary regulation.

One feature common to the relationship of promoter and investors and that of trustee and beneficiaries is that both played an important role in the economic life of the nation. Raising capital through the sale of shares in public corporations was essential to the maintenance of Britain's competitive position in international markets. Investor confidence was, however, anything but a given. The abuses of the promoters of the bubble companies of the 1700s and the consequent financial ruin of some of Britain's most prominent families would still be associated with investment in public corporations at the time the companies acts of the first half of the nineteenth century came into force.[109] If Britain were to maintain its competitive advantage, investors had to be assured that the price of a company's shares bore some reasonable relationship to the value of its assets. The activities of the Baron Erlangers of this world, left unchecked, threatened to undermine that confidence. Pending the establishment of institutional controls or regulatory legislation, the task of protecting the public fell on the shoulders of the judiciary, just as the task of protecting the *cestuis que trustent* and the

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[108] *Lagunas, supra*, note 91 at 431.

[109] See L.S. Benjamin, pseud. Lewis Melville, *The South Sea Bubble* (London: D. O'Connor, 1921).

cestuis que use had fallen on the shoulders of the Chancellor in the early years of the 1400s...

The second characteristic of both relationships is the existence of an opportunity, inherent in the relationships themselves, which enabled one or more of the parties to exploit the interests of others. The companies acts interposed a juristic person between the promoters, who created the public company and controlled its decision making powers during one of the most critical periods of its existence—the time when the company acquired its business enterprise—and those who ultimately paid for that enterprise. This gave promoters an opportunity to exploit the interests of investors which was not adequately regulated by company legislation or existing doctrine.

Legislators had provided corporate stakeholders with a business organisation designed to be run on democratic principles. Control of corporate decision-making was to be left in the hands of those who held the majority of shares carrying voting rights. Market forces were to be relied on to steer the undertaking towards maximum profitability. Those with the greatest financial stake in the wise management of the business enterprise would, and should, have the power to direct it. As a group, they would have the greatest economic incentive to ensure that the company's affairs were governed wisely. Those with a lesser stake would benefit from the self-interest of the majority, and it was unnecessary, and perhaps even undesirable, that they should be able to control its activities. The whole thing represented a touching faith in the integrity of economic man.

Experience soon showed, however, that this model did not take account of a number of situations in which those in control of the company had an economic incentive to have it behave in a manner which was not aimed at maximising its commercial potential, but in maximising theirs. One

such situation occurs when companies buy assets from those who make its decisions. The situation was summed up by Lord Blackburn in *Erlanger*:

> Neither does [the *Companies Act 1867*] impose any duty on those promoters to have regard to the interests of the company which they are thus empowered to create. But it gives them an almost unlimited power to make the corporation subject to such regulations as they please, and for such purposes as they please, and to create it with a managing body whom they select, having powers such as they choose to give to those managers, so that the promoters can create such a corporation that the corporation, as soon as it comes into being, may be bound by anything, not in itself illegal, which those promoters have chosen. And I think those who accept and use such extensive powers, which so greatly affect the interests of the corporation when it comes into being, are not entitled to disregard the interests of that corporation altogether. They must make a reasonable use of the powers which they accept from the Legislature with regard to the formation of the corporation, and that requires them to pay some regard to its interests. And consequently they do stand with regard to that corporation when formed, in what is commonly called a fiduciary relation to some extent.[110]

The absence of any other common law or equitable doctrine which would provide the required protection was guaranteed by the interposition of a juristic person between the buyers and sellers of the corporate enterprise, and by the desire of legislators to allow market forces to shape the ultimate relationship. By the turn of the century, the law of contract and agency and doctrines such as deceit, misrepresentation and fraud provided reasonable protection against the genus of chicanery preferred by dishonest promoters. Nevertheless, these sources of regulation were not adequate to protect the relationship between company promoters and investors. Many

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[110] *Erlanger, supra*, note 86 at 1268 & 1269. Lord Blackburn's analysis of the responsibility which falls upon the shoulders of the beneficiary of statutory powers, and the doctrine which he applied to enforce it, is similar to the approach used by the Supreme Court in *Guerin*. The *Indian Act* gives the Crown sweeping powers over the disposition of reserve land without imposing corresponding responsibilities. In *Guerin*, the doctrine of fiduciary obligation was summoned to ensure that the government " ... ma[d]e a reasonable use of the powers which they accept from the Legislature."

of the existing doctrines depended on direct dealings among the parties to an impugned transaction.[111] Notionally, the parties to the purchase of the corporate enterprise were the promoters and the corporation itself. As long as a majority of the corporation's guiding minds consisted of the promoters or their nominees, the corporation had access to the information necessary to make an informed decision and could not be said to have suffered from lack of full disclosure.

The asset purchase was, of course, usually a preliminary stage in the ultimate fraud which would take place when the corporation's shares were sold to unsuspecting investors. This transaction involved the corporation itself and the parties who subscribed for shares. Analysing these dealings on the basis that the company had misrepresented the value of its own assets would give the shareholders judgement against their own company, thereby reducing the value of all of its shares by an amount related in some way to the difference between the true value of the company's assets and the price the claimants had paid. Shareholders who were innocent of any complicity in the over valuation of the stock would also suffer a reduction in the value of their shares. It would be virtually impossible to determine with reasonable accuracy the actual loss suffered by innocent subscribers. For example, the factors which determine whether an individual will invest in a given enterprise vary from investor to investor and include such intangibles as the subscribers personal assessment of the earning potential of the corporation. In addition, it is doubtful whether large numbers of individuals, each of whom would suffer a comparatively small and difficult-to-prove loss, would have the economic incentive to pursue such an action. More likely, individuals would simply avoid investing in untried corporate

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[111] R.C. Clark, *Corporate Law*, (Boston: Little, Brown & Co, 1986) at 716 & 717 [hereinafter *Corporate Law*].

enterprises and the ultimate loss would be to the country's competitive position.

Finally, the trustee/beneficiary relationship was analogous to that of promoter and investors because the opportunity for exploitation inherent in both relationships could be regulated, albeit somewhat inelegantly, by the imposition of obligations designed to align the interests of the potential victimiser with those of his potential victims. The victim was not really the company, of course, but the law made use of the corporate personality to the extent that it was convenient to do so and abandoned it where it interfered with overall regulatory objectives. The law required disclosure of the promoters' conflict of interest to human beings who had a real stake in the company's success, who were likely to understand the significance of the conflict of interest and who had the power to have the company seek redress for the wrong done to it by the dishonesty of its promoters. Up to a point, this result could be achieved by declaring that the promoters stood in a fiduciary relationship to the corporation and that, as fiduciaries, they had an obligation to declare their conflict of interest and abstain from participating in the ratification of transactions in which they were interested. This approach would only produce a just result, however, where the company's directors were independent of the promoters.

In cases in which the promoters actually comprised the guiding minds of the company, it was necessary to define the fiduciary obligations in such a way as to provide some compensation to innocent investors who had bought stock, or were likely to do so, in the belief that the price which they had paid for the company's shares would reflect the fair market value of the assets whose purchase they had financed. A reasonable level of regulation could be obtained by declaring that the company had been deceived and stripping the dishonest promoters of what they had gained from the transaction.

Alternatively, the courts could include amongst the promoters' fiduciary obligations the duty to act exclusively in the best interests of the company, and impose on the promoters the burden of proving that they had discharged this obligation. Proof of unconscionable dealings or, what usually amounted to the same thing, failure to exonerate themselves from the implication of dishonesty arising from the circumstances surrounding the asset purchase, usually entitled the company to have the transaction set aside, recover undisclosed profits, or both. In this way, innocent investors duped by promoters' dishonesty would receive some compensation by way of an increase in the value of their stock and the public record of the decision would serve as a lesson for the future.

4. Conclusion

In this chapter, I argue that a judicial declaration that a relationship is fiduciary is nothing more than a rationalization for the imposition of fiduciary obligations. There is no list of characteristics common to all such relationships which we can use to predict reliably whether a given relationship will be declared to be fiduciary, other than the need for regulation through the doctrine of fiduciary obligation. The best that Canadian courts have offered so far is a series of " ... indicia that help recognize a fiduciary relationship rather than ingredients that define it."[112] The Supreme Court has, however, cautioned us that " ... the categories of fiduciary, like those of negligence should not be considered closed ...."[113] On their own, the predictive value of these is indicia is rather low. The situation that currently prevails is that " ... the court will recognize a

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[112] *Hodgkinson, supra*, note 8 at 408 & 409.

[113] *Guerin, supra*, note 1 at 384.

fiduciary relationship when it sees one although it may not be able to say why and it may not even call it that."[114]

What the Supreme Court panel in the *McInerney* case was doing when they provided a list of the indicia which " ... help [us] to recognize a fiduciary relationship ... " was to describe some of the elements which give rise to an opportunity for exploitation. A discretionary power to affect the legal or practical interests of another certainly provides such an opportunity. As Mr. Justice La Forest concedes, however, these criteria are merely descriptive. They do not explain why some relationships which do not include such a power have been held to be fiduciary,[115] and they do not explain why some relationships which do contain such a power have been held not to be fiduciary.[116]

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[114] *Lefebvre* v. *Gardiner* (1988), 27 B.C.L.R. (2d) 294 at 299 (B.C.S.C.).

[115] See, e.g., *Reading* v. *A.G.*, [1951] A.C. 507 (H.L.), where a sergeant in the British armed forces on duty in Egypt accepted payments from smugglers in exchange for his escorting civilian vehicles carrying contraband. He wore his military uniform on these occasions as it was generally known that Egyptian authorities would not search civilian vehicles escorted by British servicemen who were on duty. The Sergeant was cashiered and returned to Britain, where the government obtained judgment against him for the amount of the payments he had received from the smugglers. It is difficult to see how the Reading's conduct could be characterized as the exercise of a discretionary power, or, having so characterized it, how concepts of "discretionary power" and "vulnerability" broad enough to cover Sgt. Reading's situation would enable us to distinguish a fiduciary relationship from any other situation in which circumstances give rise to an opportunity for exploitation. On that basis, a burglar who finds an unlocked window would owe a duty of loyalty to the occupiers of the premises he intends to loot.

[116] See, e.g., *Jirna, supra*, note 51, where a franchisor was sued for breach of fiduciary obligation in failing to pass on to his franchisees rebates for volume purchases paid to the franchisor by suppliers. The franchise agreement required franchisees to buy all products used in the operation of the business exclusively from the franchisor or from suppliers named by the franchisor. The Supreme Court of Canada held that the contract did not require the franchisor to account for rebates, and that he was entitled to decline to take them into account in determining the price which the franchisees had to pay for supplies. Clearly,

The utility of a given relationship ultimately depends upon the social and economic structure of the society in which it exists. As society changes, so too does the roster of relationships critical to its stability.[117] Selecting relationships worthy of judicial protection is inevitably a matter of legal policy. It is this legislative function of the doctrine which makes it impossible to provide an exhaustive list of relationships which will be declared to be fiduciary. The purpose of the doctrine and the way in which it is applied can, however, be used to exclude some possible contenders.

We have seen that fiduciary obligations are imposed to preserve the integrity of useful relationships where existing sources do not provide an adequate level of protection. This phenomenon can be used to exclude many cases in which the misconduct which is alleged to threaten the integrity of the relationship would give rise to an action for breach of contract or in tort.[118] The remedial objective of the doctrine coupled with the principle of replicability helps to determine the content of fiduciary obligations likely to be imposed. In contractual relationships, it is unlikely that the doctrine of fiduciary obligation will ever perform more than an interstitial function—providing evidentiary presumptions to facilitate proof

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Mister Donut had a discretionary power as to whether to give franchisees the benefit of the rebate, and the franchisees were financially vulnerable if the franchisor chose to keep the rebates for itself.

[117] T. Frankel, "Fiduciary Law" (1983) 71 California L. Rev. 795 at 802–804.

[118] "Adequate" in the sense used here, includes situations in which the remedies available for the alleged misconduct provide adequate protection. Fiduciary liability is sometimes imposed as a justification for granting of equitable remedies. See, M.D. Talbott, "Restitution Remedies in Contract Cases: Finding a Fiduciary or Confidential Relationship to Gain Remedies" (1959) 20 Ohio St. L.J. 320 at 326 & 327. For an analysis of the inadequacy of legal remedies in the native law context, see R.P. Chambers, "Judicial Enforcement of the Federal Trust Responsibility to Indians" (1975) 27 Stanford L. Rev. 1213 at 1234–1236.

of misconduct or giving the victim of exploitative conduct access to a greater range of remedies, for example.[119]

The requirements of the principle of replicability also has an evolutionary effect. As individual relationships are increasingly subjected to regulation by the imposition of fiduciary obligations, the target relationships become associated with cluster of juridical rules specifically adapted to their needs. Over time, these rules form a permanent shield which is applied irrespective of any explicit declaration as to the fiduciary status of the relationship which they protect. Finally, the rules themselves become a branch of the law distinct from the original doctrine. This phenomenon can be observed in the development of the doctrines of breach of confidence and negligent misrepresentation.

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[119] In the case of the relationship between Canada and the provinces, on the one hand, and Canadian natives, on the other, the doctrine may be called upon to provide most of the needed regulation. See "New Directions," *supra*, note 7 at 424.

CHAPTER II

FIDUCIARY OBLIGATIONS

1. Introduction

It is important to be able to estimate, in advance of any judicial ruling, the likelihood that a given course of conduct will be held to constitute a breach of a fiduciary duty. Armed with a reliable assessment, parties who risk being held to be fiduciaries could take steps to ensure that they fulfill potential obligations. In appropriate cases, they might avoid fiduciary liability altogether by disclosing conflicts of interest, by excluding liability by contract or by declining to proceed with a proposed transaction unless and until vulnerable parties receive independent advice. Parties whose conduct has already put them at risk might negotiate a principled resolution of the claims of alleged victims.

Replication of the judicial reasoning upon which fiduciary liability is based is not always easy. Fiduciaries are not necessarily subject to all of the obligations to which a trustee would be subject under an express trust of property.[120] Not every obligation owed by one of the parties to a fiduciary relationship to the other is a fiduciary obligation.[121] The degree of loyalty exacted from fiduciaries in some relationships is more intense than that

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[120] "Fiduciary Relationships," *supra*, note 19 at 73. See, e.g., *Re Coomber*, [1911] 1 Ch. 723 at 729 (C.A.) manager/owner.

[121] *Girardet* v. *Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 at 362 (B.C.S.C.)—solicitor/client; *Lac, supra*, note 23 at 647; *McInerney, supra*, note 54 at 149 & 150.

required of fiduciaries in others.[122] Fiduciary duties " ... are shaped by the demands of the situation."[123]

In the first chapter, I argued that fiduciary obligations are imposed for the purpose of extending the regulation of useful relationships threatened by the existence of an inherent and otherwise unregulated opportunity for one party to exploit or victimize the other. In this chapter, I will identify the features of relationships which give rise to opportunities for exploitation which have, in the past, been regulated by the imposition of fiduciary obligations. I will describe the principles which I think the courts apply in formulating obligations aimed at redressing exploitative conduct. Finally, I will outline a method of analysis which may be used to predict, with a reasonable degree of confidence, the fiduciary obligations likely to be imposed in respect of a given relationship.

2. Opportunities for Exploitation

In relationships which require the imposition of fiduciary obligations for their protection, the beneficiary depends, for the enjoyment of important legal or practical interests, on advice or services or both which the fiduciary is expected to provide or for which he is expected to arrange.[124] For a variety of reasons, the beneficiary has no alternative, or

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[122] A.W. Scott, "The Fiduciary Principle" (1949) 37 California L. Rev. 539 at 541 [hereinafter "Scott, 'Fiduciary Principle'"]. Professor Scott thought that the degree of intensity of the duty of loyalty increased in direct proportion to the degree of independent authority possessed by the fiduciary.

[123] *McInerney, supra*, note 54 at 149. See also, *Canadian Aero Service Ltd* v. *O'Malley* (1973), [1974] S.C.R. 592 at 619 & *New Zealand Netherlands Society "Oranje"* Inc. v. *Kuys*, [1973] 2 All E.R. 1222 at 1225 (*per* Lord Wilberforce) (P.C.).

[124] In "Fiduciaries: Identification and Remedies," *supra*, note 20, Professor Ong argues that the beneficiary's implied dependence on the fiduciary is a characteristic of all fiduciary relationships.

no practicable alternative, short of foregoing the hoped-for benefits, but to accept the fiduciary's judgment as to what should be done to advance the beneficiary's interests and as to how the undertaking should proceed.

In most fiduciary relationships, the beneficiary accepts the fiduciary's judgment because he actually trusts the fiduciary. The beneficiary is given to believe that he can rely upon the fiduciary to perform as expected and that supervision or vigilance is unnecessary. This belief may be deliberately cultivated by the fiduciary.[125] Alternatively, it may be an unconsidered conclusion reasonably drawn by the beneficiary from the circumstances of the relationship. Some of the most common, as well as the most important, of all human relationships fall into this last category. The relationship between parent and child,[126] spiritual adviser and devotee[127]

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[125] See, e.g., *Huguenin* v. *Baseley* (1807), 14 Ves. Jun. 273, 33 E.R. 526 (L.C.)(real estate) manager/owner. Ms. Huguenin, the plaintiff, had inherited real property which the defendant Baseley sought to acquire for himself. He deliberately exploited Ms. Huguenin's ignorance of business matters, her distress at having to take responsibility for remedying the dilapidated condition of her estates, her inability to obtain advice from close family members, the fact that he was distantly related to her and the expectation of honesty which attached to his clerical calling. As a result of Baseley's persuasion, she became convinced that anything he did would be in her best interests. At his suggestion, she dismissed competent managers who had advised caution and vigilance and conveyed the property to Baseley and his family as part of an obscure scheme for the management of her estates. The extent to which her judgment was impaired by Baseley's intervention is to be seen from a letter which she wrote to her solicitors explaining her decision to terminate her relationship with them, " ... Providence has raised me up a friend and that friend is Mr. *Baseley*, who will take upon him the trouble of bringing all my affairs into such a plan as I shall hereafter be enabled to conduct them with facility to myself."

[126] *Trusts & Guarantee Co.* v. *Hart* (1902), 32 S.C.R. 553 at 558 & 559—parent/child. See also, *Fiduciary Relationship & Resulting Trusts, supra*, note 57 at 16–29 & authorities there cited. A person also owes fiduciary obligations to persons to whom he stands *in loco parentis*. See, *Fiduciary Relationship & Resulting Trusts, supra*, note 57 at 109–141 & authorities there cited. Relationships between more distant relatives have also been held to be subject to fiduciary regulation. See, e.g., *Inche Noriah* v. *Shaik Allie Bin Omar* (1928), [1929] A.C. 127 at 133 (P.C.)–nephew/aunt.

and guardian and ward[128] are all, at least to some extent, regulated by the imposition of fiduciary liability.[129] In these cases, the expectation of probity is inculcated into the mind of the dependent party by social convention or by necessity.

In other relationships regulated by this doctrine, the beneficiary is driven to accept the fiduciary's judgment because it is impossible or impracticable for the beneficiary to monitor the fiduciary's performance or to evaluate critically the fiduciary's advice or services. The basis of relationships with an advisory component is the acknowledged inability of the beneficiary to decide for himself what course of action to pursue. The beneficiary is more often than not incapable of assessing the quality or objectivity of the advice he receives. Even where the parties could actually draft a contract containing an exhaustive list of possible scenarios coupled with a description of what the fiduciary is to do in each case, they are not likely to do so, as the exercise would usually be prohibitively expensive.[130]

Monitoring is usually impracticable in service relationships. The purpose of most service relationships is to relieve the beneficiary of the need to carry out a task himself. Maintaining constant vigilance over the

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[127] *Allcard, supra*, note 12 at 181–186. See also, *Fiduciary Relationship & Resulting Trusts, supra*, note 57 at 16–29 & authorities there cited.

[128] See, *Fiduciary Relationship & Resulting Trusts, supra*, note 57 at 85 & 86 & authorities there cited.

[129] But not the relationship of husband and wife. See, *M^{ac}Kenzie* v. *Royal Bank of Canada*, [1934] A.C. 468 at 475 (P.C.); *Barclays Bank Plc.* v. *O'Brien* (1993), [1994] 1 A.C. 180 at 190 & 195 (H.L).

[130] F.H. Easterbrook & D.R. Fischel, *The Economic Structure of Corporate Law* (Cambridge, Mass: Harvard University Press, 1991) at 90–93 [hereinafter *Economic Structure*], where the authors argue that, at least in the corporate context, "[t]he fiduciary principle is an alternative to elaborate promises and extra monitoring."

fiduciary's activities, or paying to have someone else do so, is usually inconvenient and expensive for the beneficiary and it invariably decreases the utility of delegation and specialization which are, very often, the objects for which the relationship exists.[131] Fiduciaries are frequently in a position to conceal or destroy evidence of neglect or self-interested behavior, thereby making detection by the beneficiary or his advisers difficult and costly, or impossible.[132] Often, the results of the fiduciary's advice or services cannot be used as a guide for detecting misconduct. Results frequently depend on circumstances beyond the control or reasonable foreseeability of the fiduciary. In these cases, dishonest or neglectful performance by the fiduciary may be indistinguishable from honest and diligent service.[133]

In summary, the beneficiary accepts the fiduciary's judgment because he trusts the fiduciary, because he lacks the information, education, skill, training, or experience needed to assess the quality of the advice or services which the fiduciary provides, because the cost of casting the fiduciary's obligations in contractual form is either impossible or prohibitively expensive, or because the cost of monitoring the fiduciary's performance is disproportionate to the benefits for which the relationship was established.

It is the expectation by the fiduciary that his conduct will not be effectively monitored nor his judgment seriously questioned which provides the fiduciary with an opportunity to exploit or victimize the

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[131] "Fiduciary Obligation," *supra*, note 8 at 4; E.R. Hoover (The Hon.), "Basic Principles Underlying Duty of Loyalty" (1956) 5 Cleveland-Marshall L. Rev. 7 at 10 & 11 [hereinafter "Basic Principles"].

[132] "Basic Principles," *supra*, note 131 at 12–14.

[133] "Economic Character," *supra*, note 20 at 1049.

beneficiary. The fiduciary can exploit this situation in several ways. He can misuse influence, information, power or property created or obtained for the purpose of or in connection with advice or services which he has become responsible to provide. He can neglect his responsibilities entirely or delegate them to another party who is unable or unwilling to discharge them in accordance with the beneficiary's expectations. He can act negligently in connection with the discharge of his undertaking—without exercising the degree of care appropriate to the importance to beneficiaries of the type of advice or services which the fiduciary is expected to provide. In cases in which the fiduciary is required to serve more than one beneficiary, he can prefer the interests of one or some over those of another or others.[134]

No court system could ever take over the task of managing all of these relationships.[135] It would almost invariably be unfair to the fiduciary

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[134] Reserve land dealings frequently offer opportunities for exploitation. Upon acceptance of a surrender of reserve land, for example, the government acquires the right to deal with the land subject to the conditions contained in the surrender, if any. See *Indian Act*, ss. 18(1) & 41. The risk for Indians lies not so much in the possibility that the government would try to pocket the proceeds or make a secret commission, but in the possibility that officials would fail to act diligently. See *Blueberry River, supra*, note 5, where Indian Affairs inadvertently failed to exercise a statutory right to rescind a transfer of mineral rights in surrendered land once they realized that the rights had been conveyed by mistake. Here, as in transactions among non-natives, the doctrine of fiduciary obligation is applied "to keep persons in a fiduciary capacity up to their duty." The quotation is taken from Lord Dunedin's judgment in *Nocton* v. *Lord Ashburton*, [1914] A.C. 932 at 963 (H.L.).

[135] Provincial legislation does, however, permit trustees to make a summary application to court for directions. British Columbia's *Trustee Act*, R.S.B.C. 1979, c. 414, s. 88, is typical of this type of legislation. Apart altogether from the question as to whether this legislation even applies to fiduciaries who do not administer a trust of property, the courts have refused to permit trustees to use such legislation to delegate discretionary responsibilities to the courts. For a discussion of the ambit of these provisions, see *Trusts in Canada, supra*, note 26 at 897–909 & authorities there cited.

if judges were to dictate his obligations *ex post facto*—on the basis of events which neither party could predict or control—or if they were to assess his performance only against its outcome, thereby providing a guarantee of success which was neither promised nor expected. Imposing unrealistically high standards upon fiduciaries would interfere with the formation of useful relationships just as surely as the existence of unregulated opportunities for exploitation. Nor could the courts simply ignore these relationships on the ground that they fell outside the classes protected by juridical doctrine. The importance of the benefits which they generate and the frequency with which they occur preclude this option. Faced with an unavoidable requirement for effective regulation, and unable to insist on adherence to specific promises, the courts have intervened in the only way contemplated by judicial precedent. They have required the fiduciary to conduct himself in a *trustworthy manner*—in a manner appropriate to the importance to beneficiaries of the performance of the type of obligations which the fiduciary has undertaken, or which circumstances have thrust upon him.

Long ago, equity identified the standards which characterize trustworthy performance. They are fidelity, diligence, prudence and impartiality.[136] Courts of equitable jurisdiction developed a series of rules designed to induce adherence to these standards by trustees who had undertaken to execute express trusts of property. Over the years, the rules were adapted on an *ad hoc* basis to protect the integrity of a variety of relationships which were not otherwise effectively regulated. It is probably not possible to identify all of the relationships subject to such regulation as

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[136] *Trusts in Canada*, *supra*, note 26 at 690, 696–710, 710–749, 750–762 &787–879; "Unconscionable Transactions," *supra*, note 27 at 52; D.W.M. Waters, "Lac Minerals Ltd. v. International Corona Resources Ltd." (1990) 69 Can. Bar Rev. 455 at 468 [hereinafter "Lac Minerals"].

" ... the categories of fiduciary, like those of negligence, should not be considered closed .... "[137] Nor is it possible to provide a comprehensive list of the rules likely to be applied to fiduciaries falling into each category, as the courts have declined to " ... fetter this useful jurisdiction by defining the exact limits of its exercise."[138]

It is difficult to predict with confidence the precise obligations which will be imposed by the application to a specific relationship of broad concepts like fidelity, diligence, prudence and impartiality. Their main advantage is that, taken together, they comprise all of the specific obligations which must be imposed to protect the integrity of relationships.[139] If we are to replicate the reasoning applied by the courts when they come to spell out the content of fiduciary duties it will be necessary to identify the principles upon which the courts rely to determine the degree of fidelity, diligence, prudence and impartiality to which fiduciaries have actually been held in respect of specific classes of relationships. The body of rules developed to induce observance of a given standard of conduct in respect of a particular type of relationship should define the standard for such relationships.

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[137] *Guerin*, *supra*, note 1 at 384.

[138] *Tate* v. *Williamson* (1866), L.R. 2 Ch. App. 55 at 61 (*per* Lord Chancellor Chelmsford)—sly relative/distressed, dissolute expectant. This caution was repeated by all members of the court in *Tufton* v. *Sperni*, [1952] 2 T.L.R. 516 at 522, 529, 530 & 533 (C.A.)—coworkers for the advancement of the Muslim religion.

[139] See, e.g., "Contract and Fiduciary Duty," *supra*, note 20 at 427. American writers tend to include fidelity, diligence and impartiality as components of a duty of loyalty. Prudence is usually described as a duty of care. See, e.g., J.H. Langbein, "The Contractarian Basis of the Law of Trusts" (1995) 105 Yale L.J. 625 at 655–657 [hereinafter "Contractarian Basis of Trusts"]. I have avoided the use of "loyalty" here as it always seems to me to imply a much more expansive level of personal devotion towards the dependent party than the guarded generosity which is really all that the law requires.

3. The Formulation of Fiduciary Obligations

Remedies for breach of fiduciary obligation are designed to serve three purposes. They provide redress for victims of exploitative conduct. They deter similar misconduct by other fiduciaries. In respect of ongoing relationships, they also provide guidance as to how the fiduciary is to conduct himself in future dealings his beneficiary.[140] Remedies granted in common law actions—punitive damages, for example—sometimes have a deterrent element as well. The common law's arsenal of prescriptive remedies is, however, usually trained squarely on one or more of the litigants. It is the defendant's behavior which attracts judicial censure. An important feature of most cases involving breach of fiduciary obligations is that the audience to whom the judicial rationalization of the outcome is addressed is usually much broader than those assembled in the courtroom for the hearing. Although the overall purpose of the doctrine is to protect the integrity of useful relationships, the outcome of individual cases seldom protects the litigants' relationship. It is usually too late for that by the time its terms are presented for adjudication. The best that the court can do is to support the required standard of performance by declaring it to have been an enforceable commitment all along, and fashion a remedy aimed both at compensating the beneficiary and at withdrawing from the fiduciary all benefits which he might have hoped to gain by acting in a manner inconsistent with that which the law (now) prescribes—this last, *pour encourager les autres*.

In cases in which the court can determine with tolerable accuracy that the conduct complained of threatens the existence of similar relationships, the judge can simply declare the relationship fiduciary and

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[140] The Crown/Indian relationship is an ongoing relationship in this sense.

prescribe the obligations required to protect it against the particular brand of misconduct suggested by the evidence.[141] In such cases, the fiduciary obligation becomes, so to speak, the reciprocal of the exploitative conduct. Cases which can be dealt with in this manner often involve egregious violations of any acceptable standard of honest dealing.[142] Other examples include cases in which the social or economic issues have been sufficiently well defined in the material before the court as to make possible the formulation of an obligation of general application.[143] In these cases the court is imposing a substantive obligation mandated by the importance of maintaining the integrity of a class of relationships of social or economic value.

A somewhat different treatment is appropriate, however, where a variety of possible terms might protect the relationship more or less equally well, but where it is unclear which the parties themselves would have

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[141] See, e.g., "Flannigan, 'Fiduciary Obligation,'" *supra*, note 20 at 310 & 311, where the author argues that "[Fiduciary obligations vary] in accordance with the relevancy of the particular duty to the respective factual positions of the parties to the relationship. Generally speaking, [fiduciary obligations are] defined by whatever rules are required to maintain the integrity of the particular relationship." Professor Flannigan would, however, limit the application of the doctrine to "trusting relationships" in which the fiduciary has "access to assets" (pp. 321 & 322). For this theory to be of general application, the notion of "trust" has to be redefined to include situations in which the beneficiary does not actually trust the fiduciary ("vigilant trusts"), and the notion of "assets" has to be so broadly defined that it loses much discriminative power. In *Szarfer* v. *Chodos* (1986), 54 O.R. (2d) 663 (H.C.), for example, the assets to which fiduciary gained access by reason of his misconduct consisted of the affections of the beneficiary's estranged wife.

[142] *Reading, supra*, note 115, and *A.G.* v. *Goddard*, [1929] 98 L.J.K.B. 743, are examples. No army of occupation could tolerate the loss of authority generated by the use of military privileges for violating the laws of the country which it occupied, and no police force could maintain order if it confined itself to prosecuting only those criminals who fail to come up with a bribe satisfactory to officer in charge of the investigation.

[143] See, e.g., *McInerney, supra*, note 54.

chosen. Most often, this uncertainty arises because the range of possible terms differ in their economic impact on one or both of the parties. The terms which the parties would have chosen had they foreseen the circumstances which actually occurred would depend on the strength of their relative bargaining positions when their relationship was first established or as it developed. In these cases, courts are not able to provide the required regulation simply by implying specific obligations.[144] As the circumstances which give rise to opportunities for exploitation become less and less similar to those within the reasonable contemplation of both parties at the time the relationship was first established, the imposition of obligations for its protection assumes, more and more, the character of judicial management. Courts seeking to avoid becoming arbitrators of the day-to-day disputes arising in such relationships have little alternative but to induce similarly situated parties to re-negotiate the basis of their relationship whenever events make re-negotiation essential to its protection. In such cases, the substantive obligations imposed by the court are whatever is needed to induce re-negotiation if, as and whenever the protection of similar relationships requires it. Defining the content of the fiduciary obligations which will be imposed to regulate such relationships requires an understanding of the tools available to the judiciary for this purpose.

The major function of legal rules, however imposed, is the definition, allotment and enforcement of "entitlements." Entitlements are pre-

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[144] These situations are to be distinguished from those in which the parties have specifically given the courts a license to impose obligations *ex ante*—to impose so-called "quasi-fiduciary obligations"—by contracting that one of them is to use his best efforts to achieve a certain result. See, e.g., *Sheffield District Railway Co.* v. *Great Central Railway Co.* (1911), 27 T.L.R. 451 at 452 & 453 (Rail. & Canal Com.) and *Atmospheric Diving Systems Inc.* v. *International Hard Suits Inc.*, [1994] 5 W.W.R. 719 at 733–736 (B.C.S.C.).

judgments as to which of competing parties will prevail in the event of conflict.[145] In disputes among parties to relationships declared to be "fiduciary," entitlements are compendiously described as "loyalty" and "prudence." They are allotted to those categories of parties whom the law designates as beneficiaries—the parties who depend on the conduct of others for the enjoyment of legal or practical interests. If we regard the social cost of unregulated exploitative conduct as the destruction of useful relationships, fiduciaries are in the best position to avoid those costs. All they have to do is to announce, in a timely manner, the circumstances which prevent their continuing to perform as expected. At that point, the beneficiary will have to decide whether to terminate the relationship entirely, accept the proposed deviation or make it worthwhile for the fiduciary to continue as before. Despite judicial rhetoric indicating otherwise,[146] it is highly unlikely that a beneficiary's entitlement is anything like "loyalty," as that word is commonly understood.[147]

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[145] G. Calabresi & A.D. Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85 Harvard L. Rev. 1089 at 1090–1093 [hereinafter "One View"].

[146] "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior [expected of fiduciaries]." Per Cardozo, C.J., in *Meinhard* v. *Salmon*, 164 N.E. 545 (N.Y. Ct. App. 1928), quoted in D.A. DeMott, *Fiduciary Obligation, Agency and Partnership: Duties in Ongoing Business Relationships* (St. Paul, Minn.: West, 1991) at 24.

[147] See, L.S. Sealy, "Some Principles of Fiduciary Obligation" [1963] Cambridge L.J. 119 at 125 & 126 where Professor Sealy argues that, at least in respect of one of his classifications of fiduciary relationships, contracts between beneficiaries and their fiduciaries will be upheld if the beneficiary is aware that the fiduciary is an opposite principal or has an adverse interest, and if the beneficiary has available any special information which the fiduciary has acquired in his capacity of fiduciary: " ... [D]isclosure of nothing more than these two matters is necessary, even today, for a contract between fiduciary and beneficiary to be upheld .... "

The rule most often cited as justification for the imposition of fiduciary obligations is the rule prohibiting conflicts of interest—the rule that a fiduciary may not allow himself to be put into a situation in which his personal interests conflict with those of his beneficiary. Notwithstanding this prohibition, the law does not appear to regard conflicts of interest *per se* as intrinsically evil.[148] Provided that information is plentiful and transaction costs are non-existent, self interest is generally thought to advance social benefits,[149] so much so, in fact, that some commentators argue that the sole purpose of juridical principles is to mimic the result which would have been attained through cost-free negotiations.[150] What is problematic is the pursuit of self-interest in circumstances in which its existence could not reasonably be expected by the dependent party.[151] As

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[148] See, e.g., *Mogul Steamship Co. Ltd* v. *McGregor* (1889), 23 Q.B.D.598 (C.A.), aff'd [1892] A.C. 25 (H.L.), where Bowen L.J., said, in respect of a commercial relationship:

> I can find no authority for the doctrine that ... a commercial motive deprives of just cause or excuse acts done in the course of trade which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade.

per Bowen, L.J., at 23 Q.B.D. 614. See also, *Bray* v. *Ford* (1895), [1896] A.C. 44 at 51 & 52 (H.L.) and the caution set forth in P.D. Finn, "Commercial Law and Morality" in *Fiduciary Obligations* (Vancouver: Continuing Legal Education Society of B.C., 1989) 2.1.01 at 2.1.14.

[149] R.H. Coase, "The Problem of Social Cost" (1960) 3 J.L. & Economics 1.

[150] See, e.g., "Contract & Fiduciary Duty", *supra*, note 20 at 426–428.

[151] Cf. *Kelly* v. *Enderton* (1912), [1913] A.C. 191 (P.C.), and *Foster* v. *Réaume*, [1924] 2 D.L.R. 951 (S.C.C.). In the *Foster* case, the defendant Réaume was a real estate agent ostensibly employed by the Plaintiffs to arrange of the sale of their property. At his request, the Plaintiffs granted him an option to purchase in his own name for the purpose of facilitating a sale. Ultimately, the property was sold at an acceptable price. However, Réaume failed to disclose the fact that, during the time he was negotiating the sale of this property, he had also been retained by the buyer to negotiate its purchase. The Supreme Court of Canada restored the trial judgment in favor of the Plaintiffs on the basis that the Réaume was in breach of his obligations to the Plaintiffs by failing to disclose the conflict of

the party who proceeds in ignorance of the other's self-interested intentions is unable to take steps to protect himself, there is little chance that the dealings will turn out as he had been given to expect. The beneficiary is, however, seldom required to prove that the fiduciary has in fact preferred his own interests. The presumptions which attend allegations of misconduct by fiduciaries usually make that unnecessary. In fiduciary law, disloyalty is inferred from its appearance. Once judicial suspicions of misconduct are aroused, the fiduciary is conclusively presumed to have acted dishonestly, or at a minimum, he is required to prove that he acted honestly.[152] Thus, the misconduct which gives rise to the rhetoric of selfless service is lack of candor, not lack of altruism. The beneficiary's entitlement is an entitlement to a meaningful and timely disclosure.

It is unlikely, however, that disclosure is seen as an end in itself. The reason for insisting that the fiduciary disclose his intention to prefer his own interests to those of the beneficiary is the preservation of useful relationships in a form in which they will produce the benefits for which they were created. Disclosure tends to promote that purpose. It gives both parties an opportunity to bargain about the quality of the service the fiduciary is to provide, following developments which make it materially more onerous for the fiduciary to continue at the level expected at the outset. The standard of service actually enforced, while it may not amount to loyalty, nevertheless requires of the fiduciary a great deal less self-interest than is likely to be comfortable. All that is needed for the doctrine

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interest. In *Kelly*, the facts were similar, except that the defendant Enderton made it clear to the seller before he acquired the option that he was buying on his own account. The Court upheld the dismissal of the claim based on conflict of interest.

[152] "Economic Character," *supra*, note 20 at 1053–1056.

to do its job is that the benefits from misconduct should appear to the average fiduciary as approximately equal to the benefits from honest and diligent performance. If that result can be brought about, the doctrine should induce conduct which is just as satisfactory as universal moral reform, and far more likely: re-negotiation of the basis of the relationship which respects legitimate information requirements as well as the relative bargaining positions of both parties, or discontinuance of the conduct which threatens such relationships. The doctrine of fiduciary obligation attempts to harness the self-interest of the fiduciary into an exercise aimed at preserving relationships on the only terms upon which they could produce results reasonably acceptable to all parties.[153]

a. The art & science of economic inducement

Protecting relationships which contain inherent opportunities for exploitation means reducing significantly the probability that the fiduciary will seize the exploitative opportunities inherent it. Apart from such imponderables as the moral character of the fiduciary or the strength of his affections for the beneficiary, the probability of deviation depends largely on the utility which the fiduciary feels will flow from exploitation. In other words, fiduciaries, like anyone else, tend to choose, from the range of options presented to them by circumstance, that course of conduct which is likely to produce the greatest benefit for themselves. Expected benefit is a function of the value to the fiduciary of the benefit he

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[153] This outcome is far more satisfactory than the imposition of obligations *ex post*. Inevitably, the temptation to rely on circumstances which have actually occurred as a measure of what ought to have been foreseen is unfair to fiduciaries. Resort to useful relationships is threatened just as surely by unrealistic expectations of other-interested behavior by fiduciaries as it is by exploitation of the interests of beneficiaries.

is likely to receive from exploitation and the probability that he will receive that benefit.

As long as fiduciaries believe that the payoff from exploitation is roughly equal to the payoff from performance, there will be no incentive for them to deviate from the expected level of performance. They would do just as well to fulfill reasonable expectations. There will be cases, however, in which, the payoff from exploitation is greater than the payoff from performance, sometimes much greater. Here, fiduciaries would benefit, at least on the average, if they were to deviate from expected standards. It is the latter situation which gives rise to the need for regulation. In individual cases, the point at which a particular fiduciary finds a specific temptation too good to resist will depend on a number of factors. Some of these—the extent to which the fiduciary is risk-neutral, risk-averse or risk-preferring or and whether the fiduciary correctly assesses the degree of risk or the value of deviation—depend on the preferences and capabilities of the individual fiduciary. Other factors depend upon the type of relationship under consideration. It is a feature of certain classes of relationships that the likelihood of disclosure and redress is remote—most of the status relationships regulated by the doctrine of undue influence are examples—and the temptation for a fiduciary to deviate from expected standards depends almost entirely on the economic opportunities which present themselves, and on the moral cast of the fiduciary. If the doctrine of fiduciary obligation is to induce general adherence to accepted standards, the court cannot deal with each individual case as if it were one of a kind. Judicial rules must be designed to apply to classes of relationships,[154] and to average behavior. In the absence of empirical

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[154] In *C.I.B.C., supra,* note 103 at 209, for example, the House of Lords pointed out that the doctrine of undue influence was aimed at remedying breaches of confidence inflicted by classes of fiduciaries upon classes of beneficiaries.

evidence, judges simply have to rely on experience and intuition to assess averages.

The doctrine of fiduciary obligation operates to discourage misconduct by fiduciaries by approximating the benefits available through misconduct to those available through performance. This result is achieved by a series of procedural rules aimed at improving the chance that the beneficiary will be able to establish misconduct, and by increasing the cost to the fiduciary whenever he does so.[155] As long as fiduciaries are able to discern the boundaries of their responsibilities, the doctrine seldom imposes an unfair burden on them. Fiduciaries who find that unforeseen circumstances have made it materially more onerous to adhere to expected standards can always disclose their intention to pursue inconsistent opportunities and ask for the beneficiary's consent to the proposed course of action. If the beneficiary refuses to consent, the fiduciary can, in most cases, terminate the relationship or re-negotiate his role in it.

i. improving the odds

The risk of disclosure would be increased if the standard which beneficiaries must satisfy to prove liability were to be decreased. Lowering the evidentiary standard would also help overcome the impossibility or impracticability of the beneficiary's monitoring the fiduciary's performance or evaluating the quality or objectivity of his advice.

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[155] As mentioned earlier, the obligation not to engage in conduct inimical to the integrity of the relationship and the obligation to make complete and timely disclosure of the fiduciary's intention to deviate from expected performance are substantive obligations. As a matter of policy they are justified by the importance of relationships declared to be fiduciary. The rules which cast upon the fiduciary the onus of exculpating himself from allegations of misconduct are procedural. Their purpose is to support discharge of the substantive obligations.

There are three issues in respect of which the court could lower the standard of proof which the beneficiary would otherwise have to discharge. First, the court might relieve the beneficiary of the necessity of proving on a balance of probabilities that the fiduciary actually exploited his interests. For example, the court could give judgment for the beneficiary upon evidence that the fiduciary was tempted to deviate from the expected level of performance by the possibility of receiving benefits which exceeded those which he might expect to receive by adherence to that standard, and that the outcome of the fiduciary's efforts was consistent with a finding that he succumbed to that temptation. In order to displace the implication of misconduct, the fiduciary would have to prove affirmatively that there was no exploitation.[156] Secondly, the court could relieve the beneficiary of the necessity of proving that the breach complained of was the effective cause of the loss suffered by the beneficiary. For example, the court might declare the fiduciary liable for all loss suffered by the beneficiary upon proof that the alleged misconduct was one of the likely causes of that loss.[157] Finally, the court could relieve the beneficiary of the necessity of proving the precise extent of his loss. Here, the court might give judgment for the beneficiary if the fiduciary failed to prove that the beneficiary's loss was of the magnitude claimed. It will be useful at this point to review authorities illustrating each of these evidentiary rules. I should caution that these three issues are not easy to compartmentalize. It is often difficult to tell, for example, when a question of causation becomes a question of quantum. As a practical matter, relaxation of the standard of proof in one area often includes a relaxation of the standard in another.

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[156] "Economic Character," *supra*, note 20 at 1055 & 1056.

[157] J.D. Davies, "Equitable Compensation: 'Causation, Forseeability and Remoteness'" [hereinafter "Equitable Compensation"] in D.W.M. Waters, ed.,

• proof of breach

In the *Glennie* case,[158] the assignee of the assets of a firm of stock brokers sued one of the firm's former customers for unpaid fees for services rendered, and for moneys paid by the firm on the customer's behalf for the purchase of shares and securities. The customer contended that, as a result of negligence and breach of duty by his brokers, he had suffered a loss in excess of the amount claimed, and he argued that the loss should be set off against the brokers' claim. The customer was allowed to set off his losses against the claim, and the plaintiffs' action was dismissed.

The customer's portfolio consisted largely of shares in International Nickel Ltd. and the Brazilian Traction Light, Heat and Power Co. At one point, the customer, concerned about continuous decreases in share prices, instructed his brokers to sell all stocks which they then held on his behalf, to apply the proceeds in payment of what he owed the firm and to pay the balance to himself. Had these instructions been carried out, the customer's indebtedness to his brokers could have been paid off out of the proceeds of the sale and he would have received a surplus of about $10,000. The plaintiff's manager, however, advised the customer not to sell, and the customer accepted this advice and provided the firm with even more collateral to secure payment of his account. The jury found that the manager's advice was not disinterested. In fact, it was motivated by the firm's interest in maintaining the value of the Nickel and Brazilian shares.

The onus of establishing negligence or breach of duty fell upon the defendant customer, who sought to have his loss set-off against the

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Equity, Fiduciaries and Trusts, 1993 (Toronto: Carswell, 1993) 297 at 304 & 305 [hereinafter *Equity '93*].

[158] *T.C. Glennie* v. *McD. & C. Holdings Ltd*, [1935] S.C.R. 257.

plaintiff's claim for fees and disbursements. The customer alleged that the advice he received was " ... tainted by a personal interest on the part of the brokers which they did not disclose ... and which was not [then] known to him .... "[159] Mr. Justice Davis, who delivered the unanimous judgment of the Supreme Court said:[160]

> It would be useless to detail the mass of evidence given at the trial. Each story taken separately is in itself a convincing story, but when you hear both stories together you realize that the difficulty lies not so much on the facts as in the implications involved in, and the inferences to be drawn from, the proved facts. There is really very little substantial dispute as to the facts.

There was, however, one circumstance which could have persuaded the jury to accept the customer's interpretation of events. The principals of the firm of stock brokers failed to testify. They did not give evidence at the hearing exculpating themselves from their customer's charge of dishonesty.[161] This is really the only circumstance mentioned in the reasons for judgment which would have allowed the jury, or the Court for that matter, to distinguish between opposing inferences which could have been drawn from the evidence. The outcome of this case can only be explained on the basis that, once a conflict of interest was established, the brokers bore the onus of exculpating themselves from allegations that their advice was calculated exclusively to serve their own interests and not those of their customer. By shifting the onus of proof in this way, the Court relieved the beneficiary of the necessity of proving on a balance of probabilities that the fiduciary actually exploited his interests.

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[159] *Glennie, supra*, note 158 at 262.

[160] *Glennie, supra*, note 158 at 263.

[161] *Glennie, supra*, note 158 at 273.

• proof of causation

In the *Biggs* case,[162] the Privy Council was called upon to judge the conduct of a lawyer who had deliberately concealed from clients information relevant to their decision to grant a loan of $13,500 on the security of a mortgage of real property. The property was already heavily mortgaged at the time the borrowers applied for the loan, and a proper valuation would have shown that it would not have yielded enough on a forced sale to pay off all of the existing charges, let alone the proposed $13,500 mortgage. Throughout, lawyer Brickenden acted both for the borrowers and for the lenders. Besides this conflict of duty, Brickenden was also in a conflict of interest with his mortgagee clients. He held a number of mortgages on the properties on his own account and he had arranged with the borrowers that these would all be paid off in full out of the proceeds of the $13,500 advance. Actually, this was the only way in which he could be assured of repayment. The borrowers were already in arrears on previous mortgages of the same properties. If any prior mortgagee had instituted foreclosure proceedings, Brickenden was unlikely to recover most of what the borrowers owed him. Thus, he had a vested interest in the loan transaction proceeding, whether or not that was also in the interests of either of his clients.

There was no suggestion that it was Brickenden's duty to determine whether the security offered by the borrowers was adequate. That was up to the loan company's board of directors. Their handling of the transaction

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[162] *Biggs* v. *London Loan & Savings Co.* (1930), 39 O.W.N. 126 (H.C.), rev'd (1932), 41 O.W.N. 48 (C.A.), trial decision restored with variation, [1933] S.C.R. 257, aff'd *sub nom. Brickenden* v. *London Loan & Savings Co.*, [1934] 3 D.L.R. 465 (P.C.).

left a lot to be desired. For one thing, they approved the transaction before reviewing the certificate of title.[163] In fact, the trial judge suggested that the conduct of the mortgagee's directors in handling the transaction put them in breach of *their* fiduciary duty to the mortgagee.[164] Nor were the loan company's officers any more careful. They allowed the net proceeds of the loan to be paid to the borrowers four days prior to approval of the loan.[165]

Brickenden was, however, held liable to pay to the loan company an amount equal to what it had lost by advancing the $13,500 to the borrowers. Brickenden was either to pay the balance owing on the $13,500 loan, in which case he would be entitled to an assignment of the mortgage security, or alternatively, he was to pay to the loan company the difference between the balance owing on the $13,500 loan and the amount recovered in respect of that loan from a judicial sale of the mortgaged properties. The loan company was to have the option of deciding which of these two alternatives Brickenden was to be obliged to accept.[166]

The underlying thesis of this judgment emerges from an analysis of the manner in which the Supreme Court and the Privy Council dealt with various arguments advanced on behalf of Brickenden. He argued that the loan company made its decision to advance the $13,500 independently of his advice as to the state of the title. Even if his certificate was defective in

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[163] 31 O.W.N. at 128.

[164] 31 O.W.N. at 127 & 128. As Raney, J., put it, "If [the managing director] were living and in a position to defend himself, it is not unlikely that the Court, in an appropriate proceeding, would be able to fix the directors, or some of them, with personal responsibility for whatever loss may be incurred ultimately in those transactions, owing to their neglect to perform the fiduciary duties which they undertook when they accepted their appointments."

[165] [1934], 3 D.L.R. at 468.

[166] 31 O.W.N. at 129, [1933] S.C.R. at 258 & 259 & [1934] 3 D.L.R. 470 & 472.

that it failed to list two mortgages in his own favor, there was no evidence that the directors ever considered the certificate before they approved the loan, and hence, no evidence that its inaccuracies ever influenced their decision. Sixteen out of the nineteen judges who heard the case dismissed that argument. Lord Thankerton offered this explanation on behalf of the Privy Council:

> When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant.[167]

What the Court is talking about here is the standard of proof of causation which is to be applied in cases involving breaches of fiduciary obligations. In non-fiduciary cases, credible evidence adduced on behalf of a defendant establishing that it was just as likely that the plaintiff's loss was caused by circumstances for which the defendant was not accountable as by those for which he was would result in the dismissal of the plaintiff's claim. The reason is that, in our legal system, plaintiffs must bear the onus of proving their case on a balance of probabilities. The *Biggs* case indicates that it is otherwise where the plaintiff establishes that the defendant has violated a fiduciary obligation which he owed to the plaintiff.[168]

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[167] [1934] 3 D.L.R. at 469.

[168] See, e.g., *Jacks* v. *Davis* (1982), 141 D.L.R. (3d) 355 at 359–361 (B.C.C.A.).

• proof of quantum

The Plaintiffs in the *McNeil* case[169] sold coal mining rights to the defendant McNeil. The rights were sold upon the understanding that McNeil would incorporate a company to be called the Port Hood Coal Co. Once the Defendant had acquired from the Plaintiffs and others enough mining rights to form a commercially exploitable block of mineral rights, he was to transfer the mining rights in the block to Port Hood. Port Hood would pay for the mining rights by the issuance and delivery to the Defendant of Port Hood bonds having an aggregate market value equal to the cash value of the mining rights as of the date the rights were transferred to the company, together with an equal number of that company's shares. The cash value of the Plaintiffs' mining rights, as of the date of the transfer to Port Hood, was $4500. As of that date, the company's bonds were only worth 90% of their face value and its shares had no market value. The Plaintiffs should have received bonds of a face value of $5,000 and an equal number of shares.

As things turned out, the Defendant had to raise approximately $65,000 to acquire an exploitable block of mineral rights, and he was required to pay the lender a bonus of $12,500 in order to secure this loan. The Defendant had made no allowance for this unexpected expense. Accordingly, he took the position that the cost of this loan should be borne by each investor in proportion to the value of the rights which he transferred. The transaction could not have been completed without such payment. Everyone who participated in the transaction benefited from this

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[169] *Fultz* v. *M'Neil* (1905), [1906] N.S.R. 506 (N.S.C.A.), upheld *sub nom M'Neil* v. *Fultz* (1906), 38 S.C.R. 198.

expenditure and all should be required to shoulder some of the burden of discharging it. McNeil held back, out of the bonds and shares to which each of the Plaintiffs would otherwise be entitled, bonds and shares of a market value of $1,350.

The Court held that McNeil was not entitled to withhold securities as compensation for the finance charges. The Plaintiffs had never expressly conferred this authority on McNeil, and no legal doctrine allowed the court to impose it. Accordingly, McNeil was ordered to pay each of the Plaintiffs $1,350 plus interest and costs. On appeal to the Supreme Court of Canada, McNeil added an alternative argument concerning quantum, and it is this argument which is of interest here. McNeil contended that, even if he was required to compensate the Plaintiffs, his liability should be limited to the market value of the bonds and shares as of the date upon which the Plaintiffs made a formal demand for delivery. As the Plaintiffs had never made such a demand, the bonds and shares should be valued as of the date of commencement of the action, and McNeil's liability should be limited to that amount.

The Supreme Court rejected this argument. Mr. Justice Duff, who delivered the judgment of the Court, said McNeil should be :[170]

> ... treated as a trustee wrongfully withholding property which he was bound under his trust to deliver to his *cestuis que trustent*, [McNeil] is liable to make reparations for the loss suffered by the trust by reason of his breach of trust; and (every presumption being made against him as a wrongdoer), that loss must be calculated on the assumption that the securities would have been sold at the best price.

In the *McNeil* case, the court relieved the beneficiaries of the burden ordinarily cast upon claimants of proving the precise extent of their loss. It

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[170] *Fultz, supra*, note 169 at 206

was enough that the victims could point to some loss arising from their fiduciary's misconduct. The Court awarded compensation on the basis of the highest price for which the securities might have been sold between the date upon which the Defendant was supposed to have delivered them to the Plaintiffs and the date the action was commenced. The Court did not require evidence that the Plaintiffs would have sold the securities at peak prices.[171]

In cases in which the fiduciary gains possession of money or property belonging to the beneficiary, the courts impose on the fiduciary the obligation of keeping the beneficiary's money or property separate from his own. He is also required to maintain accounts showing details of receipts and disbursements.[172] If the fiduciary allows his beneficiary's money or property to become mixed with his own, the court will declare the beneficiary entitled to everything which the fiduciary is unable to prove belongs to himself.[173]

ii. raising the stakes

In addition to making it easier for beneficiaries to prove exploitation, equity developed two techniques which tended to make liability a much more expensive proposition for fiduciaries than it would have been for most defendants faced with liability arising out of common law causes of

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[171] See, e.g., *Guerin, supra*, note 1 at 362 & 363. In *Fales* v. *Canada Permanent Trust Co.* (1976), [1977] 2 S.C.R. 302, the fiduciary failed to dispose of unauthorized securities in a timely manner. Ultimately, the securities became valueless. The fiduciary was ordered to pay compensation based on the average price at which similar stock was sold during the period in which the securities could have been sold to advantage.

[172] *Reid-Newfoundland Co.* v. *Anglo-American Telegraph Co. Ltd*, [1912] A.C. 555 at 559 (P.C.).

[173] *Lupton* v. *White* (1808), 15 Ves. Jun. 432, 33 E.R. 817 (L.C.).

action.[174] First, remedies for breach of fiduciary obligation are generally designed to provide restitution—to put the victim back in the same position in which he would have been had there been no misconduct.[175] Liability–reducing principles, like contributory negligence,[176] and (at least to some extent) foreseeability,[177] are usually ignored. Second, fiduciary remedies enable the courts to withdraw from fiduciaries all benefits which they might have hoped to gain by their misconduct, regardless of whether the victim has proved that he suffered an equivalent loss.[178] Where a fiduciary has gained a benefit without having imposed a corresponding loss on the beneficiary, the courts have simply added the fiduciary's benefit to the beneficiary's recovery.[179] A fiduciary who exploits the interests of a beneficiary from whom he receives salary, wages or commissions, for

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[174] Other than fraud or deceit.

[175] See, e.g., *Biggs, supra*, note 162 at 258 & 259.

[176] *Carl B. Potter Ltd* v. *The Mercantile Bank of Canada*, [1980] 2 S.C.R. 343 at 351 & 352.

[177] Cf., the minority and majority judgments in *Canson, supra*, note 23 at 552–556 (*per* McLachlin, J. for the minority) and at 579–589 (*per* La Forest, J. for the majority).

[178] See, e.g., *Canadian Aero Service, supra*, note 123 at 621 & 622.

[179] See, e.g., *Coy* v. *Pommerenke* (1911), 44 S.C.R. 543, where an agent for the sale of land induced his principal to sell to a nominee of a partnership which consisted of the agent, the nominee and an innocent third party, without telling the principal that the agent was one of the purchasers. The partnership paid market value for the property and the agent received a commission from the vendor. The partners later resold the land to a *bona fide* purchaser for value without notice of the agent's misconduct. The resale price was considerably higher than that paid to the principal. The principal, upon discovery the resale, sued the agent and his partners. He recovered judgment against the agent and one of the partners who knew of the agent's misconduct. The court held that the principal was entitled to the market value of the property on the first sale, plus the profits made by the agent and his confederate on the resale, plus the commission paid to the agent for arranging the first sale. Thus, the judgment conferred a greater benefit on the principal than he would have received had there been no misconduct.

example, is usually denied the right to receive such income, or if paid already, will be required to refund it. This rule applies even though the beneficiary has received the services or advice for which he paid.[180]

b. Protecting uniquely vulnerable beneficiaries

In describing the regulatory options available to the court up to this point, I have divided juridically protected relationships into two broad categories. The first comprises relationships which the court can regulate directly by implying the term or terms needed to protect them. The second category comprises relationships in respect of which the court is unable to decide what arrangement the parties would have negotiated had they foreseen the circumstances which actually occurred. In cases falling into the latter category, the courts' usual approach is to define, allot and enforce, an entitlement in favor of the dependent party. Specifically, the dependent party is entitled to a complete and timely disclosure of the fiduciary's decision to deviate from expected performance and of the circumstances which led to that decision. The intermediate objective of the imposition of fiduciary duties in respect of relationships falling into the second category, is to induce the fiduciary to disclose the circumstances which have influenced his decision to depart from expected performance. The ultimate objective is to force re-negotiation of the basis of the relationship.

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[180] See, e.g., *Manitoba and North-West Land Corp.* v. *Davidson* (1903), 34 S.C.R. 255, where the plaintiff real estate agent sold his principal's land at the price stipulated by the principal. The court, nevertheless, refused to allow the agent to recover the agreed commission because the agent had agreed to accept a secret commission of $200 from the purchaser in exchange for the agent's promise to give the purchaser the exclusive right to buy a block of the land for a period of 6 days. The agent never received the $200; he was denied his commission because he had courted a temptation to prefer his own interests to those of his principal.

Rules aimed at inducing re-negotiation are not, however, a panacea for the regulation of all of the relationships which fall into the second category. Consequently, it will be convenient to sub-divide this category of relationships into two groups. The first will include beneficiaries whose capacity to negotiate in their own best interests falls below the average. Children, the elderly, persons of unsound mind and persons whose judgment has been impaired by a disequilibrating preoccupation or by undue influence on the part of the fiduciary, are obvious examples. The second sub-group includes relationships in which the constituency of beneficiaries is so large, and the interests of individual members so diverse, that re-negotiation is simply unrealistic. The law makes different provision for each of these two situations, and I will deal with each separately.

i. reduced capacity to re-negotiate

This category includes most of the relationships which are regulated by the doctrine of undue influence. Undue influence cases fall into two classes.[181] In the first class—cases of actual undue influence—the dependent party must prove that the fiduciary possessed a dominant influence over his will which induced the claimant to consent to the impugned transaction.[182] In the second class—cases of presumed undue influence—the claimant need only prove that the nature of the relationship between himself and the fiduciary was such that the potential for domination was inherent in it.[183] Once the claimant establishes the

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[181] *Allcard, supra*, note 12 at 171 & 181.

[182] See, e.g., *Bank of Montreal* v. *Stuart* (1910), [1911] A.C. 120 at 136 & 137 (P.C.).

[183] *Geffen* v. *Goodman Estate*, [1991] 2 S.C.R. 353 at 377, 378 & 392. See, e.g., *Cox* v. *Adams* (1904), 35 S.C.R. 393 at 404,415, 419 & 420 (parent/child). *Cox* must be regarded as overruled by *Stuart, supra*, note 182 at 126, in so far as *Cox*

existence of such a relationship, the onus passes to the fiduciary to prove that the claimant fully understood the significance of the transaction, and proceeded only after full, free and informed thought about it.[184] A potential for domination is presumed to be inherent in certain relationships—parent/child, solicitor/client, spiritual adviser/devotee, are among the ones most consistently cited. In other relationships, the potential for domination must be proved.[185]

Claims of presumed undue influence are dealt with in a manner very similar to that employed in the regulation of other types of fiduciary relationships. Once the claimant establishes the possibility of exploitation, an onus of exculpation is imposed on the alleged wrongdoer. If the fiduciary fails to establish that the claimant's decision was not the result of "the free exercise of independent will,"[186] the claimant is entitled to redress.

The undue influence cases take the matter a step further, however. It is not enough that the claimant be provided with the relevant information and left to decide for himself whether he still wishes to proceed with the proposed transaction. The fiduciary must prove that the claimant's decision was free from the fiduciary's influence. In most cases, the fiduciary would not be safe in proceeding with the proposed transaction unless and until the beneficiary receives independent advice.[187] The

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decides that a similar presumption arises with respect to transactions between husband and wife.

[184] *Zamet, supra*, note 101 at 941.

[185] See, e.g., *Hodgkinson, supra*, note 8.

[186] *Inche Noriah, supra*, note 126 at 135.

[187] *Liles* v. *Terry*, [1895] 2 Q.B. 679 at 684 (C.A.). Cf. *Inche Noriah, supra*, note 126 at 135 where it is suggested that independent advice may not always be necessary.

independent adviser acts, in a sense, as a surrogate for the detached, self-interested persona which the law attributes to us all. The adviser is expected to put the case against proceeding with the transaction proposed by the fiduciary.[188] Parties who give the beneficiary to believe that they are independent advisers, but whose objectivity is tainted by their relationship with the fiduciary or their own self-interest, may find that they, too, are required to participate in the provision of redress.[189]

ii. diverse constituency of beneficiaries

Imposing obligations aimed at inducing re-negotiation of the basis of useful but vulnerable relationships is of little value if, as a practical matter, the fiduciary cannot obtain the consent of the beneficiaries in a timely and cost-effective way. Regulatory problems of this sort are characteristic of relationships between the directors and officers of public corporations, on the one hand, and the remaining players in the corporate undertaking, on the other.[190] They are also characteristic of relationships between elected representatives and their electorate.[191] Strict enforcement of disclosure and re-negotiation requirements on the basis of circumstances not contemplated at the time the fiduciaries undertook their responsibilities would likely result in unfairness to fiduciaries, who may, in turn, decline to

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[188] In *Allcard, supra*, note 12, the independent adviser was expected to have urged Ms. Allcard not to make a gift of her inheritance for the relief of poverty, an objective which, at the time she made the gift, she had taken a solemn vow to advance.

[189] See, e.g., *Canson, supra*, note 23.

[190] K.B. Davis, Jr., "Judicial Review of Fiduciary Decisionmaking—Some Theoretical Perspectives" (1985) 80 Nw. U. L. Rev. 1 at 40–42 [hereinafter "Fiduciary Decisionmaking"].

[191] D.M. Lawrence, "Local Government Officials as Fiduciaries: The Appropriate Standard" (1993) 71 U. of Detroit Mercy L. Rev. 1 at 18 & 19 [hereinafter "Local Government"].

participate in such relationships. This outcome is hardly conducive to the preservation of these useful relationships.

This problem is far from being resolved. Corporate law, however, appears to have two methods of containing the disadvantages of regulating these relationships through the doctrine of fiduciary obligation. The first is to restrict the liability of directors and officers for "disloyalty."[192] The second is to grant to directors limited rights to contract out of strict observance of the rules against conflicts of interest.[193] What is important here is that protection of a large constituency of beneficiaries with diverse interests requires adaptation of the concept of fidelity. In this case, the beneficiaries' vulnerability does not lie in their incapacity to look out for their own interests, but in the restriction in the choice of fiduciaries available to serve those interests if insistence on strict standards of fidelity were to be imposed.

4. Determining the regulatory needs of specific relationships

a. enforcing the duties of fidelity

I have argued that fiduciary obligations are what is required to protect useful relationships not adequately regulated through other sources. In some cases, the content of the obligations is fairly obvious. It

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[192] This approach would justify a limitation on the rule prohibiting exploitation by directors and officers of opportunities which had been rejected by the company in good faith. See, e.g., *Peso Silver Mines Ltd.* v. *Cropper*, [1966] S.C.R. 673 at 682, although the Supreme Court did not analyze the result on this basis. The result which would have been arrived at by applying standards of fidelity applicable to trusts is described in S.M. Beck, "The Saga of Peso Silver Mines: Corporate Opportunity Reconsidered" (1971) 49 Can. Bar Rev. 80 at 102 & 103. Professor Beck argues persuasively that the outcome in *Peso* cannot be defended on the basis of trust standards.

[193] *Canada Business Corporations Act, supra*, note 44, s. 120.

simply consists of a prohibition against the conduct which threatens the existence of the relationship. In other cases, determining the content of the obligations is more difficult. It involves an assessment of what is required to induce the fiduciary to make timely and fair disclosure to the beneficiary both of the fiduciary's intended departure from conduct reasonably expected of fiduciaries in that class of relationship, and of the circumstances which gave rise as to that intention.

If the doctrine is to protect useful relationships, it is important that this assessment be as accurate as possible, and that the duties imposed on fiduciaries represent the minimum required to offset the equilibrium lost through the threat of undetectable exploitation. Ineffective regulation discourages beneficiaries from participating in relationships which are essential to the advancement of their interests. Overly strict regulation will deter prudent fiduciaries from assuming or continuing in advisory or service roles. It may also induce fiduciaries to exact a fee for potential restrictions on their capacity to advance their personal interests during or following their period of service to their beneficiaries. Money paid to prevent fiduciaries from engaging in activities which do not in fact threaten the interests which a particular beneficiary hopes to advance by the relationship is money thrown away.

To some extent, fashioning appropriate obligations will depend on the circumstances of each case, and predictions as to the content of likely obligations will inevitably contain elements of uncertainty. There is, however, a way to reduce errors in determining which obligations are necessary to protect the integrity of individual relationships. Opportunities for exploitation, and its potential benefits for fiduciaries, tend to be related to the structure of the relationship and, as mentioned earlier, to the existence of other adequate sources of regulation. Accordingly it should be

possible to develop a template for each class of relationships which will indicate the content of likely obligations.

The *Biggs* case[194] will serve as an illustration of a method which may be used to determine the obligations required to neutralize opportunities for exploitation inherent in the relationship between a lawyer and his lender/client in a loan transaction.

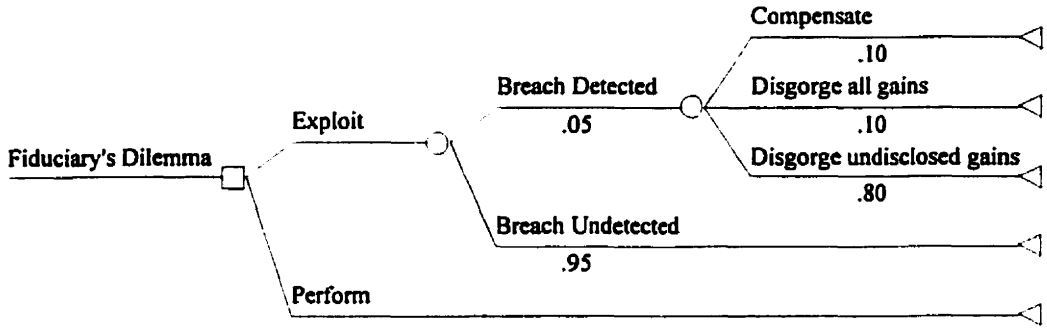

Figure 1

Figure 1 is a decision tree,[195] and it is intended to represent the alternatives open to lawyer Brickenden at the time he decided not to

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[194] *Supra*, note 162.

[195] The two digit decimal figures beneath the various branches of the tree represent the probability of occurrence of the event described above that branch. For example, the probability of Brickenden's misconduct being discovered is merely 5% (.05). For a discussion of the theoretical basis of decision analysis, see H. Raiffa, *Decision Analysis: Introductory Lectures on Choices under Uncertainty*, (New York: Random House, 1968) [hereinafter *Decision Analysis*]. For an example of its application to legal problems, see H. Raiffa, *The Art and Science of Negotiation*, (Cambridge, Mass.: Harvard University Press, 1982) at 66–77, M.B. Victor, "Litigation Risk Analysis and ADR" in J.H. Wilkinson, ed., *Donovan Leisure Newton & Irvine ADR Practice Book* (New York: John Wiley & Sons, 1990) at 307 and M.B. Victor, "Risk Evaluation in Intellectual Property Litigation" in L. Horwitz & E. Horwitz, eds., *Intellectual Property Counseling and Litigation*, vol. 3 (New York: Matthew Bender, 1989) at 50–1.

disclose to his client, London Loan & Savings, the fact that he intended to apply $1,993.33 of the new $13,500 loan sought by Mr. and Mrs. Biggs to pay off moneys which the Biggs owed him.[196] At that time, Brickenden held three mortgages on the Biggs' property. The outstanding balance on one of these mortgages was $5,000; on another, about $800; and on a third, roughly $600. He disclosed the $5,000 mortgage to London Loan and the Company agreed that it would be in order that he should be paid out of the proceeds of the new advance. However, he failed to inform his client that the borrowers were going to pay him $1,993.33 to retire two more mortgages in his favor, as well as a further $500 or so by way of fees, commission and disbursements. This information should have been of considerable importance to London Loan's directors when they came to evaluate the Biggs' application for a further advance. For one thing, it gave a more accurate picture of what the Company was risking by lending the applicants any more money. The Biggs were not successful entrepreneurs who needed a cash infusion to tide them over a difficult period. Instead, they were hopelessly over their heads in debt. Brickenden, their legal advisor and the creditor who probably knew most about their current financial state and the value of the security which they were offering for the new advance, did not have confidence in their being able to meet their obligations. Full disclosure might have prevented Brickenden from unloading his bad debts on to his client.

Prior to disbursing the loan proceeds, Brickenden had to choose whether to exploit his superior knowledge at the expense of his client. If he had told his client the truth before the loan had been disbursed, it might never have been approved. As the trial judge found that the security would not even have repaid the charges filed against the title prior to the advance

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[196] *Supra*, note 162.

of the $13,000 loan, Brickenden stood to lose the outstanding balances on all three of his mortgages plus the fees and commissions the Biggs had agreed to pay when the transaction went through, in all, about $6,993.93.

Concealing the existence of two of the mortgages undoubtedly helped ensure that the Biggs' application received favorable consideration and made it possible for Brickenden to recover the full amount due him plus a bonus for his services. There was an element of risk, however. If he were discovered, he would likely have to return the $1,993.33 paid in respect of the two undisclosed mortgages. He might even have to compensate London Loan for the difference between what they recovered from the sale of the security, if anything, and the $13,500 which they had advanced. Nevertheless, Brickenden could reasonably have felt fairly safe in deciding not to disclose. London Loan's managing director, Mr. Kent, seemed prepared to close his eyes to his lawyer's dealings.[197] Brickenden was the son-in-law of G.G. McCormick, president of the Loan Company,[198] a point not overlooked by the Supreme Court. So Brickenden's chances of getting away with his scheme were probably very good. He could not reasonably have counted on the assignment of the Biggs mortgages to independent companies, and the Biggs' action against them for a declaration that neither bonus nor interest at the stipulated rate was payable under the London Loan mortgage.[199] Let us assume, for the purposes of illustration, that Brickenden had estimated that the chance of his misconduct being discovered was about 5%.

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[197] [1933] S.C.R. at 265 & 266.

[198] [1933] S.C.R. at 259 & 260.

[199] These transactions are described at [1933] S.C.R. 265–268.

There was, however, another risk that Brickenden had to take into account. If he were caught, he might not only lose the amount he collected in respect of the undisclosed mortgages and his fees, commissions and disbursements, he might also be made liable to repay the amount which London Loan lost by proceeding with the transaction in the first place—the difference between the $13,500 advanced and the amount the Company actually recovered on a sale of the security. Even here, liability must have seemed far from certain. It was not up to Brickenden to value the security offered by the Biggs. That was his client's responsibility. Brickenden might reasonably have felt it unlikely that he would be held liable for the "marked laxity and dereliction of duty" of his client's officers.[200] The Loan Company had not been deceived about the amount the Biggs owed. They had disclosed on their application documents that $7,500 was to be applied in payment of "sundry accounts." Let us say, for the purposes of illustration, that Brickenden could reasonably assume that, if his misconduct were to be discovered at all, there was only a 10% chance that he would have to reimburse his client for all of its losses—that is, $13,500 or something like it;[201] a 10% chance that he would have to pay $6,993.33;[202] and an 80% chance that he would only have to pay $1,993.33.

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[200] The quotation is taken from Mr. Justice Crocket's judgment at [1933] S.C.R. 295. It is unfortunate that Judge Hoover's article, *supra*, note 131, was not available to Brickenden at this time.

[201] $13,500 would have been about right. The trial judge had found that the security was insufficient to cover the mortgages in existence prior to London Loan $13,500 advance.

[202] That is, the $5,000 owing on the mortgage that he did disclose plus the outstanding balances, fees and commissions he had received in respect of the undisclosed mortgages.

Figure 2 illustrates the expected monetary values of the various options open to Brickenden before he committed himself to non-disclosure:

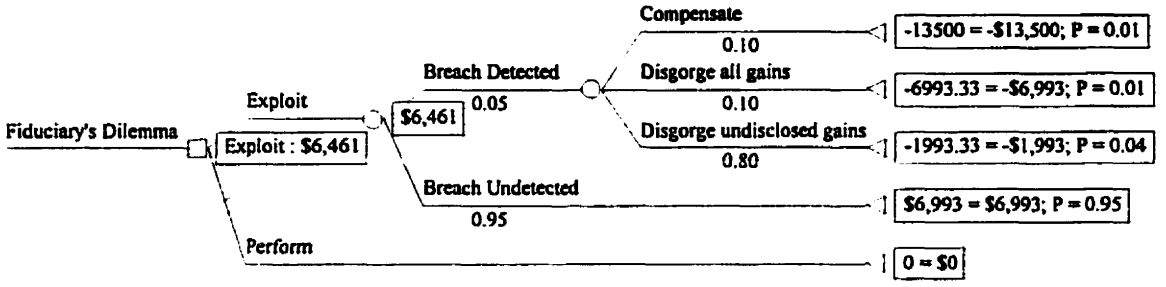

Figure 2

Based solely upon possible payoffs and the probability of detection, it was reasonable for Brickenden to have chosen to take advantage of the opportunity for exploitation with which the circumstances had presented him. This is, in fact, exactly what he did.[203]

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[203] The double line "barring" the path to the "Perform" option indicates that people faced with the situation illustrated by the decision tree would not do as well financially, on the average, if they were to choose the option indicated by the barred path. The dollar figures at the end of the branches represent the monetary value, or payoff, associated with each course of conduct. For example, if Brickenden's scheme were discovered and if he were held liable to compensate London Loan or its assignee for the $13,500 lost as a result of the advance to the Biggs, the expected monetary value of that outcome would be minus $13,500. The expected monetary value of each choice is contained in the rectangles within the tree or following the node presenting the various options open to the decision-maker. These values represent the product of the payoff earned if it occurred and the probability of its occurring. For example, Brickenden stood to gain $6,993.33 if his breach remained undetected. Because there was only a 95% chance that this would be the outcome, the expected monetary value of that decision is $6,461 ($6,993.33 x .95). An outcome which depends on more than one chance occurrence is the product of the payoff earned if it occurred and the probability of the occurrence of each of the events upon which its occurrence depends. Throughout, I have assumed that the fiduciary is risk-neutral.

What is important is not so much the accuracy of my estimate of Brickenden's evaluation of the probability of detection or of his potential exposure to liability—both are purely speculative, in any event. What is important is that the exercise allows us to observe the effect of changes the probability of detection and the amount of potential liability upon decisions which the fiduciary might reasonably make.

For example, let us assume that, in evaluating the disadvantages of exploitation, Brickenden took into account the possibility that detection might result in disbarment. He would have to add to the -$13,500 liability the present value of the diminution in his income stream for the period of disbarment as well as the present value of any further reduction in income which the inevitable public censure might cause. He might also make an allowance for the stress caused by discovery. Suppose that he concluded that disclosure would cost him $50,000, in addition to the payoffs shown in Figure 2. Brickenden's decision, assuming he used the logic implicit in the tree, would have been the same. He would still have tried to exploit his client's interests:

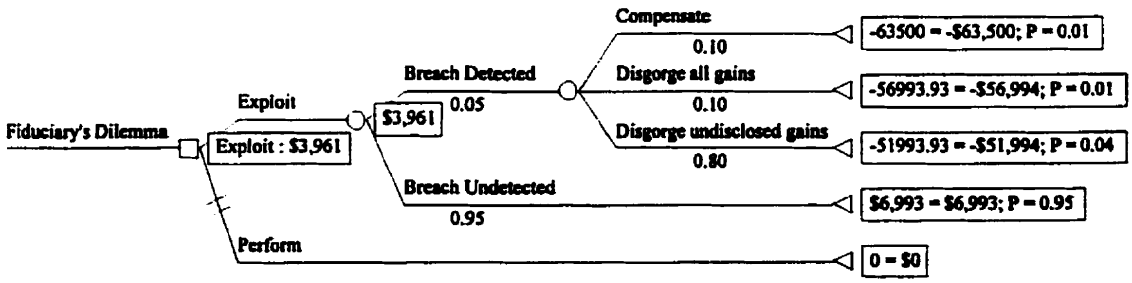

Figure 3

In fact, it is not until the loss caused by discovery of the breach adds about $120,000 to each of the three stated payoffs associated with the

"Breach Detected" branch that Brickenden would have been justified in thinking that he would do better in the long run by honest and diligent performance of his obligations than by seizing the opportunity for exploitation. This analysis has an important lesson for those seeking to determine the content of fiduciary obligations imposed to induce the fiduciary to perform rather than to exploit: it is critical to the efficacy of such a regime that the obligations imposed improve materially the probability that the fiduciary will be held liable.[204] The techniques which improve the beneficiary's ability to prove misconduct have already been mentioned. They consist of a series of presumptions which the beneficiary must disprove if he is to avoid liability. In relationships similar to the above, obligations should be imposed which maximize the chances that the beneficiaries will discover misconduct. These include obligations to account, to report and to explain. Imposing such obligations justifies a requirement that the fiduciary who cannot explain away suspicious circumstances must be liable for his beneficiary's loss. Incidentally, it also supports the notion that the quintessential feature of fiduciary relationships is loyalty.

Changes in the amount of potential liability, however, are not unimportant in all circumstances. Let us assume, for the purposes of illustration, that Brickenden was convinced that the Loan Company would not have rejected the Biggs' application if he had disclosed the existence of the two small mortgages in his favor. On this assumption, Brickenden would have been able to keep the $5,000 paid by the loan company for an assignment of his $5,000 mortgage. Assume that discovery of his

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[204] It would be difficult to see how a court, on any theory of equitable compensation, could have justified imposing a penalty of 120,000 1933 dollars on Mr. Brickenden.

misconduct would, however, have left him in the same position as illustrated in Figure 2. Decision theory would still have Brickenden preferring exploitation to performance because the likely gain from performance ($6,461), would be slightly greater than the gain from honest service ($5,000). If, however, he also believed that the risk of detection was 20% instead of 5%, he would have done better to have performed:

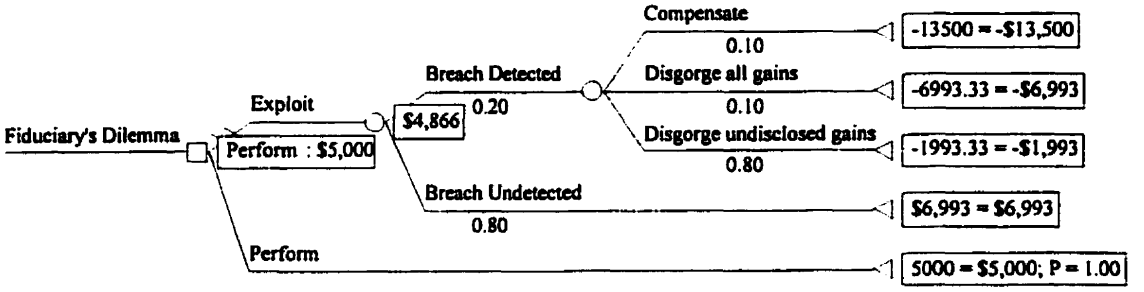

Figure 4

Concerns which Brickenden might have entertained about additional losses caused by public censure, emotional distress or loss of prospective earnings due to disbarment (which I have arbitrarily set at $130,000) would not have altered his decision:

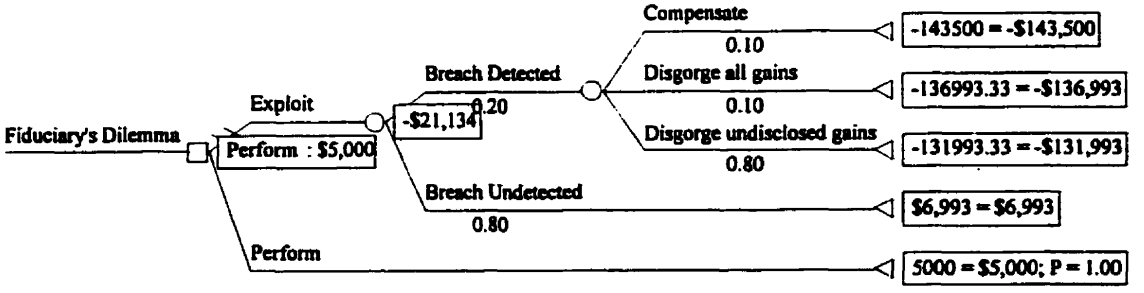

Figure 5

In the circumstances illustrated by Figures 4 and 5, there would have been little purpose in the imposition of a penalty upon Brickenden which went beyond stripping him of gains earned through conduct inimical to the existence of similar relationships. In fact, eccentric imposition of punitive liability would probably only serve to deter settlement of cases in which it was imposed, without conferring much added protection on the relationships themselves.

The criticisms most frequently levied against the use of decision theory in attempting to predict behavior is that applying it requires specialized knowledge which most people do not possess or employ, coupled with the fact that the great majority of people are incapable of assessing correctly the impact of improbable occurrences or the probability of horrific occurrences.[205] While these criticisms are undoubtedly valid, no substitute is yet available[206] and the need for protection of useful relationships cannot attend a more perfect conceptualization of human motivation. Furthermore, judges are not likely hobbled by either problem, and what is required is an explanation of the outcomes of cases involving fiduciary liability. If courts cannot assume that the heuristics which people rely on to make decisions, however devised, will arrive at the same result as calculated self-interest, the prospect that effective regulation can be achieved by economic inducement is probably doomed to failure anyway.

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[205] R. Cooter & T. Ulen, *Law and Economics* (New York: HarperCollins, 1988) at 415–418 [hereinafter *Law & Economics*].

[206] *Decision Analysis, supra*, note 195 at 268–272.

b. enforcing the duties of prudence

It has often been argued that fiduciary obligations imposed in respect of relationships other than that of trustee and beneficiary, do not include a duty of care.[207] In 1995, however, the Supreme Court held that the government was liable to compensate an Indian band for the government's failure to reserve mineral rights in a conveyance of reserve land which the band had surrendered for sale or lease.[208] Liability was imposed for "inadvertence."[209] Specifically, Indian Affairs officials overlooked the possibility that one day, the mineral rights might be of value, and that including them as part of the conveyance would not have increased the price. There was, therefore, nothing to lose by reserving them, and possibly, something to be gained for the surrendering band. In fact, there was even a departmental policy that the mineral rights should be included. Although the Crown was said to have " ... taken on the obligations of a trustee in relation to the [surrendered land],"[210] it must be remembered that the Indian interest cannot be the subject of a trust, properly so called, and that the Crown/native relationship which comes into existence following a surrender is not that of trustee and beneficiary.[211] The

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[207] See, e.g., "Fiduciary Principle," *supra*, note 8 at 28–31. In *The Law of Fiduciaries, supra*, note 20 at 49, the author claims that " ... the duty of care has absolutely no necessary connection with fiduciary relationships. In the instances in which fiduciary relationships have a duty of care attached, ... that duty of care rests either in contract (e.g. most agents) or in tort (e.g. some types of advisers)." In the United States, fiduciary obligations often include a duty of care: see the cases cited at p. 29 of "Fiduciary Principle," *supra*, note 8.

[208] *Blueberry River, supra*, note 5 at 363–366.

[209] *Blueberry River, supra*, note 5 at 364 & 404.

[210] *Blueberry River, supra*, note 5 at 363.

[211] *Guerin, supra*, note 1 at 386.

resulting obligation, which certainly resembles an obligation to be careful, must have been imposed pursuant to the doctrine of fiduciary obligation. It appears likely, in view of the *Blueberry River* decision, that a duty of care can indeed be imposed as a fiduciary obligation. This possibility raises questions as to whether the courts will adopt the same approach in enforcing the duties of prudence as they employ in enforcing the duties of fidelity.

Inducing re-negotiation may require the injection of punitive or restitutionary elements into judgments and the development of special evidentiary presumptions, but there is no justification for similar measures in cases in which the threat to the relationship arises from a breach of a duty of care. Here, the rules developed for torts and contracts should provide adequate protection. If they do not, the entire basis of judicial remedies should be examined and new rules established for all situations. It is difficult to see why the law should distinguish between a professional trustee who fails to take apply due care and attention in the investment of estate assets and a motorist who fails to pay due care and attention to the manner in which he drives.

CHAPTER III

THE CROWN-INDIAN RELATIONSHIP

1. Introduction

In previous chapters, I argued that fiduciary obligations are imposed for the purpose of maintaining the integrity of relationships of social or economic value. Individual obligations are selected from the code of rules developed to regulate the relationship of trustee and beneficiary. One reason which would support the choice of this particular regime is that its obligations are broad enough to cover likely regulatory needs and the imposition of specific obligations can be explained as an extension of established doctrine. Not all of these rules are imported into every fiduciary relationship, however, and those which are, are adapted to suit the specific regulatory requirements of the target relationship. The need for regulation arises because the relationship contains inherent opportunities for one or more of the parties to exploit the interests of another or others. Such conduct, left unregulated, would tend to discourage full or any participation in similar relationships or would discourage continued participation in ongoing relationships, and would deprive society of the benefits which they were established to provide. The doctrine of fiduciary obligation empowers the courts to promote the establishment of such relationships by providing redress to victims of exploitative conduct in circumstances in which relief would otherwise be unavailable.

The scope of the fiduciary obligations likely to be imposed in respect of a given relationship depends, in part, upon the features of the relationship which must be preserved if it is to yield the expected benefits. It also depends upon the extent to which existing sources of regulation fail

to provide satisfactory protection. The first step in determining whether a specific course of conduct threatens the integrity of a given relationship is to determine the object for which such relationships are established and to identify the features of the relationship necessary for the attainment of that object. The second is to determine whether the impugned conduct is exploitative in the sense that it takes advantage of an unregulated opportunity which is inherent in the relationship and which, if exploited, would impose a burden upon the victim to which he had never agreed and which would tend to discourage or restrict his participation.

In this chapter, I will examine the legal and economic structure of the relationship between the federal government and status Indians in so far as it is relevant to the management and disposition of unsurrendered reserve land. I will give examples of opportunities for exploitation which are inherent in this relationship, which are not otherwise adequately regulated and which, if taken up by government, will threaten the utility of the relationship. In chapter 4, I will suggest the content of the fiduciary obligations required to provide the necessary regulation in respect of the examples which I present.

2. The *Guerin* Judgments

Lawyers asked to advise on fiduciary liability are very often left without much judicial guidance as to whether the relationship which they are considering will be declared to be fiduciary, and as to the content of the obligations likely to be imposed. The legislative character of this doctrine—the ability of the courts to create juridical policy by choosing the relationships to which protection is to be extended—makes it extremely difficult to advise in cases not covered by enactment or authority. In the case of the Crown-Indian relationship, however, such speculation is

unnecessary. The Supreme Court of Canada has ruled that this relationship is fiduciary. The Court has also described its juridical structure, its essential features and the social and economic benefits for which it was created. These matters are all dealt with in the *Guerin* case. In this section, however, I will concentrate on one feature of this decision, the explanation given by the Court for the difference between the Crown's relationship with aboriginal peoples and the Crown's relationship with other segments of Canadian society.

There are three sets of judgments in the *Guerin* case. Although all eight judges of the Supreme Court of Canada agreed that the Crown was liable to compensate the Band for breach of an equitable obligation, each group arrived at its ultimate conclusion by a slightly different process of reasoning. These differences are of significance in assessing the elements of the Crown/native relationship prior to surrender and each set of judgments will now be examined separately. It is important to bear in mind during the discussion that follows that the *Guerin* case involved surrendered lands. Comments in the reasons for judgment which relate to unsurrendered reserve lands are, therefore, *obiter dicta*.

Madam Justice Wilson, writing for herself and for Ritchie and M^{c}Intyre, JJ., said that Indian bands have a beneficial interest in unsurrendered reserve lands. The Crown, however, has a statutory power to determine the use to which such lands may be put. Long ago, the Crown undertook the responsibility of protecting and preserving native interests from invasion or destruction. To enable it to discharge this undertaking, the Crown assumed the power to decide for itself whether proposed or actual uses of reserve lands are for the benefit of the aboriginal occupants. Section 18(1) of the *Indian Act* acknowledges the currency of this commitment and its application to unsurrendered reserve

land. The Crown has an obligation to limit its use of this power to the purposes for which it was given. This obligation is a fiduciary obligation which will be enforced by the courts.[212] Following a surrender, the juridical nature of the Crown/native relationship changes. The Crown holds surrendered land in trust to dispose of it in accordance with directions given by the band.[213]

Mr. Justice Dickson, who delivered judgment for himself and for Beetz, Chouinard and Lamer, JJ., held that a fiduciary duty arises on surrender.[214] That duty requires the Crown to dispose of the surrendered land for the benefit of the surrendering band.[215] Once again, the duty is based on a historical commitment. Long ago, the Crown assumed the responsibility of protecting native peoples in dealings with third parties. It implemented this undertaking by declaring native land rights inalienable except by surrender to the Crown. In this way, the Crown was able to interpose itself between native sellers and non-native buyers and to use this position to prevent exploitation of natives. Section 18(1) of the *Indian Act* acknowledges the currency of this commitment and its application to Indian reserves.[216] Mr. Justice Dickson did not specifically deal with the juridical nature of the Crown/native relationship in the absence of a surrender. His judgment implies, however, that fiduciary duties do not arise from the relationship created by the *Indian Act* unless Crown

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[212] *Guerin, supra*, note 1 at 349–351.

[213] *Guerin, supra*, note 1 at 354 & 355.

[214] *Guerin, supra*, note 1 at 385.

[215] *Guerin, supra*, note 1 at 387.

[216] *Guerin, supra*, note 1 at 382–384.

representation is required to prevent exploitation in transactions involving a disposition to non-members of a band's interests in its reserved lands.[217]

Mr. Justice Estey held that the Crown was the agent of the band for the disposition of surrendered reserve lands and, therefore, was under an obligation to obey the band's instructions.[218] This relationship and its obligations arose out of a government commitment to protect native interests, a commitment occasioned by "a strong community interest in protecting the rights of the native population in those lands to which they had a longstanding connection." This community interest has existed for a long time, as it is reflected in certain provisions of the Royal Proclamation of 1763[219] as well as all versions of the *Indian Act*. It was this commitment which resulted in the enactment of the various protective mechanisms of the *Indian Act*, including the surrender provisions.[220] Mr. Justice Estey did not deal specifically with the obligations which the Crown might owe to native peoples in the absence of a surrender. It is implicit in his judgment, however, that comparable obligations would also arise in any situation in which the Crown has undertaken or has become obliged to act as agent for a native group.[221]

All of these judgments rely on a historical commitment by the Crown to protect native land rights as the justification for the imposition of enforceable duties. While individual judges make reference to various

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[217] *Guerin, supra*, note 1 at 382 & 383 and *Blueberry River, supra*, note 5 at 370–373.

[218] *Guerin, supra*, note 1 at 393.

[219] R.S.C. 1985, Appendix II, No. 1 [hereinafter Proclamation or Royal Proclamation].

[220] *Guerin, supra*, note 1 at 392.

[221] *Guerin, supra*, note 1 at 392.

sections of the *Indian Act* or to the Royal Proclamation, these provisions are cited as a confirmation or acknowledgment of the existence of the historical commitment rather than its source.[222] In fact, the judges see themselves as enforcing a constitutional undertaking dating back to the establishment of British sovereignty in North America, an undertaking which the Crown is said to have confirmed continuously since that time.

3. The Crown's Historical Commitment to Native People

The Royal Proclamation of 1763 and the various versions of the *Indian Act* from time to time in force are continually cited by the courts as confirmation of the existence and terms of the Crown's historical commitment to native peoples. In this section, I will examine these enactments with a view to deriving from their terms the essence of the Crown's commitment.

I have divided my analysis of the Indian Acts into two sub-sections. The first deals with the statutes in force prior to 7 June 1950. Most of these statutes were enacted at a time when it was widely held that the solution to the Indian problem (as the presence of aboriginal cultures was then seen) was for native peoples to assimilate—to adopt the values and manners of the immigrant majority. The second sub-section deals with the *Indian Act* of 1950 and its successors. The 1950 statute and later versions were passed after an extensive study of reserve conditions and consultation with Indian representatives. These statutes were enacted at a time of growing uneasiness among the non-native majority about the legitimacy of the

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[222] *Guerin, supra*, note 1 at 349 (Wilson, J.); 383 & 384 (Dickson, J.); 392 (Estey, J.).

coercive measures of the past and dismay at the adverse impact these measures had had upon aboriginal peoples.[223]

a. The Royal Proclamation of 1763

Until the mid-eighteenth century, a number of European nations vied for the right to govern territories along the eastern seaboard of North America. After 1750, however, only Britain and France remained serious contenders. France formally withdrew from the colonization of most of the easterly portion of the continent on 10 February 1763 with the execution of the Treaty of Paris. Eight months later, Britain announced publicly its policy with respect to the administration and settlement of those portions of the continent over which it claimed sovereignty. This announcement was contained in the Royal Proclamation of 1763.[224]

Four features of the Royal Proclamation are of importance in determining the scope of the Crown's historical commitment to native peoples. The first is the territorial extent of the assertion of British sovereignty contained in the Proclamation. Britain claimed sovereignty over most of the easterly third of North America, including unceded territories then occupied or used by the Indians.[225] The Proclamation describes unceded Indian lands located within the boundaries of the existing or newly acquired colonies as situate on "Parts of *Our* Dominions and Territories".[226] The assertion of sovereignty went further than that,

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[223] J.R. Miller, *Skyscrapers Hide the Heavens*, rev. ed. (Toronto: Univ. of Toronto Press, 1989) at 220 & 221 [hereinafter *Skyscrapers*].

[224] J. Stagg, *Anglo-Indian Relations in North America to 1763 and An Analysis of the Royal Proclamation of 7 October 1763* (Ottawa: Indian & Northern Affairs, 1981) at 337-339 & 345-348 [hereinafter *Anglo-Indian Relations*].

[225] *Anglo-Indian Relations, supra*, note 224 at 375.

[226] Royal Proclamation, *supra*, note 219 at 5 [Emphasis added].

however. The Proclamation presumed to reserve for Indian use a vast area lying outside the boundaries of any established colony. This reserved area was bounded on the East by the Atlantic watershed, on the South by the colonies of East and West Florida and on the North by Rupert's Land and the newly-acquired colony of Quebec, and it extended westward for an indefinite distance towards the center of the continent. Unceded Indian lands within this area were declared to be reserved "*under our Sovereignty, Protection, and Dominion*" for the use of the Indians.[227]

The second feature of the Royal Proclamation which is of importance here is that its structure assumes that native peoples possess rights of use and occupation which pre-date Britain's assertion of sovereignty and which have not been extinguished by it.[228] The Proclamation does not expressly create native rights in unceded lands; it impliedly recognizes their existence, however, by prescribing the measures to be taken for their protection.[229] For example, it requires the removal of non-natives who have settled on lands "which, not having been ceded to or purchased by Us, are *still* reserved to the said Indians".[230]

The third feature of importance is that the Royal Proclamation clearly implied that, in future, native peoples were not to be compulsorily displaced from the territories which they used or occupied. Addressing the

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[227] Royal Proclamation, *supra*, note 219 at 5 [Emphasis added].

[228] *Calder* v. *A.G. (British Columbia)*, [1973] S.C.R. 313 as interpreted by *Guerin, supra*, note 1 at 376 & 377, *per* Dickson, J. Cf. *St. Catherine's Milling & Lumber Co.* v. *R.* (1888), 14 A.C. 46 at 55 (P.C.), where the Privy Council suggested that Indian possession " ... can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty of the British Crown."

[229] *Anglo-Indian Relations, supra*, note 224 at 373 & 374.

[230] Royal Proclamation, *supra*, note 219 at 5. [Emphasis added].

circumstances under which purchases of aboriginal lands would be permitted, it was decreed that "... if at any Time any of the Said Indians *should be inclined to dispose of the said Lands*, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly .... "[231]

Finally, the Proclamation prescribes measures to be taken to protect native rights of use and occupation. First, unceded Indian lands are declared to be reserved for Indian use. This reservation covers unceded lands located within the area lying West of the Atlantic watershed as well as all unceded lands lying within existing or newly acquired colonies.[232] Second, colonial officials—civil or military—are prohibited from surveying or granting titles to reserved lands, wherever situated, prior to cession.[233] Third, non-natives are prohibited from establishing settlements on reserved lands, and those who have already done so are required to leave.[234] Fourth, private purchases of land directly from native occupiers are prohibited. Fifth, provision is made for the voluntary relinquishment of native rights of use and occupation in favor of the Crown.[235] This last feature is most important in determining the scope of the historical commitment, and requires some elaboration.

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[231] Royal Proclamation, *supra*, note 219 at 6. [Emphasis added.]

[232] Royal Proclamation, *supra*, note 219 at 5.

[233] Royal Proclamation, *supra*, note 219 at 5. The wording of the provision limiting the power of colonial governors to make surveys or grants of unceded Indian lands within the boundaries of their colonies is unclear. For a discussion of the interpretation of these provisions, see *Anglo-Indian Relations*, *supra*, note 224 at 382-391 and B. Slattery, *Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories* (D. Phil. Thesis, Oxford University, 1979; reprinted, Saskatoon: University of Sask., 1979) at 261-267 [hereinafter *Land Rights*].

[234] Royal Proclamation, *supra*, note 219 at 5.

[235] Royal Proclamation, *supra*, note 219 at 6.

The preamble to the Proclamation declared that:

> ... great Frauds 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 ....[236]

The great Frauds and Abuses referred to in this statement can be conveniently grouped into three general categories. The first includes cases in which immigrants would simply appropriate aboriginal hunting grounds for their settlements.[237] In the second, speculators would buy land from the natives on the understanding that the purchase price would be paid when individual parcels were sold to settlers. The speculators would sell all or part of the original tract, but would fail to pay the balance of the purchase price to the native sellers.[238] Finally, private purchasers would buy land from natives who lacked the authority of their people to sell.[239]

These problems had not just come to the attention of the Imperial government at the conclusion of the Seven Years' War. Well before 1763, colonial governments had attempted to prevent irregular purchases of native land by prohibiting non-natives from buying land directly from native occupiers without first obtaining the approval of colonial authorities.[240] Generally speaking, these efforts were poorly conceived, unevenly enforced and usually ineffectual.[241] Later, administrators would

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[236] Royal Proclamation, *supra*, note 219 at 6.

[237] *Anglo-Indian Relations*, *supra*, note 224 at 58 & 59, 81, 106, 191 & 192.

[238] *Anglo-Indian Relations*, *supra*, note 224 at 104 & 213.

[239] *Anglo-Indian Relations*, *supra*, note 224 at 104, 105 & 193.

[240] *Anglo-Indian Relations*, *supra*, note 224 at 367-369. P.A. Cumming & N.H. Mickenberg, eds., *Native Rights in Canada*, 2d ed. (Toronto: Indian-Eskimo Assn. of Can. & General Publishing Co., 1972) at 67 & 68 [hereinafter *Native Rights*].

[241] *Anglo-Indian Relations*, *supra*, note 224 at 17-28.

point to the conflict of interest which existed between settler-controlled local governments and unrepresented native groups as a cause for putting decisions respecting native lands into the hands of a body more representative of the interests of the community as a whole.[242] In British North America, the intervention of the Imperial Government in Indian land transactions was rendered necessary by military expediency.

The balance of military strength in mid-18th century North America was such that almost any action by major Indian groups to redress illegal or dishonest appropriation of their lands would threaten British security. Occasionally, natives would take matters into their own hands and attempt to recover their lands by force. British or colonial military units would then be required to intervene to protect the settlers.[243] Before the final defeat of the French forces in 1760, even Indian ill-will could threaten Britain's tenuous military position. By the mid-1700s, the British army's ability to mount a credible land campaign against the French depended heavily upon Indian support or neutrality.[244] Native groups whose assistance was essential to British success made it clear that their hesitation in taking the side of the British, or remaining out of the fight entirely, stemmed largely from their fear that their land rights would continue to be violated by British settlers in the event of a French defeat.[245] Indian participation in the later battles of the war usually had to be bought with assurances that

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[242] R.H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada* (Saskatoon: Univ. of Saskatchewan, 1990) at 24 [hereinafter *Indian Reserves*].

[243] *Anglo-Indian Relations, supra*, note 224 at 20, 21, 254 & 255. One such incident developed into the Tuscarora War of 1711-13.

[244] *Anglo-Indian Relations, supra*, note 224 at 30-33, 135, 140, 160, 208, 217 & 230.

[245] *Anglo-Indian Relations, supra*, note 224 at 184-188.

aboriginal land claims would be redressed.[246] After the fall of New France, rumors of an all-out campaign by the British to exterminate native peoples and take over their lands circulated along the American frontier and threatened to provoke an Indian uprising.[247] Even in 1763, therefore, the ability of the British to exploit their newly acquired American empire depended on the establishment of a conciliatory policy with respect to native land rights.

Restrictions on the alienability of native title, as these measures later came to be known, were inserted to guarantee the government's ability to afford the promised protection. As long as natives could not be dispossessed except through the medium of a process controlled by central government authorities, the Crown would be in a position to ensure that any surrender of native land rights did not give rise to unmanageable consequences. The Proclamation decreed the structure of the process by which this was to be accomplished. Indians could only effectively relinquish their land rights at a public ceremony which was organized for that specific purpose and which was presided over by representatives of the central government. On this occasion, the Indians would publicly declare their collective assent to the relinquishment of their rights and the central government would publicly accept the (then) unencumbered land. In later years, the surrender requirement was to receive a theoretical rationalization far removed from its pragmatic origins. Upon discovery by European nations, the land rights of North American natives became

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[246] *Anglo-Indian Relations, supra*, note 224 at 208-217.

[247] *Anglo-Indian Relations, supra*, note 224 at 280-283. In fact, a serious uprising, which has since become known as Pontiac's Rebellion, was well under way at the time the terms of the Proclamation were being formulated. The extent to which the uprising contributed to its provisions is unclear: see *Anglo-Indian Relations, supra*, note 224 at 334-339.

impaired. "[T]heir power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[248] According to this doctrine, Britain, and later, Canada and the United States, acquired a preemptive right to purchase the land occupied by native groups.[249]

There is a difference of opinion as to the extent to which performance of government obligations expressly or impliedly contained in the Proclamation were intended to be subject to unilateral variation or cancellation by government authority. For some, the Proclamation was the " ... Magna Charta [*sic*] of all the Indians of Canada ... "[250] for others, merely "a temporary expedient to quiet the minds of the Indians."[251] The historical record is perhaps a better gauge of the sincerity of these promises than speculation as to the authors' intentions. In Canada, for example, the necessity for cession and the procedure for securing Indian assent was to acquire a constitutional status and a statutory force.[252] Arguably, its provisions could not even be affected by pre-confederation legislation, or

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[248] *Johnson* v. *M'Intosh* 21 U.S. (8 Wheat.) 543 (1823), cited with approval in *Guerin, supra*, note 1 at 377–379.

[249] N. Jessup Newton, "Federal Power over Indians: Its Sources, Scope, and Limitations" (1984) 132 Univ. of Penn. L. Rev. 195 at 207–210.

[250] D. Campbell Scott, "The Administration of Indian Affairs in Canada" (Paper prepared for the 4th biennial conference of the Institute of Pacific Relations (Ottawa: Can. Institute of International Affairs, 1931) at 1.

[251] A remark attributed to George Washington, an early settler (and later military and political leader) said to have surreptitiously marked out lands beyond the boundary established by the Proclamation. See *Native Rights, supra*, note 240 at 70, quoting J.M. Sosin, *Whitehall in the Wilderness* (Lincoln, Neb.: Univ. of Nebraska Press, 1961).

[252] *Native Rights, supra*, note 240 at 26; *Easterbrook* v. *R.* (1930), [1931] S.C.R. 210 at 217 & 218.

by federal enactments passed prior to 1931.[253] The procedure for obtaining cessions of aboriginal claims ultimately developed into a fixed policy which led to the making of treaties covering most parts of Canada.[254] Indian legislation enacted between 1850 and 1985 provided that the prohibition against the direct private purchase of aboriginal lands applied to the Indian reserves covered by those enactments. Later versions of the *Indian Act* added a code of procedure for ensuring that surrenders of native rights of use and occupation had the assent of Indians whose rights would be affected by the proposed transaction.[255]

While the voluntary surrender requirement is strictly adhered to in respect of transactions involving reserve land, it does not appear to have been so strictly adhered to in the process leading to the establishment of the reserves in the first place. There is nothing about the government's preemptive right to purchase as described in *Johnson* v. *M'Intosh* which suggests that natives were to be obliged to sell on demand. As time went on, however, increased emphasis was placed by the courts on the temporizing language of the Proclamation.[256] When Canada needed aboriginal land cessions during the 19th and early 20th centuries in order to

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[253] B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 774 & 775 [hereinafter "Aboriginal Rights"].

[254] A.G. Harper, "Canada's Indian Administration: The Treaty System" (1947) 7 América Indígena 129 at 133 [hereinafter "Treaty System"].

[255] U.C. 1850, c. 74, ss. 1 & 2; S.C. 1868, c. 42, ss. 6, 8 & 17; *The Indian Act, 1876*, S.C. 1876, c. 18, ss. 11, 25 & 26; *The Indian Act, 1880*, S.C. 1880, c. 28, ss. 22, 36 & 37; *The Indian Act*, R.S.C. 1886, c. 43, ss. 21, 38 & 39; *Indian Act*, R.S.C. 1906, c. 81, ss. 33, 48 & 49; *Indian Act*, R.S.C. 1927, c. 98, ss. 34 & 50-52; *The Indian Act*, S.C. 1951, c. 29, ss. 28 & 37-41; *Indian Act*, R.S.C. 1952, c. 149, ss. 28 & 37-41; *Indian Act*, R.S.C. 1970, c. I-6, ss. 28 & 37-41; *Indian Act*, R.S.C. 1985, c. I-5, ss. 28 & 37-41.

[256] *St. Catherine's Milling, supra*, note 228 at 55, where it was said that Indian land rights were a " ... personal and usufructuary right *dependent on the good will of the Sovereign*." [Emphasis added.]

make allowance for the expected arrival of European settlers, Indians were presented with *pro forma* agreements, called treaties, which they were expected to accept without significant change.[257] Some studies suggest that, at least in some cases, Indians may not have fully appreciated the nature of the rights which they were giving up, and that those signing as their representatives may not have had the authority to make such a commitment.[258] Recent judicial opinion has suggested that Indian approval may not even have been a juridical requirement for the extinguishment of their land rights.[259]

Commentators do not agree about the precise juridical effect or territorial scope of the Royal Proclamation. The Proclamation does, however, provide some assistance in sketching in an outline of the intended relationship between the Crown, on the one hand, and North America's native populations, on the other. The Proclamation contains a clear assertion of the Crown's authority to govern native peoples. There is

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[257] "Treaty System," *supra*, note 254. With respect to pre-1947 treaties made with Canadian natives, Harper observes that (p. 145),

> It cannot be said that the terms of these treaties were ever *negotiated* with the Indians; only their acceptance was subjected to the democratic process. There was remarkably little effect upon the contents of the treaties, introduced as a result of demands made by Indians. The representatives of the government offered the treaties as instruments which the Indians could accept or reject.

[258] L.M. Hanks, Jr. & J. R. Hanks, *Tribe under Trust: A Study of the Blackfoot Reserve of Alberta* (Toronto: Univ. of Toronto Press, 1950) at 5–14 and *Native Rights, supra*, note 240 at 124, and D.F.K. Madill, *Treaty Research Report: Treaty Eight* (Ottawa: Dept. of Indian & Northern Affairs, 1986) at 110 & 111.

[259] *Ontario (A.G.)* v. *Bear Island Foundation* (1989), 58 D.L.R. (4th) 117 at 135 & 136 (Ont. C.A.), affirmed by the Supreme Court of Canada at [1991] S.C.R. 570 at 575, although not on the exact point for which the Court of Appeal's decision is cited here. United States authorities to similar effect are discussed in N. Jessup Newton, "At the Whim of the Sovereign: Aboriginal Title Reconsidered" (1980) 31 Hastings L.J. 1215.

a somewhat less clear promise of protection against exploitation by non-native peoples. At a minimum, the practices which caused friction between the two groups in the past are to be addressed in the manner specified, with the Crown cast in the role of mediator—restraining the pace and extent of settlement and ensuring genuine acquiescence by a majority of the natives whose interests would be affected to proposed dispositions of traditional territories. The terms of the relationship are, however, expressly made subject to change in a manner determined by the Crown.[260]

Inviting as it may be to interpret this instrument as the foundation of a comprehensive and permanent legal and political relationship between the Crown and native peoples, the construction of the Proclamation and the historical circumstances which brought it into existence make it most unlikely that that was what was intended by its authors, or even understood by aboriginal populations. Evidently, Pontiac did not give it much credence.[261] In view of what was to come, his skepticism was probably fully justified.

b. The reserve system

i. Crown/Indian relationship between 1814 & 1945

In fur trading days, natives were seen—chiefly by the French—as partners in commerce.[262] During the Seven Years' War, one group or another was essential to the success of land war efforts conducted by both

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[260] The arrangement could only be relied on "for the time being and until Our further pleasure becomes known."

[261] L. Chevrette, "Pontiac" in G.W. Brown, ed., *Dictionary of Canadian Biography*, vol. 3 (Toronto: Univ. of Toronto Press, 1966–) 530.

[262] *Skyscrapers*, *supra*, note 223 at 23–58 & J.R. Miller, "Introduction" in J.R. Miller, ed., *Sweet Promises: A Reader on Indian–White Relations in Canada* (Toronto: Univ. of Toronto Press, 1991) vii at xvi [hereinafter *Sweet Promises*].

French and British commanders. The British relied heavily upon their native allies during the Revolutionary War.[263] Indians fought on Britain's side throughout the War of 1812, and were critical to British success in turning back the American invasion. Native participation was not, however, based on some abstract notion of loyalty to European sovereigns.

Natives took part in these essentially European conflicts when and to the extent that they felt that participation would serve their interests.[264] French sovereignty was preferable to British sovereignty because the French came primarily to trade, not to demand exclusive possession of native hunting grounds for agricultural purposes. As France's military fortunes began to wane, however, Britain seemed a better bet and native allegiances shifted accordingly. When their assistance was sought by the combatants of the Revolutionary War, Indian groups who felt that British promises of respect for native land rights in exchange for military support were more likely to be kept continued to support the British cause. The Americans' disregard for Indian land rights after the defeat of British forces in the Revolutionary War, led natives living North of the border of British North America and the United States to back Britain in the War of 1812.

As long as there was an approximate unity of native and non-native interests, the Crown had an incentive to respect native rights. Once the Europeans resolved their dispute about who was to govern North America and turned their attention to settlement, however, the native population was subject to exploitation at the hands of a government by then controlled by non-native interests. By the mid-1800s, natives came to be seen as an

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[263] B. Graymont, "The Six Nations Indians in the Revolutionary War" in *Sweet Promises*, supra, note 262, 94 at 96.

[264] J.R. Miller, "Owen Glendower, Hotspur, and Canadian Indian Policy" in *Sweet Promises, supra*, note 262, 323 at 324 & 325.

obstacle to the orderly settlement of the new country.[265] Maintaining the system by which the government distributed money, goods and equipment to native peoples to secure their allegiance was no longer necessary. Annuity payments and presents came to be regarded as an unjustifiable financial burden. This change in outlook occurred shortly after the conclusion of the War of 1812.[266]

The thinking of the day was broadly assimilationist. Canada's native population would have to be brought to abandon their collective lifestyle, to adopt the cultural values of the majority and, (preferably), to do so quickly. At a minimum, they had to be persuaded to remove themselves from the path of the hoped-for waves of immigrant farmers, miners and ranchers expected to arrive at the turn of the century. The solution appeared simple. To start with, the Indians had to be segregated from the majority of the population both to protect them from exploitation at the hands of non-natives and to prevent their activities from interfering with the newcomers. Next, their social and economic evolution was to be "accelerated" until it reached the level of their new neighbors. They were to be provided with the skills which would allow them to compete in the mainstream market economy so that they could become economically self-sufficient. Afterwards, they were to be released into the general population into which they would eventually be assimilated.[267] This process became known as enfranchisement.[268]

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[265] *Skyscrapers, supra*, note 223 at 172 & 273.

[266] *Skyscrapers, supra*, note 223 at 79–98 and 267–276.

[267] G.F.G. Stanley, "Introductory Essay" in A.L. Getty & A.S. Lussier, *As Long as the Sun Shines and Water Flows* (Vancouver: Univ. of B.C. Press, 1983) 1 at 13 & 14 [hereinafter *Sun Shines*].

[268] Once a person was found to be a suitable candidate for entry into non-native society, government officials would issue a certificate to that effect. Upon the

The legislation which established the juridical relationship between the Crown and Canada's status Indians was developed during the heyday of the protection, civilization and advancement effort. The federal government became the holder of the legal title to lands reserved for aboriginal peoples. Neither the band for whom the reserve was set apart, not its individual members could voluntarily dispose of their land without Crown approval or participation. Non-members could not acquire interests through involuntary disposition. Government's decision-making power with respect to the uses to which the reserves could be put was to serve the policy of Indian self-sufficiency. The reserve served as a controlled environment in which the native occupants could be brought gradually to adapt to the economic and cultural life of the non-native community.[269] It also constituted a pool of land which could be subdivided and conveyed to band members in severalty as individual Indians were persuaded to terminate their cultural adhesions. This policy was supported by various versions of the *Indian Act* passed between 1868 and 1949, enactments which gave Indian Affairs officials sweeping powers to regulate the everyday lives of status Indians.

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issuance of this certificate, the Indian and his family became entitled to all of the rights and responsibilities of citizenship, including the right to vote. In general, Canadian Indians were not entitled to vote until the second half of the 20th century. Enfranchised Indians would also be entitled to a conveyance in fee simple of a portion of the reserve set apart for their former band. They also became entitled to receive a lump sum payment in lieu of future annuities. See, J.L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in *Sun Shines, supra*, note 267 at 39 [hereinafter "Protection, Civilization, Assimilation"].

[269] A.G. Harper, "Canada's Indian Administration: Basic Concepts and Objetives" [sic] (1945) América Indígena 119 at 132 [hereinafter "Basic Concepts & Objectives"] and A.G. Harper, "Canada's Indian Administration: 'The Indian Act'" (1946) América Indígena 297 at 313.

Generally speaking, Indians accepted the culturally neutral elements of this policy—the provision of livestock and farm equipment and instruction in agricultural pursuits and the delivery of health services, for example—but they greeted with stubborn resistance those which threatened traditional values.[270] For most status Indians, reserves were the sites within which Indian societies were segregated, and in theory at least protected, from interference by non-Indians.[271] They also constituted the main, and often the only, capital asset of the band for whose use and benefit they were set apart. From the Indian perspective, decisions affecting the use of reserve land had to balance these two, often competing, requirements. The overall objective which bands sought to achieve in making decisions with respect to the use of reserve lands was the maintenance of their traditional values, and not the dismemberment of their societies.

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[270] J.S. Milloy, "The Early Indian Acts: Developmental Strategy and Constitutional Change" in *Sun Shines, supra*, note 267, 56 at 60 [hereinafter "The Early Indian Acts"].

[271] This perspective was forcibly brought home to the government in the response of status Indians to the 1969 White Paper on Indian Policy. The White Paper had proposed repeal of the *Indian Act* and distribution to individual members of property—land and money—held for the use and benefit of the group to which they belonged. In Citizens Plus, described as the Red Paper on Indian Policy, status Indians were quick to point out that individual Indians had always had the opportunity to become "enfranchised" and obtain admission to non-Indian society along with their "share" of reserve lands and band money. "But most Indians prefer to remain Indians. We believe that to be a good useful Canadian we must first be a good, happy and productive Indian .... " See, "Statement of the Government of Canada on Indian Policy, 1969" and "Citizens Plus, 1970," both quoted in B.W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, rev. 1st ed. (Ottawa: Carleton Univ. Press, 1991) at 618–629. For an American perspective, see F. Pommersheim, "The Reservation as Place: A South Dakota Essay" (1989) 34 South Dakota L. Rev. 246 at 254.

Government administrators had a different perspective. They, too, worked towards economic self-sufficiency for native groups. However, early Indian Affairs officials viewed the communal lifestyle adopted by most Indians as inimical to that goal. If Indians were to become self-sufficient, they had to be taught capitalist values—they had to receive personally the product of their own labor, for example. Distributing wealth amongst those who did not contribute to its production was thought to discourage individual effort.[272] Administrators appeared to dismiss the possibility of harnessing traditional values as a means of attaining self-sufficiency and letting Indians decide for themselves whether, when and to what extent they were prepared to adopt non-native values.

If the pre-WW II Crown/Indian relationship were to be reduced to the few elements upon which there might have been agreement had there been communication, the following picture would emerge. Most of Canada's status Indians remain in occupation of a small portion of the territories which they occupied prior to contact. On the whole, individuals firmly reject the option, continually pressed upon them by the government, of cultural assimilation with the non-native majority. Although the Indian Acts give status Indians an opportunity to have their land dealt with on their behalf as if they were the holders of the maximum title which the civil or common law allows, they are unwilling to deal with it in a way which is inconsistent with communitarian values. When they do dispose of reserve land, they generally do so out of economic desperation or out of a desire to improve their communal existence.

The government is the custodian of title to this land, and it has a veto in respect of many initiatives which Indians might otherwise consider for

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[272] S. Carter, "Two Acres and a Cow: 'Peasant' Farming for the Indians of the North-West, 1889–1897" in *Sweet Promises, supra*, note 262, 353 at 355–360.

their cultural and economic advancement. Government's primary allegiance appears to favor predominantly the interests of an electorate which does not share or value the aboriginal vision of the good life. The interests of the electorate are not directly opposed to Indian objectives, however, just to those which the majority sees to be inimical to its interests—mostly, its economic interests. After all, one of the benefits which it was hoped that assimilation would produce was the elimination of an expensive administration whose sole purpose was caring for a segment of the population who, in the view of most, ought to have been taking care of itself. Caught in the middle of all this is the federal government. Its role, as in colonial times, was to mediate the conflicting interests of these two factions. Indian bargaining power has now decreased considerably. Indians would have to await a change in public opinion to press their case successfully. That opportunity arrived with the conclusion of World War II.

ii. Crown/Indian relationship after WW II[273]

In 1946, the Canadian government established the Special Joint Committee of the Senate and House of Commons to look into the operation of the *Indian Act* and the conduct of Indian affairs. The Committee sat for three parliamentary sessions. It heard submissions from native groups from all parts of the country and examined in detail all aspects of administrative policy and operations. Its members visited reserves, heard testimony from Indian leaders and Indian Affairs officials,

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[273] The Parliamentary history presented in this section is based on an unpublished report prepared for the Department of Indian & Northern Affairs in 1994 by S. Phinnie and E.M. Davies, historians employed with the Department's Litigation Support Directorate, and on J. Leslie & R. Maguire, eds., *The Historical Development of the Indian Act*, 2nd ed. (Ottawa: Dept. of Indian & Northern Affairs, 1978) [hereinafter *Development of Indian Act*]. The legal implications which I draw from this material do not necessarily represent the views of the authors, the department or the government.

studied petitions from native organizations and interviewed experts in health care, education, and economic policy.[274] On 22 June 1948, the Committee delivered its fourth and final report to the Senate and the House of Commons. Committee members pointed out that "[m]any anachronisms, anomalies, contradictions and divergencies [*sic*] were found in the [1927 *Indian Act*]." They proposed that " ... with few exceptions, all sections of the Act be either repealed or amended." The Committee favored handing over to Indians themselves more power to govern their own affairs. Specifically, they recommended,

> (a) That the revised Act contain provisions to protect from injustice and exploitation such Indians as are not sufficiently advanced to manage their own affairs;
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> * * *
>
> (c) That greater responsibility and more progressive measures of self government of Reserve and Band affairs be granted to Band Councils, to assume and carry out such responsibilities;
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> (d) That financial assistance be granted to Band Councils to enable them to undertake, under proper supervision, projects for the physical and economic betterment of the Band members;
>
> (e) That such Reserves as become sufficiently advanced be then recommended for incorporation within the terms of the Municipal Acts of the province in which they are situate;[275]

On 7 June 1950, W.E. Harris, the Minister responsible for Indian Affairs, introduced Bill 267, *An Act respecting Indians*[276] into the House of

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[274] For a summary of the circumstances surrounding the appointment of the Special Joint Committee and an outline of its activities, see *Development of Indian Act, supra*, note 273 at 132–144.

[275] Special Joint Committee of the Senate and the House of Commons on the *Indian Act, Minutes of Proceedings and Evidence, 1948 Session* (Ottawa: King's Printer, 1948) (Co-chairs: W.H. Taylor & D.F. Brown) at 186 & 187 [hereinafter *Special Joint Committee Report*].

Commons. Extensive criticism of the provisions of Bill 267 came both from opposition members and from the Indian community.[277] The bill was withdrawn on 22 June 1950 to give the government a further opportunity to discuss its contents with native leaders.[278] The Department wrote to " ... every Indian and Indian organization and to every non-Indian and non-Indian organization who had communicated ... about the bill.[279] Representations were extensive. Departmental officials interviewed a great many band councils and individual Indians.[280]

On 27 February 1951, Mr. Harris introduced Bill 79, *An Act Respecting Indians*, into the House of Commons.[281] Bill 79 contained many of the changes sought by Indian critics and was clearly intended to implement the major recommendations of the Joint Committee of 1946–48.[282] With a view to explaining the provisions of the new proposal directly to the Indian community and obtaining native views on the proposal, the government invited 18 representatives of Indian groups to Ottawa to meet with the Minister and discuss the proposed legislation. This meeting was held on 28 February, and on 1–3 March of 1951. It was the first meeting of its

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[276] 2nd Sess., 21st Parl., 1950 [hereinafter Bill 267]. See, *House of Commons Debates* (7 June 1950) at 3329–3334.

[277] *House of Commons Debates* (21 June 1950) at 3936–3951 & 3962–3982.

[278] *House of Commons Debates* (22 June 1950) at 3983 & 3984.

[279] *House of Commons Debates* (16 March 1951) at 1350 & 1351.

[280] Special Committee of the House of Commons on Bill 79, *Minutes of Proceedings and Evidence* (Ottawa: King's Printer, 1951) (Chair: D.F. Brown) [hereinafter *Special Committee Minutes*].

[281] 4th Sess., 21st Parl., 1951 [hereinafter Bill 79]. See, *House of Commons Debates* (27 February 1951) at 713–759.

[282] *Special Committee Minutes, supra*, note 280 at 14–22.

kind.[283] Minutes of the meeting were presented to Parliament prior to the second reading debate.[284]

In 16 March 1951, the House of Commons appointed a Special Committee to study the bill.[285] As each clause of Bill 79 was referred to this Committee for consideration, the Minister would list the comments made by those who had attended the meeting of 28 February to 3 March of 1951, as well as observations from individuals and organizations who had corresponded directly with the Department.[286] The Minister emphasized the degree to which the Bill's provisions were consistent with Indian preferences, and provided explanations for the fairly few occasions upon which they diverged. On 20 June 1951, Bill 79 became Canada's new *Indian Act*.[287] Apart from changes relating to band membership, taxation of reserve lands occupied by non-members and enfranchisement, the 1951 revision remains in force to this day.[288]

In certain respects, the new legislation was quite different from its predecessors.[289] Provisions empowering non-natives to interfere with Indian cultural practices[290] or social behavior[291] were removed. The

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[283] *House of Commons Debates* (16 March 1951) at 1351.

[284] *House of Commons Debates* (16 March 1951) at 1364–1367.

[285] *House of Commons Debates* (16 March 1951) at 1350–1360.

[286] *House of Commons Debates* (16 March 1951) at 1350 & 1351.

[287] S.C. 1951, c. 29.

[288] The current version is the *Indian Act*, R.S.C. 1985, c. I-5.

[289] Cf. "Protection, Civilization, Assimilation," *supra*, note 268 at 52 & 53, *Development of Indian Act, supra* note 273 at 149–162 and *Indian Reserves, supra*, note 242 at 137.

[290] Section 140 of R.S.C. 1927, c. 98 [hereinafter "*1927 Act*"] had prohibited Sun Dance and Potlatch ceremonies.

[291] Section 140A of the *1927 Act* made it an offence for an Indian who, "by inordinate frequenting of a poolroom ... misspends or wastes his time or means

prohibition against furnishing natives with encouragement, financial support or expertise in connection with the formulation or presentation of land claims was eliminated.[292] The most important difference lay in the increased authority given band councils. As recommended by the Special Joint Commission in 1948, band councils were given more power to govern the day-to-day affairs of their reserves. Authority which was formerly exercised by government representatives with no requirement for prior consultation with or approval of Indian bands or their representatives now required the consent of the band council. In many respects, the changes confirmed practices which had been adopted by Indian Branch officials decades before. On 20 June 1951, however, they became a formal constituent of the Crown/Indian relationship.

The following table illustrates the differences between the authority of band councils immediately before the introduction of the 1951 legislation and the legislation enacted during the period 1951–60, the period during which the changes proposed by the Special Joint Committee were incorporated into the *Indian Act*.[293]

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to the detriment of himself, his family or household .... " Section 140(3) made it an offence for an Indian to participate in aboriginal costume in any " ... show, exhibition, performance, stampede or pageant .... "

[292] Section 141 of the *1927 Act* had prohibited persons from soliciting or accepting money in connection with a claim for aboriginal or land rights.

[293] The Superintendent General of Indian Affairs (abbreviated to Supt. in Table I) was the minister of the department having responsibility for the federal Indian Affairs Branch for the time being. (See, R.S.C. 1927, c. 98, s. 4.) The 1951 and subsequent versions of the *Indian Act* referred to this official as the Minister. (See, S.C. 1951, c. 29, s. 3.).

Table 1	
1927 Act	**1951–60 Act**
Membership	
Supt. determines conclusively who was entitled to be a member of a band, subject only to an appeal to the Governor in Council (s. 18).	Band council can protest inclusion of person whose name appears on band's membership list. Council can appeal to the courts (s. 9).
Permission to use, occupy or exercise rights on reserves	
Supt. has unfettered right to permit use or occupation of reserve land by non-members (s. 34).	Min. may grant rights of use and occupation of reserve lands to non-members for a year, or for longer if band council consents (s. 28(2)).
Allotment of exclusive possession of reserve land to members	
Band or band council can make allotment (s. 21).	Only band council can make allotment (s. 20(1)).
Convocation of surrender meetings	
Only Supt. or Gov. in Council can convoke band meetings to consider surrenders (s. 51(1)).	Band council or Min. can convoke surrender meetings(s. 39(1)(b)).
Timber Licenses	
Supt. can grant licenses to harvest timber on reserve land (s. 76).	Min. can grant such licenses if empowered by regulation, but only with consent of band council (s. 57(a)).
Improvement of Unused or Uncultivated Reserve Land	
Supt. can unilaterally arrange for cultivation of such land and apply band's capital money to defray expenses (s. 93(3)).	Min. can make such arrangements and apply band's capital money to defray expenses, but only with the consent of the band council (s. 58(1)).

Table 1	
1927 Act	**1951–60 Act**
Sales of Non-Metallic Minerals on Reserves	
Supt. can grant licenses to remove sand, gravel or soil (s. 118(1)).	Min. can dispose of such substances, but only with consent of band council. Min. may grant temporary permits when consent cannot be obtained quickly (s. 58(4)).
Expenditure of Band's Capital Moneys	
Gov. in Council can authorize expenditure of band's capital moneys for listed purposes. Band council approval only required in a few cases (ss. 92 & 93).	Min. can authorize and direct such expenditures for similar purposes, but consent of band council required in all cases (s. 64).
Expenditure of Band's Revenue Moneys	
Gov. in Council could authorize and direct the expenditure of band moneys as long as they reasonably believed it to be in the best interests of the band (s. 91).	Min. can authorization and direct expenditure, in the specific circumstances listed in the legislation, but only with the consent of the band council (s. 64(1)).
Adjustment of Contracts	
Gov. in Council could reduce the purchase price or interest payable in respect of surrendered land. Band council consent not required (s. 91).	Min. is given similar powers but he may not exercise them unless the band council consents (s. 59(a)).
Zoning	
Act did not provide for zoning by-laws or for bylaws regulating the use of business on the reserve.	Band council authorized to enact such by-laws, subject to the Minister's approval (s. 80(1)(g) & (h)).

Table 1	
1927 Act	**1951–60 Act**
Expanded Jurisdiction	
	Gov. in Council could authorize band council to enact by-laws providing for and assessment of reserve land, the licensing of businesses operating within the reserve...Council could also employ managers, accountants, etc., (s. 82).
Grants of Reserve Land to Enfranchised Indians	
Supt. could have letters patent issued conveying portion of reserve land to enfranchised Indian locatee (s. 110(8)).	Min. given similar powers, but only with band council consent (s. 110(2)–(4)).

As Table 1 suggests, the government had taken up most of the recommendations made by the Joint Committee.[294] Important obligations with respect to reserve management were turned over to the band council. Parliament maintained control by providing that officials were inserted into important decision-making processes in such a way that they would be able to see first hand what was going on. Officials were given a veto over band and band council decisions to prevent improvident transactions and exploitation,[295] particularly, one assumes, of bands deemed "not sufficiently advanced to manage their own affairs."[296] More important, however, band councils gained a new prominence and an increased mandate. The scope for

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[294] *Special Committee Minutes, supra*, note 280 at 14–22.

[295] *Blueberry River, supra*, note 5 at 370 & 371.

[296] *Special Joint Committee Report, supra*, note 275 at 186 & 187.

unilateral action by government officials over reserve affairs was significantly reduced by comparison with the structure which existed prior to 20 June 1951. Band council approval was now required for virtually any important decision which affected the management or administration of the reserve. As Minister Harris proudly emphasized in his address to the Special Committee of the House of Commons,[297] the decisions which may be taken by the Minister without band council had been reduced from 78 to 58, and by the Governor in Council, from 82 to 26. Status Indians were slowly gaining control over the management of their affairs.

In the second half of the 20th century, then, the Crown/Indian relationship is very different from that of guardian and ward, a relationship to which it has frequently been compared.[298] Undoubtedly, government officials have power to veto important initiatives which bands or their councils might otherwise attempt to pursue, just as they had under the 1927 legislation. The Crown also holds the legal title to reserve land. After 20 June 1951, however, much of the control formerly vested in the Governor in Council or in the Superintendent General is shared between the Minister and the band councils. Cultural assimilation has long since ceased to be a legitimate objective; economic integration has become the official policy.[299]

4. *Guerin* Revisited

The *Guerin* decision provides confirmation of the change which had taken place in the Crown/Indian relationship between the assimilationist

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[297] *Special Committee Minutes, supra*, note 280 at 9.

[298] "Fiduciary Duty & Indian Title," *supra*, note 7 at 590–592. Not all commentators share this view of the relationship. See, F.S. Cohen, *Handbook of Federal Indian Law* (Washington: U.S. Govt. Printing Office, 1942) at 169–173.

[299] *House of Commons Debates* (16 March 1951) at 1350.

years of the late 1800s and the end of the Second World War. The need for the application of the doctrine of fiduciary obligation to protect the relationship is not immediately apparent, however, and it is important to examine the facts of the case carefully to understand why and how its application presented the only reasonable option. *Guerin* also has its limitations as justification for the variety of lawsuits which it is alleged to support, although these limitations were largely ignored in the euphoria which followed its publication. These limitations are only discernible from a careful analysis of the facts upon which the decision was based.

The Musqueam Indian reserve is situate along the southwesterly edge of the Point Grey peninsula in Vancouver, British Columbia. The reserve is a short drive from the city center and is surrounded by undeveloped park land. The land was, and still is, very valuable as a residential site.[300] In 1955, the band population was small,[301] and the entire reserve[302] was not used for residential or commercial use. Local Indian Affairs officials suggested that the unoccupied part of the reserve be leased on a long term basis and that revenue from the lease be made available to the band.[303] Headquarters agreed and, after commissioning a real estate appraisal of the land, local officials opened negotiations with the Shaughnessy Heights Golf and Country Club, a country club whose

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[300] *Guerin* v. *R.* (1981), [1982] 2 F.C. 385 at 432 (F.C.T.D.) [hereinafter "*Guerin–Trial*"].

[301] *Guerin–Trial, supra*, note 300 at 389: 235 people.

[302] *Guerin–Trial, supra*, note 300 at 389: Musqueam Reserve No. 2 was 416.5 acres in area.

[303] *R.* v. *Guerin* (1982), [1983] 2 F.C. 656 at 663 & 664 (F.C.A.) [hereinafter "*Guerin–Appeal*"].

directors had expressed interest in leasing part of the reserve for its golf course.[304]

Negotiating a long-term lease with a golf club might seem an unusual way to market prime residential land but, from the start, Indian Affairs appeared determined to plant a golf course in the middle of the development. In fact, the idea of leasing to a golf club actually preceded the discovery of a prospective tenant who wanted to rent a site for its golf course.[305] The reasons can, perhaps, be inferred from the written justification local officials provided to their superiors in Ottawa. What Indian Affairs had in mind was duplicating the highly successful British Properties development in West Vancouver,[306] which had also used a golf and country club to attract wealthy home buyers to its up-market residential development. Carefully planned, the Musqueam development could offer the same park-like settings and spectacular views, but without the rush-hour traffic. The golf course would provide the centerpiece and set the tone, and the grounds would be groomed and maintained without cost to the development.

Another factor which may have required a loss leader to induce people to invest in upscale housing was the fact that the residential lots were not to be sold to buyers. The Indians would never have permitted a permanent disposition of such a large portion of their reserve. Buyers

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[304] *Guerin–Trial, supra*, note 300 at 394–396.

[305] *Guerin–Appeal, supra*, note 303 at 664. Indian Affairs officials in both Vancouver and Ottawa were discussing the possibility of a golf course lease as a development possibility as early as October of 1955. The club which actually leased the lands did not start looking for an alternative site until 1956. Its existing tenancy did not expire until 1960. Officers of the lessee club had their first meeting with Indian Affairs officials in February of 1957. See, *Guerin–Trial, supra*, note 300 at 392, 394 & 395.

[306] *Guerin–Trial, supra*, note 300 at 390.

would have to be induced to build expensive homes on lots of which they had only 99-year leases. Leasehold residential lots are still not common in western Canada, and they were certainly uncommon during the late 1950s.[307] To increase problems further, residential properties on the other side of the peninsula were also likely to appear on the market at about the same time as those in the Musqueam subdivision.[308]

Before Indian Affairs could proceed with its development, however, the Musqueam band would have to be persuaded to surrender the portion of its reserve which would be required for the subdivision. Local officials seemed to feel that obtaining a surrender would be problematic.[309] They appeared to have little confidence in the entrepreneurial savvy of the band or its council.[310] The role of the Indian Affairs Branch, as District Superintendent F.E. Anfield seemed to see it, was to do what was necessary to release the land from the Indians' control so that the Department could carry out their plans for their reserve.[311] The band's reserve development policy, up to the time that Indian Affairs conceived its subdivision plan, was to allot small parcels to members, who were then free to lease to non-members. Mr. Anfield said that this practice was so ill-advised that it could

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[307] *Guerin–Appeal, supra*, note 303 at 666.

[308] *Guerin–Trial, supra*, note 300 at 432 & 433.

[309] As Mr. Anfield put it, " ... some very realistic and immediate plans must be formulated to bring about the stated wish of these Musqueam people .... " (*Guerin–Trial, supra*, note 300 at 390). Actually, at the time he wrote this, the stated wish of the Musqueam people seemed to be to allot individual parcels to members. What he probably meant was that the Indians had to be sold on the idea of a non-native residential subdivision which would tie up 75% of their reserve for the next 100 years.

[310] *Guerin–Trial, supra*, note 300 at 394, 395, 409, 410.

[311] Specifically, "to bring about the stated wish of these Musqueam people": *supra*, note 309.

only end in "economic disaster" for the band.[312] This preoccupation would make any "workable negotiations" in which band members might participate "practically impossible."[313]

As if that were not enough, Indian Affairs seemed to think that the proximity of the proposed subdivision to the part of the reserve occupied by band members would itself discourage prospective home-buyers. Mr. Anfield felt that this problem could only be solved by forcing the Indians to shape up or ship out. He suggested the establishment of a "model village" located at the extreme westerly boundary of the reserve. Alternatively, members might have to move off the reserve entirely.[314]

The seeds of the legal problem which was to follow were sewn in the conviction of Indian Affairs officials that neither band members nor their council were capable of meaningful participation in the commercial development of their reserve and that the Department was, therefore, justified in denying them any role in the decision making process.[315] This was a reversal of the policy of granting " ... greater responsibility and more progressive measures of self-government of Reserve and Band affairs ... to Band Councils, to assume and carry out such responsibilities."[316] The District Superintendent saw the surrender as a license to implement the departmental development scheme regardless of Indian wishes. He brought it about by plumping the golf course lease as an investment in its

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[312] *Guerin–Trial, supra*, note 300 at 390.

[313] *Guerin–Trial, supra*, note 300 at 390.

[314] *Guerin–Appeal, supra*, note 303 at 663 & 664.

[315] *Guerin–Trial, supra*, note 300 at 409 & 410.

[316] *Guerin–Trial, supra*, note 300 at 411. As the Trial Judge put it, "At that time and for many years before, according to the evidence, a great number of Indian Affairs' personnel, vis-a-vis Indian bands and Indians, took a paternalistic, albeit well-meaning attitude: the Indians were children or wards, father knew best."

own right,[317] and then proceeded to depart from the principles upon which he had sold it to the band.[318] The band council was excluded from these negotiations. They were not even given a copy of the lease. Despite numerous requests, its terms were not disclosed to them during the 12-year period following completion of the transaction.[319]

In the end, the Department succeeded in establishing "British Properties West," known locally as the Musqueam subdivision. Today, the development area is occupied by an upscale residential subdivision which is the equal of any in lower mainland. It is certainly the equal of its "famous counterpart in West Vancouver." The residential leases come to an end about 2060, when the band retakes possession of all properties.

Taken in isolation, the golf course lease is undoubtedly a poor investment. As an element of the larger undertaking, its commercial benefits are more debatable.[320] What is important for present purposes is that the government was not condemned by the judiciary for having made a bad deal, but for having ignored the understanding upon which it had secured Indian consent to the lease.[321] The result was that the Musqueam were compensated on the basis of the development potential of the land lost by the commitment to the golf club. That potential was calculated without regard to the fact that land values had been increased by the existence of the golf course,[322] and without regard to the fact that values

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[317] See, e.g., the extract from Anfield's address to those present at the surrender meeting in *Guerin–Appeal, supra*, note 303 at 677.

[318] *Guerin–Trial, supra*, note 300 at 412 & 413 and *Guerin–Appeal, supra*, note 303 at 687.

[319] *Guerin–Trial, supra*, note 300 at 418 & 419.

[320] *Guerin–Trial, supra*, note 300 at 437.

[321] *Guerin–Trial, supra*, note 300 at 425.

[322] *Guerin–Trial, supra*, note 300 at 437.

rose dramatically after 1958 because of a remarkable increase in demand for residential properties. The increased demand could not have been within the reasonable contemplation of the parties at the time the lease was executed.[323]

The award combined compensation and deterrence in classic fiduciary terms.[324] It appears to have been aimed at demonstrating to public officials how far they had strayed from the principles of the legislation they were supposed to have been administering. While government officials had not acted dishonestly, they had betrayed the legitimate expectations of band members. The decision confirms the terms of the relationship recommended to Parliament in 1948 and incorporated into the Indian legislation of the 1950s—Indian bands were, through their councils, to assume greater responsibilities and a greater measure of self-government over their own affairs. The bureaucracy's role was to protect against exploitation of Indians whose level of economic integration was not sufficient to allow them to protect themselves. Inevitably, the terms of the relationship would have to be worked out separately with each native community. The exercise would require communication, commitment to the process and, above all, candor, the hallmark of the fiduciary relationship.

5. Conclusion

The Crown/Indian relationship, in so far as it is relevant to the management and administration of reserve land, requires that government

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[323] *Guerin–Trial, supra*, note 300 at 435.

[324] As opposed to punitive damages, which the Trial Judge declined to impose because there was no evidence of oppressive, arbitrary or high-handed conduct or "fraud in the sense of deceit, dishonesty or moral turpitude" on the part of Indian Affairs officials. (See *Guerin–Trial, supra*, note 300 at 443 & 425.)

authorities restrict the exercise of their statutory powers to preventing exploitation of status Indians. The *Indian Act* in force today still provides for government supervision of reserve land transactions. The continued presence of these provisions is not to be taken as a license for a return to the paternalistic policies of the past.[325] The historical justification for their existence lies in the benign conviction of federal legislators of the 1950s that there were groups "not sufficiently advanced to manage their own affairs."[326] A majority of the Indian representatives who attended the historic meeting of 28 February to 3 March of 1951 apparently agreed. The thrust of their criticisms of Bill 79's reserve land sections was that band councils should also be able to initiate development proposals or veto departmental initiatives, not that all government review should be eliminated.[327]

Apart from preventing improvident dealings and using its statutory powers, where necessary, to carry out properly transactions which it has accepted, the government does not become the guarantor of the wisdom of non-exploitative Indian initiatives.[328] The power given to the band council to initiate reserve land dealings and veto government proposals carries

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[325] That is surely the lesson to be drawn from the *Guerin* decision.

[326] *Special Joint Committee Report, supra*, note 275 at 186 & 187 and *Special Committee Minutes, supra*, note 280 at 4.

[327] *House of Commons Debates* (16 March 1951) at 1364–1367. This is a point overlooked by commentators who argue that the 1951 *Indian Act* did not differ significantly from previous versions. See, e.g., *Indian Reserves, supra*, note 242 at 137, *Development of Indian Act, supra*, note 273 at 149, "Protection, Civilization, Assimilation," *supra*, note 268 at 52 & 53. This is not an exaggeration from a purely superficial point of view. A careful analysis of the amendments and the historical events which generated them, however, suggests that the Act had changed significantly. At least, that was the conclusion which the Trial Judge reached in *Guerin*. Unfortunately, it did not seem to have occurred to federal administrators involved in the Musqueam Park development.

[328] *Blueberry River, supra*, note 5 (decided under the *1927 Act*).

with it the responsibility to investigate and evaluate the advisability of individual transactions from the point of view of the constituency the council has undertaken to serve. To the extent that that responsibility is taken up by band councils, government responsibility is diminished. Members have recourse to the courts for the failure of the council to discharge its responsibilities to them. The council, itself, owes fiduciary obligations to the band in respect of its conduct of band affairs.[329]

The ultimate control over certain reserve land dealings which the *Indian Act* vests in the federal government presents officials with an opportunity to exploit Indian interests, that is, to use their power to veto Indian initiatives in a manner inconsistent with reasonable (in this case, parliamentary) expectations. To the extent that Parliament maintains existing controls by statute, the opportunity for exploitation is inherent in the Crown/Indian relationship.[330] In chapter 4, I will examine the exploitative opportunities which arise in three specific types of reserve land transactions and suggest the content of the fiduciary obligations needed to prevent exploitation of Indian interests.

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[329] *Gilbert* v. *Abby*, [1992] 4 C.N.L.R. 21 (B.C.S.C.).

[330] I do not mean to imply here that, deprived of government review and approval of proposed transactions, status Indians would be easy prey for speculators. The current statutory definition of the Crown/Indian relationship requires that officials provide this service, needed or not, and, until the legislation is amended or repealed, Indians and Indian Affairs will have to manage their respective roles with as much grace as each can muster.

CHAPTER IV

THE CROWN'S FIDUCIARY DUTY TO INDIANS

1. Introduction

In chapter 1 of this thesis, I argued that the doctrine of fiduciary obligation is more legislative than interpretive. Specifically, it represents a technique for amending and supplementing the body of judge-made legal and equitable rules generally referred to as the common law. The function of the doctrine is to preserve the integrity of useful relationships not adequately regulated through other sources. Besides being its greatest strength, the doctrine's legislative ambition is also its greatest weakness. One of the most important objectives of civil law is to enable lawyers to incorporate juridical principles into advice to individuals seeking to regulate their dealings with one another without recourse to litigation. To achieve this result, outcomes of individual lawsuits must be capable of rationalization on the basis of explicit principles which can be applied in similar circumstances. Any technique designed to facilitate the creation of rules not contemplated by existing doctrine is bound to run afoul of this requirement for replicable judicial reasoning. Opinions as to whether a relationship not previously declared to be fiduciary will be regulated through the doctrine of fiduciary obligation will always be subject to a large margin for error.

It is not necessary to speculate as to whether or not the Crown/Indian relationship is fiduciary. This relationship has been authoritatively held to require the imposition of fiduciary obligations.[331] Here, the challenge is to identify the obligations which will be imposed to

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[331] *Guerin, supra*, note 1.

preserve the integrity of this relationship, and to determine the manner in which they will be adapted to serve this purpose.

In chapter 2, I describe the way in which the doctrine is applied to regulate those relationships which, by legislative or judicial fiat, must be regarded as fiduciary. I argue that there are really two situations which the law must address—first, cases in which the obligations required for the protection of the relationship should have been obvious to the party or parties against whom the claim is made, and cases in which the evidence establishes that there is only one obligation likely adequate protection; second, cases in which it would not be fair for the court to dictate the terms of the relationship after the fact.

In the first class of cases, courts simply impose the necessary obligations.[332] In the second, they declare the dependent party or parties entitled to timely notice of any decision, by those upon whom they depend, to deviate from the standard of service required to generate the benefits generally expected from such relationships, and entitled to complete disclosure of all circumstances relevant to that decision. It is this entitlement to candor which gives the doctrine its vaguely moral cast. At that point, the law expects the parties to confirm the original arrangement, re-negotiate its terms or terminate it altogether. Failing disclosure and

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[332] In *Dreaver* v. *R.* (1935), 5 C.N.L.C. 92 (Ex. Ct.), for example, the Mistawasis band sought to have Canada repay sums wrongfully deducted from the band's capital account by Indian Affairs officials. While some of the amounts claimed represented reimbursement for payments made by the government in connection with the administration of the band's affairs, no enactment, treaty or surrender required the band to reimburse the Crown for such payments. Other deductions represented the cost of medicines, drugs and medical supplies provided to members. Under the terms of a treaty between Canada and the band, Canada was obliged to supply these items to members without charge. The court ruled that the Crown held the funds in trust for the band and ordered repayment.

arms length re-negotiation, the fiduciary is obliged to conduct himself in a manner which, in the circumstances, is most likely to gain for the dependent party the benefits which such relationships are generally expected to generate.[333] Imposing such a standard is not unfair because the party of whom it is required could have avoided ever having to perform simply by notifying the other in a timely way of his intention to deviate from the expected level of performance. Unfortunately, the doctrine of fiduciary obligation is much more difficult to apply than to describe. Apart entirely from the obscurity generated by its oblique objectives, its application is unavoidably eccentric. This is because the scope of the doctrine often depends upon the availability of adequate relief from other sources and not upon principles which can be deduced from the doctrine of fiduciary obligation itself. Wherever a doctrine which is based upon replicable judicial reasoning provides adequate regulation, that doctrine is applied in preference to the imposition of fiduciary obligations.

The first step in determining what fiduciary obligations will be imposed in respect of a given relationship is to identify the benefits which the relationship is expected to produce. In chapter 3, I examine the relationship between the Government of Canada and Canada's status Indians in so far as it is relevant to the management and administration of reserve land. I argue that the government's role is, generally speaking, mediatory. Its objective is to facilitate a reconciliation of the demands of Canada's native peoples, on the one hand, and those of the non-native community, on the other, as to the role which native peoples are to play in Canadian society. Over the years, governments have tried to achieve this goal in a number of different ways. The British sought to separate the two

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[333] As discussed in chapter 2, special accommodation is made in respect of certain classes of beneficiaries.

communities by confining each to a different geographical location and leaving the natives to govern themselves. British and, later, Canadian administrators tried to induce natives to assimilate culturally and economically with the non-native majority. After WW II, the federal government limited its efforts to attempting to achieve integration of native economies and the surrounding non-native economy. At the moment, the country is negotiating agreements with status Indians for a measure of self-government.[334]

A comprehensive and stable reconciliation of competing interests—whatever form it may take—requires a careful assessment by each party of its negotiable and non-negotiable interests as well as an informed consent to the impact upon those interests of any commitments required by a given settlement. Any likely reconciliation will inevitably require aboriginal peoples to make a compromise between cultural autonomy and economic self-sufficiency. Only aboriginal peoples themselves have the moral authority to make such a decision. Until native groups are in a position to commit themselves permanently to a given arrangement, they would be better advised to avoid unnecessary undertakings which foreclose likely options. Transactions requiring such undertakings are improvident in the sense that they fail to take long term social consequences into account. There is, however, another sense in which a transaction may be improvident. It may represent the dissipation of the capital resources of a native group—leasing reserve land for less than its fair market rental value or selling it for less than it is worth, for example. Both types of transactions are improvident in the sense used in the *Blueberry River* case, and both

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[334] See, e.g., British Columbia, Canada and the Nisga'a Tribal Council, *Nisga'a Treaty Negotiations Agreement in Principle*, (Vancouver: B.C. Queen's Printer, 1996) at 65–80 [hereinafter *Nisga'a Agreement in Principle*].

require that preventative measures be taken to avoid adverse consequences for native peoples[335]. The benefits which status Indians can reasonably expect from their relationship with the federal government is protection from both types of improvidence. Indians should be able to count on the government to provide protection if and to the extent that Indians' lack of familiarity with the non-native economy prevents them from appreciating the social or economic impact upon them of a given reserve land transaction for which their consent is required. In screening out improvident reserve land dealings, protection usually consists of advice or, as a last resort, a refusal to allow the transaction to proceed. Where the government has undertaken to implement a reserve land transaction, protection against improvidence includes ensuring that the transaction is carried out with diligence and prudence.

In so far as the management and administration of reserve land is concerned, Canada still holds considerable legal power. At least in theory, every significant Indian initiative involving reserve land is subject to Crown review and veto. Superficially, Indian legislation seems almost as paternalistic as it was during the assimilationist period of the late 1800s. However, the parliamentary history of the *Indian Act* of 1951, which forms the basis of the current legislation, suggests another reason for the

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[335] In *Blueberry River*, *supra*, note 5, the Court considered the band's decision to sell farmland in exchange for homesteads in locations more convenient to traplines and hunting grounds and held (at 362 & 363 *per* Gonthier, J., and at 371 *per* McLachlin, J.) that, given the band's chosen lifestyle, their decision was not improvident. The majority also ruled (at 364) that Indian Affairs officials had violated their fiduciary obligations to the band in failing to reserve mineral rights from the grant to the Director, the *Veterans Land Act*. McLachlin, J. held that the original conveyance of the mineral rights was not a breach because Indian Affairs had no reason to think that the rights had any value. She held, however, (at 401) that Indian Affairs had violated its fiduciary obligations in failing to rescind the conveyance of the mineral rights once they had reason to believe that they might be valuable.

retention of these remnants of past policies. Indian Affairs officials, and the native community itself, recognized at the time the Act was being debated that there were groups who still required government protection.[336] With that reservation, the 1951 legislation appears to contemplate a steady devolution of powers of self-regulation from government officials to Indian bands.[337] A purposive reading of the Act indicates that it should be interpreted in a manner which favors informed Indian decisions over government policy. Such an interpretation was applied in *Guerin*, which stands as a authoritative confirmation of parliamentary intent.

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[336] Between 1952 and 1954, for example, most British Columbia band councils were primarily legitimators of measures and decisions taken from outside the band and channeled through Indian Affairs officials. Even as late as 1966, the most important functions actually performed by band councils across Canada were representative and intermediary, rather than directive and adaptive. See, H.B. Hawthorn, ed., *A Survey of the Contemporary Indians of Canada: A Report on Economic, Political, Educational Needs and Policies*, vol. 2 (Ottawa: Indian Affairs Branch, 1966) at 192 & 193 [hereinafter *Survey of Canadian Indians*].

[337] See, e.g., ss. 60(1) and 68(1):

> 60. (1) The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.
>
> * * *
>
> 68. (1) The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order.
>
> * * *
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> 83. ... where the Governor in Council declares that a band has reached an advanced stage of development, the council of the band may, subject to the approval of the Minister, make by-laws for ...
>
> (a) the raising of money by
>
> (i) the assessment and taxation of interests in land in the reserve ..., and
>
> (ii) the licensing of businesses ....

The second step in determining what obligations will be imposed is to identify unregulated opportunities inherent in the structure of the relationship itself for one or more of the parties to exploit the interests of another or others. Opportunities for exploitation merit judicial regulation whenever they threaten the integrity of the relationship—whenever they create disadvantages for beneficiaries which materially offset expected benefits. In chapter 2, I argued that such opportunities arise whenever one or more of the parties expects to gain more by departing from the expected standard of performance than by adhering to it. The possibility of profit from non-performance is, no doubt, a feature of a great many relationships, fiduciary and otherwise, but the possibility will only be seen by fiduciaries as an opportunity when they have reason to believe that their conduct will not be effectively monitored nor their judgment seriously questioned. This situation exists in connection with the government's role in reserve land transactions.

As described in chapter 3, Parliament has given to the Minister of Indian Affairs and to the Governor in Council what amounts to a statutory veto over Indian initiatives for the purpose of protecting natives against exploitative transactions.[338] In addition, government officials have the

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[338] *Blueberry River, supra*, note 5, where the Governor in Council accepted an absolute surrender of reserve land for sale or lease. The Crown sold the land to the Director, the *Veterans' Land Act*, to provide farms for returning veterans. Mineral rights were not reserved from the grant, as dictated by Indian Affairs' policy of the day, with the result that they passed to the Director, and thence, to individual grantees. A few years after most of the reserve had been sold, huge deposits of oil and natural gas were discovered in the vicinity of the former reserve and, for the first time, Indian Affairs officials investigated the state of the title to the mineral rights, only to find that they had been conveyed to the Director. Title to some of the lands and minerals remained in the Director at the time the mistake came to the attention of officials, however, and the Superintendent General could have canceled the transfer of the mineral rights in the remaining conveyances pursuant to s. 64(1) of the *Indian Act*, R.S.C. 1927, c. 98. Officials inadvertently overlooked this option. The majority of the Supreme

power to initiate certain dealings,[339] and, in a few cases, to proceed without band or band council approval.[340] Bands are not always privy to the decision-making process and may often be unaware of the considerations which drive government action. People—natives and non-natives alike—whose need for outside assistance is predicated upon their lack of knowledge or experience with the subject for which assistance is required, have little alternative but to accept the judgment of those who provide it. The Crown's motivation for deviation from expected standards—the government equivalent of the "profit" motive in commercial cases involving fiduciaries—will seldom come in the form of a secret commission or money payment. Inducements sufficient to motivate the government itself to violate fiduciary obligations are more likely to be political. For example, Canadian governments have and will continue to be tempted to prefer the interests of the non-native majority over the Indian minority. This temptation may be reflected in a failure to examine critically the impact upon treaty or constitutional undertakings of legislative or economic policies which favor non-native interests.[341] It may result in approval of the

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Court of Canada held the Crown liable to compensate the band for its failure to reserve the mineral rights. All judges held the Crown liable for its failure to cancel the conveyance of the mineral rights once the mistake was discovered. Madam Justice McLachlin speaking for Cory and Major, JJ., said (at 371) that a failure to prevent a foolish or improvident decision amounts to exploitation. The majority did not discuss this point specifically although they agreed, in general, (at 354) with McLachlin, J.'s analysis.

[339] Section 28(2) of the *Indian Act* provides that " ... [t]he Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds [and] Indian health projects.

[340] Section 35(1) of the *Indian Act* provides that the Governor in Council may authorize the compulsory acquisition of reserve land. The statute contains no requirement for consultation with band members or with the band council.

[341] In *Sparrow, supra*, note 3, at 1108, Chief Justice Dickson and Mr. Justice LaForest, writing for the six-judge panel which heard the case, observed that:

compulsory acquisition of reserve land for projects which unfairly burden native groups for the benefit of non-natives. Political temptation such as that described above tends to act on the government as a whole. The doctrine of fiduciary obligation, however, also imposes vicarious liability on government for breaches by individual public servants.[342] The motivation for such breaches is seldom political. Examples would include withholding information for the purpose of avoiding disclosure of negligent conduct.

In chapter 4, I examine the fiduciary obligations of the government to the various parties involved in the allotment of reserve land—the band members, the band council, the locatee and those to whom the location is transferred, bequeathed, transmitted or leased.

2. Allotment of Unsurrendered Reserve Land

a. The allotment process

The earliest federal statute providing for the allotment of reserve land to individual Indians was the *Gradual Enfranchisement Act* of 1869.[343] All future versions of the *Indian Act* made provision for the allotment of reserve land to members of the occupying band. At first,

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> In our opinion, *Guerin*, together with *R.* v. *Taylor and Williams* ... ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship. [Citation omitted.]

[342] In the *Blueberry River* case, *supra*, note 5, the government was ordered to compensate the plaintiffs for the inadvertence of Indian Affairs officials in failing to recommend cancellation of the sale of mineral rights to the Director, the *Veterans' Land Act*, once the mistake had been discovered.

[343] *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, S.C. 1869, c. 6 [hereinafter *Gradual Enfranchisement Act*].

allotments were granted only by the Superintendent General of Indian Affairs.[344] Later on, they were granted by the band or its council and approved on behalf of the government by the Superintendent General or Minister.[345] Nineteenth century policy makers saw the reserve as a controlled environment in which Indians could learn the habits and skills which would be needed to compete in the non-native economy. The final stage of Indian development would occur when all of the members had abandoned their communal way of life and adopted the culture and religion of the dominant society.[346] Commentators argue that the original purpose of the allotment provisions was to allow Indians to get used to the non-native concept of individual ownership of property, and to enable administrators to assess whether individuals were ready for enfranchisement.[347] As mentioned earlier, cultural assimilation was officially disavowed as a legitimate policy objective at the beginning of the 1950s and economic integration replaced it as the prime goal of Canadian Indian policy.[348]

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[344] *Gradual Enfranchisement Act, supra*, note 343, s. 1.

[345] Under the *Gradual Enfranchisement Act, supra*, note 343, s. 1, only the Superintendent General was entitled to make an allotment; by S.C. 1876, c. 18, s. 6, band could allot, subject to approval of Superintendent General; by S.C. 1880, c. 28, s. 17, band or band council could allot land, subject to approval of Superintendent General; by S.C. 1951, c. 29, s. 20(1) band council was entitled to make an allotment, subject to approval of Minister.

[346] "Basic Concepts & Objectives", *supra* note 269 at 132.

[347] See, e.g., "Protection, Civilization, Assimilation," *supra*, note 268 at 132 & 133. Entitlement to exclusive possession of defined parcels of land or of exclusive rights to the produce of a parcel of land, particularly one upon which an individual or a family group had expended substantial effort, was not necessarily foreign to all North American aboriginal groups. See, e.g., M.J. Bailey, "Approximate Optimality of Aboriginal Property Rights" (1992) 35 J. of Law & Economics 183 at 195.

[348] *House of Commons Debates* (16 March 1951) at 1350.

Section 20(1) of the current *Indian Act* empowers band councils to allot unsurrendered reserve land to individual members of the band for whom the reserve was set apart. If the allotment is also approved by the Minister, the member to whom it is made[349] is said to be in lawful possession of the land. The Minister has a discretion as to whether to consent to the allotment.[350] He may approve the allotment and issue the member a Certificate of Possession. Alternatively, he may withhold his approval, in which case he must issue a Certificate of Occupation and permit the member and his heirs or successors to occupy the land for a period of two years.[351] At the end of the period in respect of which the Certificate of Occupation is in force, the Minister must either approve or refuse the allotment.[352]

b. Locatee rights

A locatee is entitled to exclusive possession of the land forming part of the location.[353] He is entitled to compensation for improvements in the event that the land is compulsorily acquired.[354] He may transfer his right to possession to another member provided the Minister approves.[355] The locatee's right to possession may be devised by will or may devolve upon the locatee's successors, provided that the devisee or successor is entitled

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[349] The "locatee." The parcel allotted is called the "location" or the "allotment."

[350] Section 20(4).

[351] Section 20(4)–(6). The Minister may extend the period of occupation for a further period not exceeding two years (s. 20(6)).

[352] Section 20(6)(a) & (b).

[353] Subject to the terms of the Act and the conditions (if any) of the allotment, the locatee may exclude all persons from the allotted parcel, even other band members. See, e.g., *Joe* v. *Findlay*, [1981] 3 W.W.R. 60 at 62 & 63 (B.C.C.A.).

[354] Section 23.

[355] Section 24.

to reside on the reserve in his own right[356] and provided the Minister approves the devisee or successor.[357] The locatee may also have the Crown lease on his behalf all or part of his location even though the tenant may be a non-native.[358] The locatee is also entitled to the proceeds of any disposition of mineral or timber or any agricultural lease granted in respect of unoccupied locations.[359]

c. Possible policies

In the *Blueberry River* case, the Supreme Court of Canada ruled that the purpose of government involvement in the surrender process was to prevent the exploitation of the occupying band.[360] In order to prevent exploitative decisions, Parliament declared surrenders of reserve land void unless accepted by the Governor in Council.[361] Madam Justice McLachlin explained that, in this context, exploitation included failure by government officials to prevent foolish or improvident decisions.[362] The legislative

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[356] Section 50.

[357] Section 49.

[358] Section 53(3). The Act contains no restrictions upon the identity of the tenant, the length of the lease or the use to which the property may be put. For example, the tenant may be a corporation controlled by the locatee and his family.

[359] Section 53(1) & (4).

[360] The discretion involved in that case was whether or not to accept surrender, rather than a discretion to approve an allotment, transfer or lease. It is unlikely that the reason for the discretion would be different in the case of allotments.

[361] *Blueberry River, supra*, note 5 at 370 & 371. See s. 39 of the *Indian Act*.

[362] McLachlin, J.'s definition of exploitation focuses on the effect of exploitation on the victim and, to that extent, differs from the definition used elsewhere in this thesis. In common parlance, "exploitation" emphasizes the reprehensible conduct of the perpetrator. Exploitation means " ... [utilizing] for one's own ends, [treating] selfishly as mere workable material (persons, etc.); '[making] capital out of.'" See J.A. Simpson & E.S.C. Weiner, eds., *Oxford English Dictionary*, vol. 5, 2d ed. (Oxford: Clarendon Press, 1989) at 574. See also,

technique of requiring approval of Indian decisions by government authorities is not limited to the surrenders. In fact, the entire allotment process is subject to Ministerial approval. I will assume, for the purposes of this chapter, that the reason for which Parliament requires government involvement in allotment transactions is the same as that for which government approval is required in surrender transactions—to prevent foolish or improvident dealings in the sense used in the *Blueberry River* case.

There are three occasions upon which government officials play a role in the allotment of reserve land—at the time the allotment is first made, at the time the location changes hands by agreement, devise or descent and at the time the allotted parcel is leased by the locatee. On each occasion the government has an opportunity to prevent the proposed transaction from proceeding simply by refusing to approve it. The legislation does not provide a list of principles upon which officials are to base their judgment in making this decision. The matter is simply left up to the discretion of the Minister. Whether a decision can be characterized as improvident or foolish depends heavily upon the values of those called upon to assess it. The Blueberry River band's 1945 decision to sell prime farm land close to town and invest the proceeds in remote reserves barely large enough for living space and pasture for their horses (but closer to their trap lines) would strike many as foolish or improvident. The decision makes good sense in the context of the overall objectives of those making it—perpetuation of a subsistence economy based on hunting and trapping and preservation of small, interdependent social and cultural units isolated

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Canadian Pacific Ltd v. *Paul*, [1988] 2 S.C.R. 654 at 677 where the Court ruled that the purpose of preventing transfers of Indian land directly to individuals was " ... a protective measure for the Indian population lest they be persuaded into improvident transactions."

from outside influences. In fact, there are at least four policies which the Minister might reasonably pursue in deciding whether to grant approval. Each requires different information to implement successfully, and each exposes the band, or the locatee, and the government to different risks.

i. equitable distribution of reserve land among members

The Minister might take the position that the reserve was set apart for the use of all members of the occupying band equally and that any method of individuation of reserve land must result in all members having an equal opportunity to obtain exclusive possession of a similar lot for whatever purposes—residential, agricultural or commercial—the band's reserve land could be put. To fulfill this obligation, the Minister would have to have information as to the amount of reserve land the band possessed, the uses to which the land might reasonably be put, the rate of growth or decrease in the segment of the band population which might require land in future, the ability of the applicant to make profitable use of the land, the amount of land the applicant already possessed, the land use plans formulated for that reserve, the amount of land which remained for allotment to other members, and so forth. Armed with such information, he should be able to assess the wisdom of a given allotment, at least to the point of telling whether it was foolish or improvident in the sense that it failed to take into account the entitlements of all of the members. With sufficient involvement in the allotment process, the Minister might even prevent exploitation in the sense in which that word is normally used—cases in which the applicant applied pressure on the councilors to obtain more than his fair share of reserve land, for example, or cases in which councilors abused the powers of their office by allotting a disproportionate share of reserve land to their supporters or families.

Prior to 1951, Indian Affairs officials seemed to see their role as ensuring that reserve land was allotted equitably among band members and that allotments were made to members who would actually occupy and use or exploit the location themselves.[363] Maintaining this policy would give reasonable construction to the requirement that the Minister approve all allotments, and all transfers, bequests or transmissions of allotted parcels. However, it would probably be regarded as offensive and oppressive by Indian leaders as it would subject decisions by individual locatees or by band councils to reversal by government officials, a situation which smacks of paternalism and has no parallel in the non-native community. It would also be inconsistent with the overall policy of devolving powers of internal self-government to Indian bands.

ii **maintain sites for preservation of aboriginal cultures**

By virtue of s. 18(1) of the *Indian Act* the Crown holds the title to reserves " ... for the use and benefit of the band for which they were set apart ...."[364] These words suggest a general commitment by the government to advance the interests of the occupying band. During the second half of the 19th century and the early years of the 20th, when most of

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[363] Even then, most allotments were approved. Indian Affairs became involved when it appeared that a few individuals had acquired a disproportionate amount of reserve land, or that allotments were being made to members who had no intention of working the land themselves. See, Special Joint Committee of the Senate and the House of Commons on the *Indian Act, Minutes of Proceedings and Evidence, 1946 Session*, (Ottawa: King's Printer, 1946) (Co-chairs: J.F. Johnston & D.F. Brown) at 559 [hereinafter *Special Joint Committee Report, 1946*] at 560 & 561, and "Indian Agent's References & Regulations," unpublished reference materials circulated to Indian Superintendents after 1933 with respect to the administration of the *1927 Act*, at paras. 253 & 274.

[364] Section 18(1). A number of other provisions are aimed at preventing the unauthorized occupation of reserve land by non-natives. See, e.g., ss. 28(1), 30 & 31.

Canada's Indian reserves were established, government initiatives were aimed at the cultural transformation of reserve inhabitants—inducing them to adopt the values and practices of the European immigrants.[365] From the assimilationist perspective, reserves simply provided a place for natives to live pending completion of the adaptation process. The government's duties with respect to unsurrendered reserve land would, therefore, be limited to preventing non-native interference with the transformation process and ensuring that sufficient land remained to provide accommodation or money once members became enfranchised. If funds were needed to provide necessaries pending enfranchisement, reserve land could be sold or leased or its mineral or forest resources exploited. Historians have suggested , however, that Indians saw things quite differently. For the most part, they were anxious to acquire the skills and tools necessary to make their way in the new economy. It is doubtful if the majority of Indian peoples were ever prepared to relinquish permanently cultural ties with their traditional societies.[366] From a native perspective, ensuring that reserves were used for "the use and benefit of the band" would likely involve the preservation of a land base and the creation of a governmental jurisdiction adequate for the survival of aboriginal cultures.

Under the preservation of cultural sites regime, the government would be obliged to reject applications for individuation of reserve land which might bring the communally occupied portion of the reserve below

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[365] As Deputy Superintendent-General Duncan Campbell Scott put it in 1920:

> ... [The] object [of the program of Indian education and advancement] is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department ....

(quoted in *Development of Indian Act, supra*, note 273 at 114).

[366] *Skyscrapers, supra*, note 223 at 277.

a certain area as long as a significant percentage of band members depend upon the existence of a tract of communally-held land occupied exclusively by members of the same cultural tradition. It may be required to do so even though a majority of electors may demand the subdivision of the entire reserve. On this basis, the individuals who comprise the occupying band at a given time have an interest similar to a life estate in the reserve which they, themselves, would be obliged to pass on to their descendants.[367] Presumably, the government would have to maintain this land base until the population seeking to maintain cultural traditions is too small to do so. Separating transactions which are improvident from those which are not involves a careful consideration of the interests of unborn generations.

The dedication of a permanent land base free from erosion by government action and safe from interference by non-natives does appear to be one of the objectives sought by native groups currently involved in

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[367] See R.P. Chambers & M.E. Price, "Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands" (1974) 26 Stanford L. Rev. 1061 at 1079–1081 [hereinafter "Leasing of Indian Lands"], where the authors (speaking of the situation in the United States) say:

> The trust responsibility could be read as placing the highest value on the federal guarantee of space, immune from state intervention, where an Indian society can be pursued. In this sense, the beneficial ownership of reservation land may be likened to a life estate. Each generation may be obliged to pass the land base on to the next, and the [government] may function as a guardian for generations yet unborn so as to guarantee that the cultural homeland and heritage will not be diminished in size or value.

See also, *Indian Reserves*, *supra*, note 242 at 2, 3, 60 & 61, where Professor Bartlett argues that, historically, Canada and all provinces other than the Maritimes, Québec and British Columbia adopted a policy " ... which sought both to maintain traditional ways of life and to develop more contemporary forms of economic development."

treaty negotiations.[368] Presumably, government action aimed at maintaining existing reserves for that purpose would meet with the general approval of Indian representatives.[369] This approach would also give meaning to the statutory requirements for ministerial approval. The Crown would not approve allotments which brought communally held reserve land below a definable critical area, or would insist upon the insertion of conditions which would require the restoration of allotted land to the communal pool if demographic estimates were to prove incorrect. The purpose of approving locatee leases would also make sense. The government would insist that locatees restrict the term of leases granted on their behalf to fit in with expected band requirements for communally held land. The approach would, however, be utterly inconsistent with government policies in effect between 1820 and 1950.[370]

iii. *laisser faire*

A third approach would be for the government to decline to exercise any supervisory jurisdiction over the allotment process—to restrict its activities to the maintenance of the Reserve Land Register.[371] The government could take the position that reserve land belongs to the occupying band and that its disposition amongst members should be dealt

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[368] *Indian Reserves, supra*, note 242 at 60–62, *James Bay and Northern Québec Agreement and Complementary Agreements*, 1991 ed., (Québec: Publications du Québec, 1991) at 55–109 and *Nisga'a Agreement in Principle, supra*, note 334 at 9–13.

[369] Indians are unlikely to agree, however, that government officials should have an unfettered right to decide when a given aboriginal population has fallen below the critical mass needed to sustain a distinct culture. It may be possible, however, to formulate acceptable principles upon which such a judgment might be made. See "Leasing of Indian Lands," *supra*, note 367 at 1094 & 1095.

[370] Cf. *Indian Reserves, supra*, note 242 at 60–62.

[371] Section 21.

with by exclusively by their council. To some extent, this is the policy currently adopted by the Department of Indian Affairs.

On the one hand, Indian Affairs' current policy probably meets with approval from the Indian community. It is likely seen as deference to management decisions made by the band council, and it supports Indian aspirations for self-government by confirming the band's competence to manage internal affairs without government intervention. On the other hand, it may expose the Crown to liability for improvident allotments. The department does not appear to have regularized its policy by notifying bands of the basis upon which it grants approval, and by obtaining orders in council under s. 60(1) granting bands complete control of the allotment process. Bands who have suffered as a result of improvident dispositions are unlikely to excuse government officials for failure to withhold approval. The government may be left without a defense to a claim that officials failed perform a duty which they owed to the band and which might reasonably be implied from the statutory requirement for ministerial approval of all allotments and all transfers of allotted lands.

iv. promote & support internal self-management

Finally, the Minister might determine that the approval power was never intended to apply to every band council or to every band or locatee; only to those "as are not sufficiently advanced to manage their own affairs,"[372] and even so, only for as long as, and to the extent that, a state of "insufficient advancement" prevails. He could, presumably, disregard allotments by the councils of bands which he finds capable of managing their own affairs, and certain transfers by capable locatees, and focus the

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[372] *Special Joint Committee Report, supra*, note 275 at 186 & 187.

attention of his officials on natives genuinely in need of government assistance, if any.

From this perspective, it would be important for Indian Affairs officials to determine the extent to which there was need, and hence, justification, for continued scrutiny by Indian Affairs officials over the internal affairs of bands coming within their jurisdiction.[373] This approach would give meaning to the statutory requirement for ministerial approval of allotments, and it would be consistent with Parliament's intention that powers of internal self-management devolve from bureaucrats to Indians as soon as bands have enough experience with the non-native economy and enough self-confidence to manage on their own. Ideally, this stage would be marked by a formal withdrawal from specified supervisory roles in connection with the allotment process through an order in council made pursuant to ss. 60(1) or 4(2).[374]

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[373] Even so, many provisions of the *Indian Act* prevent a complete withdrawal of government participation in Indian decision-making. See, e.g., s. 64(1)(k).

[374] The prospect of a band seeking a s. 60(1) order may not be great. See, e.g., the comments of J.E. Hall, Q.C. (now, Mr. Justice Hall), *Report of the Commission of Inquiry Concerning Certain Matters Associated with the Westbank Indian Band* (Ottawa: Supply & Services Canada, 1988) at 443 [hereinafter *Westbank Report*]:

> Departmental personnel are divided on the issue of how daring the Department ought to be in relation to surrendering its statutory and traditional roles to band councils and tribal councils. The Department and Indian groups are both presently suffering from a conflict between inconsistent objectives. The Indian groups, for the most part, wish to assume responsibility for their own affairs. At the same time, since the Departmental fiduciary responsibility is presently part of the hope for future economic gains, the Indian group obviously would like to retain the right to recover compensation from the Department. It is not particularly popular to acknowledge that a band's informed decision to follow a certain course of action carries with it a release of the Department's responsibility relating to that decision. Many Indian

Of the four policies discussed in this section, only the last makes sense in the context of the Crown/Indian relationship as defined by current legislation, recent judicial authority and the aspirations of Indian groups as evidenced by recent treaties and ongoing treaty negotiations.

Rejection of the first two policy options is really required by the principle of informed self-determination underlying the *Guerin* decision. In effect, the Supreme Court ruled that, if the traditional homeland of the Musqueam people was to become a development opportunity for an upscale residential subdivision, only the Musqueam people had the right to make that decision. The first policy—equitable distribution of reserve land—would risk imposing on natives values imported from outside their societies. Adopting this policy made some sense as long as the ultimate objective of the reserve system was enfranchisement. Under that regime, it was important for the reserve to be parceled out equitably so that there would be available for each native family a fair share of reserve land for ownership in severalty once its members had relinquished their ties with

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witnesses before me walked carefully around this issue. I could not blame them.

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The Department should continue to exercise great care where less advanced bands are involved, but it should not be unduly alarmed about potential suits from those bands that are willing and able to make their own decisions. Courts usually operate in the real world. Absolute jurisdiction over decision making is wholly inconsistent with residual responsibility in the Department.

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... I think that it is inevitable that the process of Indian self-government will result in an abatement, if not elimination, of the Department's financial liability for [future] collective decisions which are made by Indian groups and which result in economic failure. A clear consequence of full responsibility is that Indian groups will have to make their own assessments about what degree of risk they are prepared to assume in relation to their own decisions.

the native community and sought to become established in Euro-Canadian society. The second policy—the preservation of cultural homelands—is certainly a policy which native communities should be free to adopt if they wish, but it is surely not an objective which should be forced upon them by the government. If Indians choose to maintain distinct societies within a non-native economy, they will no doubt be expected to bear the economic consequences of their decision. It would seem to follow that natives should be able to choose whether and to what extent reserve land is to be dedicated to communal ownership.

Unquestionably, the third policy—*laisser faire*—has a great economic and political attraction for government, but implementing it would constitute an abdication of the protective role decreed by Parliament and the courts. The existence of a statutory veto over decisions of elected representatives implies some parliamentary purpose. It is unlikely that Parliament made all allotments subject to ministerial approval merely to enable the Department to maintain the Reserve Land Register. It can safely be assumed that the intention was that the veto be exercised for some protective purpose—to prevent "foolish or improvident" allotments of reserve land in the sense adopted in *Blueberry River*.

The fourth policy—facilitating internal self-management— would provide protection where it is needed and withdraw it when it had degenerated into mere intrusion. This option is consistent with Parliament's intention to devolve decision-making powers on Indian Bands. It gives meaning to the requirement for government approval and, at the same time, confines the exercise of supervisory functions to cases in which government involvement is consistent with the overall intent of the legislation.

b. Fiduciary obligations

Perhaps the best way of illustrating the application of the doctrine of fiduciary obligation to the allotment process is to analyze a hypothetical situation.[375] Let us assume that members of a band council pass a resolution allotting to a fellow councilor a large parcel of reserve land with clear commercial potential. No steps are taken to notify band members of the proposal to make this allotment. The councilor to whom the allotment is made participates in the debate on the resolution and votes in favor of it. The resolution allotting the land passes and a minute is sent to Indian Affairs for approval. Departmental officials realize that the locatee is a member of council and that he voted on the resolution approving it. Officials approve the resolution anyway. They act on the basis of a departmental policy that mandates automatic approval of all allotments by all band councils. The theory underlying the policy is that parceling out rights to occupy reserve land among band members is a matter of internal self-government and that members have the same remedies for misconduct by elected officials as non-natives have. A few weeks later, the locatee/councilor makes application under s. 58(3) of the *Indian Act* to have the government lease the allotted parcel on his behalf. The tenant is a development company whose shares are held by the locatee and members of his family. The Department approves the lease. The lease contains no covenants restricting assignment and subletting. The councilor's corporation subleases to a business enterprise directed and staffed by non-natives whose officers are ignorant of the circumstances surrounding the allotment. Only at this point are band members informed of the transactions. Members commence an action against the government for

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[375] The illustration used here does not, to the best of my knowledge, represent an actual case.

compensation for breach of fiduciary duty for approving the allotment and the lease to the councilor's company. They argue, as turns out to be the case, that the sublease is in violation of an informal understanding among all members that locations would only be let to band-run businesses of which all officers and employees were also band members.

i. **allotment**

The relationship between elected officials and the constituency which they have been chosen to represent has long been held to be fiduciary.[376] This doctrine has also been applied to regulate the relationship between the Chief and councilors of an Indian band and its membership. Where a Chief or councilor has a personal interest in a matter coming before the band council for decision, he must declare his interest and refrain from debating or voting on a resolution in respect of that matter.[377] An action may be brought on behalf of the band to obtain

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[376] *Bowes* v. *Toronto (City)* (1858) 11 Moo. 463, 14 E.R. 770 at 790 & 791 (P.C.).

[377] *Gilbert, supra*, note 329 at 23. Section 19 of the *Indian Band Council Procedure Regulations*, C.R.C. 1978, c. 950 does not appear to disqualify a member of council from voting upon a matter in which he has a personal interest:

> 19. Every member present when a question is put shall vote thereon unless the council excuses him or unless he is personally interested in the question, in which case he shall not be obliged to vote.

redress for misconduct by its council.[378] Alternatively, the decision itself could be attacked by an application for injunctive or prerogative relief.[379]

The problem posed by the illustration, however, is whether the government will be held to have a fiduciary duty to intervene. On the one hand, government officials know of the irregularity. They have an opportunity to have it rectified without taking over the decision-making process themselves—they might decline to approve the allotment unless it has been ratified by the band, for example. Refusal to approve would be defensible on purely juridical grounds. Here, officials would be invoking a statutory power of intervention for the purpose of preventing a clear breach of a fiduciary obligation imposed for the protection of band members. Withholding approval of the allotment would also be the route least likely to expose the government to liability.

On the other hand, adherence to a policy of supporting informed self-management might suggest that officials should let band members sort out such problems themselves. People who do not live on reserves, native and non-native alike, and who are faced with similar misconduct by a municipal councilor, for example, are required to seek redress through the courts. Outside the Crown/native relationship, the government is not normally liable to answer for decisions made in conflict of interest, notwithstanding that it may have advance notice of the conflict. Even

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[378] In *Gilbert, supra*, note 329, a claim was made on behalf of an Indian band against its former Chief. The evidence established that the Defendant had, as a member of the band council, had participated in council's debate on a resolution authorizing the purchase by the band of a trailer to serve as a residence for the Chief and her family, and had voted on the resolution. The Court held that the Defendant had violated her fiduciary obligations to the band, and ordered her to pay compensation to the band in respect of her use of the trailer.

[379] *Sunday* v. *Benedict* (1991), 49 F.T.R. 319 at 322 (F.C.T.D.).

assimilationists might have difficulty justifying government involvement. Maintaining constant surveillance of a person who is supposed to be learning to manage on his own is not conducive to personal independence, and it is not a practice employed outside of the Crown/Indian relationship. Unless there is some reason to distinguish between the illustration and the case of the defalcating municipal councilor, government officials should ignore the irregularity and approve the allotment.

A principled choice between these two positions can be made by determining which would best serve the objectives of the Crown/Indian relationship. In so far as unsurrendered reserve land transactions are concerned, the purpose of Crown involvement in Indian decision-making is to promote and support internal self-regulation through the agency of band councils. Officials' use of a statutory discretion permitting them to interfere with band council decisions must be consistent with and supportive of that objective. Forcing disclosure of the conflict to the membership at large would enable members to debate the merits of the allotment and review the conduct of the locatee/councilor. Members who disagreed with the decision could contest it in a timely way by whatever means they felt were appropriate in the circumstances. Regardless of whether the decision was confirmed, varied or quashed, the final word in the matter would be that of the band, not the Department. Members would be able to take control of the situation if they wished to do so. Approving the allotment without disclosing the conflict of interest of the locatee/councilor would take the matter out of the band's hands.

To this point, I have only argued that it would be consistent with and supportive of the Crown/Indian relationship for officials to decline to approve the allotment. I have not yet provided any justification for saying that withholding approval is a legal obligation. To do that I would have to

establish that failure to disclose the irregularity in these circumstances is, at least on average, destructive of the relationship.[380]

Self-interested behavior by officials elected or appointed to act on behalf of a given constituency undermines constituents' confidence in representative administration.[381] Such confidence is particularly fragile where representative administration is a fairly recent and, at least in the minds of some constituents, an unproved method of group decision-making.[382] Some situations—reserves with limited per capita land holdings and councilors from the same family, for example—may increase the risk of constituents' loss of confidence in representative administration through self-interested conduct well beyond that experienced in non-native governments where the same circumstances are seldom replicated.[383] On this analysis, therefore, the better view would appear to be that Indian Affairs officials owe an enforceable obligation to the band to decline to approve the allotment until a way has been found by the band or its council to overcome the effect, if any, of the councilor's misconduct.

The question then arises as to why this obligation should be limited to declining to approve allotments based upon known irregularities. For example, if it is appropriate for departmental officials to force disclosure of a known breach of a fiduciary obligation, why are they not also required to sit in on all meetings of the band council so that they can be certain that all irregularities come to their attention? What if the locatee/councilor did not

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[380] I will also have to establish that no adequate alternative exists to do the job, and I will get to this in section iii.

[381] See, e.g., "Local Government," *supra*, note 191 at 1 as to the political impact of self-dealing by elected municipal officials.

[382] See, e.g., *Survey of Canadian Indians, supra*, note 336, esp. c. 7.

[383] See, e.g., *Westbank Report, supra*, note 374 at xiv–xvii.

sign the resolution approving the allotment? Are departmental officials obliged to make inquiries to determine whether he participated in the debate? Once again, the answer is provided by an analysis of the structure of the relationship.

The role which the Crown has accepted in connection with the allotment of unsurrendered reserve land is defined by the *Indian Act*. In the past, band councils could not officially hold meetings for the dispatch of business except in the presence of a departmental representative.[384] The representative set the time, place and date of meetings and adjournments, presided at the meetings, maintained a record of the proceedings, regulated matters of procedure and form, reported and certified by-laws and other acts to the Superintendent General and explained to the Chief and councilors their powers and duties. Government officials operating under that regime would certainly have had access to a great deal of background information about matters dealt with by band councils. In these circumstances, a superintendent's recommendation to withhold or grant ministerial approval of a band council initiative would be based upon first hand knowledge of the circumstances. The 1951 version of the *Indian Act* and its successors contained no similar section. Provision is made in the *Indian Band Council Procedure Regulations*[385] for the role that the

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[384] See, e.g., *1927 Act*, ss. 176–180 and the *Indian Act*, R.S.C. 1906, c. 81, ss 185–189. The 1951 Act did, however, permit the Governor in Council to make regulations with respect to " ... the duties of any representative of the Minister at such meetings .... " See, S.C. 1951, c. 149, s. 89(c). The current regulations prescribe the duties of any departmental representative who does attend band council meetings, but they do not require the presence of a departmental representative. See, *Indian Band Council Procedure Regulations, supra*, note 377.

[385] C.R.C. 1978, c. 950. Presumably, the superintendent attends by the invitation of the council at such time as members feel that they require departmental advice or assistance.

superintendent is expected to play should he attend meetings of council, but nowhere is he given the right to be there. These changes are deliberate and they are consistent with a parliamentary intention that reserve land administration should devolve upon the band council. Today, the Department lacks the first hand knowledge of reserve land administration it once possessed, except, of course where officials actually attend the meetings or acquire the information in another way. Courts are unlikely to require the government to answer for irregularities which officials have no practical means of discovering, and Indians are unlikely to expect more.

ii **locatee leases**

Suppose that a locatee agrees to have a lease of his location granted to a non-native developer. The lease is to be for a fixed term of 100 years. The lease is part of a scheme for the development of the location for commercial purposes.[386] From a purely economic standpoint, the length of the term is justified by the initial investment to be made by the tenant in developing the parcel. The bargain is in all respects very favorable to the locatee. Assume that Indian Affairs has adopted a policy of refusing to grant locatee leases which exceed 45 years in duration, including all options to renew, unless the locatee can produce evidence that his application for a lease is supported by the council of his band. The band council refuses to approve the proposed lease. The locatee insists that Canada grant a lease on the agreed terms with or without band council approval. Indian Affairs officials refuse to grant such a lease and the deal falls through. The locatee sues the Crown for compensation for breach of fiduciary obligation in failing to comply with his request for a lease.

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[386] Assume, here, that the location is not affected by land use restrictions which would interfere with the proposed development.

Analysis of this problem requires an understanding of features of the *Indian Act* which are sometimes overlooked. The Indians' interest in reserve lands set apart for their use is the same as that which they possessed in their traditional territories in pre-contact times.[387] With certain exceptions not relevant here, ss. 28(1) and 37 of the Act prevent Indians from committing themselves directly to reserve land transactions. The conveyancing provisions of the Act do, however, permit the occupying band to have reserve land exploited on its behalf by the Crown as if the band were the holder of the maximum interest that the civil or common law allowed. Section 58(3) extends some of these benefits to locatees. That section authorizes the Minister to lease locatee land upon the request of the locatee and for his benefit. In the case of locatee leases, the statutory scheme makes it unnecessary for prospective tenants to conduct expensive investigations as to whether the locatee's land rights would "support" the grant of a leasehold interest,[388] or to obtain security for breaches of the landlord's covenants.[389] Tenants can simply rely on the Crown's covenants for title. Without this protection, locatees might have difficulty obtaining

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[387] *Guerin*, *supra*, note 1 at 379.

[388] Indian land rights with respect to reserve land are the same as those which existed with respect to the group's traditional territories before contact. It took four years (almost 365 days of which was court time) and millions of dollars in research costs and legal fees to establish the aboriginal rights of the Gitksan and Wet'suwet'n in the *Delgamuukw* case (*supra*, note 5). Without the conveyancing provisions of the *Indian Act*, Indian title would be virtually unmarketable. As it is, speculation as to aboriginal title to reserve lands is unnecessary. See, *Guerin*, *supra*, note 1 at 382.

[389] If a non-native tenant were to suffer loss by reason of a locatee's failure to provide a good safe holding and marketable title to the location, it may be difficult for the tenant to recover compensation from the tenant. Section 89(1) of the *Indian Act* provides that

> ... the real and personal property of an Indian ... situate on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favor of or at the instance of any person other than an Indian or a band.

full market rental value for their locations. In fact, having the location leased by the Crown is about the only way in which a locatee can exploit his holding for anything like its market value. Facilitating the leasing of individual holdings of reserve land is, therefore, one likely reason for which the locatee is required to obtain a lease through the agency of the Crown. It is also possible that Parliament had it in mind that some locatees may require assistance in negotiating and enforcing terms and documenting the transaction. Section 58(3) provides that " ... [t]he Minister *may* lease for the benefit of any Indian .... " Indian Affairs policy in the mid-1940s certainly assumed that the government should turn down requests for leases which were not in the best interests of the locatee.[390]

Generally speaking, however, the Crown holds the title to reserve land in order to allow the government to ensure that any use to which the reserve is put is for the use and benefit of the band for which it was set apart.[391] In the illustration, the locatee has struck a bargain with a prospective tenant for a very long-term lease containing provisions highly favorable to the locatee. In fact, the term of the lease is so long that it may, for all practical purposes, amount to a conveyance of the parcel to a non-native.[392] This problem becomes a legal problem because of the surrender provisions. Subject to specific exceptions, ss. 37 to 41 of the *Indian Act* require a surrender or designation by the band and approval by the federal

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[390] See, e.g., *Special Joint Committee Report, 1946, supra*, note 363 at 545.

[391] Section 18(1).

[392] See, "Leasing of Indian Lands," *supra*, note 367 at 1076–1079 where the author the impact of long-term leases of reserve land for non-native occupation. He argues that " ... the fiction of Indian retention is maintained, but the impact on the tribe is often inconsistent with the form. In this context, 99-year leases are tantamount to the sale of the fee." Neither the *Indian Act*, the regulations nor the authorities impose restrictions on the duration of such leases or their terms.

cabinet before reserve lands are " ... sold [or] title in them conveyed ... " and before communally-held reserve lands are " ... leased [or] an interest in them granted ...." From the band's perspective, the prohibitions contained in ss. 37 to 41 appear to be based on a policy of ensuring that permanent dispositions of reserve land are supported by a majority of those whose communal rights to it will be extinguished by the transaction. As mentioned in chapter 3, provisions like s. 58(3) entered the *Indian Act* as part of a scheme to give natives a taste for the rewards of capitalist enterprise and individual ownership; to encourage them to abandon their communal societies and to assimilate with the Euro-Canadian majority. This policy was officially discontinued after WW II, but s. 58(3) remains a feature of the legislation. From this point of view, s. 58(3) looks like a loophole in the cultural stockade erected by the legislation.

The question here is whether a blanket application of a departmental policy such as that outlined above represents a violation of any obligations which the Crown may owe to the band or the locatee or both. If delay in obtaining or failure to obtain band or band council approval forced cancellation of the project, would the Crown be liable for breach of a fiduciary obligation to the tenant to act on his request for a lease? If the government granted the lease, would the Crown be liable to compensate the band for failure to obtain band consent to an illegal alienation of reserve land?

I do not think that the government would be justified in refusing to grant the lease in the circumstances. I think that its failure to respond in a timely way to the locatee's request for a lease would likely violate an enforceable obligation which it owed to him. It seems to me that a fair reading of the Act requires implementation of any *bona fide* lease

transaction requested by the locatee.[393] The absence of a requirement for band council approval was not the result of some parliamentary oversight. The possibility of requiring band council approval of locatee leases was specifically discussed with Indian representatives at the February/March 1951 conference and, after debate, was approved by them. The basis upon which it was approved was that locatees should have the same rights with respect to leasing their locations as non-natives.[394] As long as the duration of the lease requested is reasonably justified by a *bona fide* arrangement between a locatee and a prospective tenant, and its terms are not foolish or improvident as far as the interests of the locatee are concerned, the Department would have no legitimate reason for refusing to grant the lease

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[393] In *Boyer* v. *R.*, [1986] 2 F.C. 393 (C.A.), a locatee made application to the Minister, pursuant to s. 58(3) of the *Indian Act*, to lease a portion of his location to a development company for a period of 21 years. Indian Affairs officials sent a draft of the lease to the band council for comment. The band council refused to approve the lease, and took the position that the Minister had no right to grant it without their formal approval. The Minister granted the lease notwithstanding the objections of the council. Councilors sued for a declaration that the lease was void for lack of Indian approval. They argued that a requirement for band or band council consent should be treated as an implied condition for the grant of a valid lease under s. 58(3). In the alternative, the Plaintiffs argued that the lease violated the Crown's fiduciary duty to the band to prevent alienation of reserve land without a surrender and Governor in Council approval pursuant to ss. 37-41 of the Indian Act. The Court held that the provisions of the statute did not permit the implication of such a condition. The Minister's duty, in exercising his discretion under s. 58(3) was to act in the best interests of the locatee. The majority of the Court cautioned, however, that the Minister

> cannot go beyond the power granted to him, which he would do if, under the guise of a lease, he was to proceed to what would be, for all practical purposes, an alienation of the land ....

The majority ruled that the 21-year lease under consideration did not constitute an alienation of the land within the meaning of s. 37 of the *Indian Act*.

[394] See *Special Committee Minutes, supra*, note 280 at 126. I would argue that the interpretation suggested by the resolution passed at the 1951 conference would, in this case, be adopted as a guide to the interpretation of s. 58(3). See *Nowegijick* v. *R.*, [1983] 1 S.C.R. 29 at 36. It is not clear as to whether this point was argued in *Boyer, supra*, note 393.

requested. If, on the other hand, the arrangement is merely a colorable attempt to evade the surrender requirements of ss. 37 to 41 of the Act, the locatee's application must be rejected by Indian Affairs officials. While it may be appropriate to consult the band council in order to obtain information necessary to make this assessment, any blanket policy of requiring approval based solely upon the duration of the lease is not justified either by the wording of the statute or the intent of the provision. Unauthorized and unnecessary disclosure of the terms of the intended lease may itself constitute a breach of an obligation of confidentiality owed to the locatee.[395]

This position is not inconsistent with an overall policy of devolving internal self-management from Indian Affairs officials to band councils. Band councils can control leases of reserve land. They could decline to grant allotments if they were concerned about the loss of the cultural character of the reserve due to intrusion by non-native tenants.[396] They could encourage band members to designate parcels of the reserve for lease to individual members pursuant to s. 37(2)of the Act and have the Crown grant leases to members on terms satisfactory to the band council. These leases could contain restrictions on assignment or subletting without the approval of the band council. Discontinuing the blanket policy referred to above would force the band council to govern in the manner contemplated by the devolution policy.

The prohibition against the alienation of reserve land without the consent of a majority of the members of the occupying band assembled for

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[395] *Lac, supra*, note 23 at 608–614.

[396] Although specific provision is made for allotment in the *Indian Act*, many bands do not allot parcels to members. See, *Westbank Report, supra*, note 374 at 394–396.

the purpose of debating and authorizing it has been a permanent feature of the Crown/Indian relationship since the mid-1700s. The requirement for band approval found its way into every federal statute regulating the relationship since 1868.[397] In the absence of specific statutory authority permitting alienation without band consent, neither individual Indians, their band council, or the Crown may alienate reserve land.[398] Section 58(3) only authorizes leases. If the transaction contemplated by the locatee and the third party could not be said to constitute a *bona fide* lease in form and substance, it is not authorized by s. 58(3).

iii alternative sources of regulation

In sections i and ii, I argued that the Crown is under an enforceable obligation to disclose to the band a conflict of interest of a band councilor which might affect a decision to allot reserve land. I also argued that the Crown is under an enforceable obligation to implement a *bona fide* request by a locatee for a lease of the allotted parcel, whether or not that request is supported by the band council. I have not yet established that these obligations would likely be characterized as fiduciary. As mentioned earlier, whether or not an obligation will be declared to be a fiduciary obligation will depend upon whether an adequate alternative source of regulation is available. Alternative sources of regulation are only adequate

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[397] *An Act providing for the organization of the Department of the Secretary of State of Canada and of the management of Indian and Ordinance Lands*, S.C. 1868, c. 42.

[398] Section 37(1), which deals with alienation of reserve land, is not expressly made subject to the other provisions of the Act. Section 37(2), which deals with leases of reserve land, begins with the words, "Except where this Act otherwise provides .... " and the closing words of s. 58(3), authorize the Minister to grant leases of locatee lands " ... without the land being designated."

if they are as effective as the doctrine of fiduciary obligation in preserving the integrity of the relationship.

The alternative source of regulation, in the case of the conflict of interest of the locatee/councilor, would be to rely upon band members to take action on their own. This strategy was certainly effective in the *Gilbert* case.[399] The problem with this approach is that its efficacy depends upon members' knowledge of the irregularity. If the general membership or a successor council does not discover the conflict of interest before the locatee leases the location to a *bona fide* tenant who is ignorant of the compromising circumstances, members may be stuck with a highly undesirable lease, notwithstanding their administrative law remedies. If there is only a limited amount of reserve land available for commercial exploitation, as is too often the case with smaller reserves, a single self-interested transaction such as this may deal the band economy an insurmountable blow. Setting aside such a lease because of a conflict of interest of one of the councilors might induce prospective tenants to steer clear of leases of reserve land, thereby limiting the marketability of reserve land. Ideally, conflict of interest problems should be dealt with before an innocent party commits himself to a transaction based upon the validity of the impugned decision. Imposing on the government fiduciary obligations to disclose conflicts which come to its attention and withhold approval until their effects have been dealt with would certainly promote this objective. Administrative remedies would not be nearly so effective.[400]

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[399] *Supra*, note 329.

[400] It would be tempting, but inappropriate in my view, to try to resolve the locatee/councilor illustration by analogy—by characterizing the problem as an example of a breach of a transmitted fiduciary obligation analogous to the "knowing complicity" cases. For a critical analysis of this line of authority, see P.D. Finn, "The Liability of Third Parties for Knowing Receipt or Assistance" in

In the locatee lease illustration, the locatee whose request for a lease had been turned down because of his failure to obtain band council concurrence would likely also be able to obtain administrative law remedies.[401] In fact, a person engaged in the commercial exploitation of allotted land would be more likely to understand his rights and the options for their enforcement. The locatee's problem would be that administrative review is unlikely to get him compensation for what he would lose if a favorable lease transaction fell through. The courts are, therefore, likely to impose a fiduciary obligation upon the government to grant the requested lease.[402]

In cases involving claims against the Crown, the imposition of fiduciary obligations frequently provides more effective relief than other sources of regulation. The doctrine of sovereign immunity has sometimes been held to protect the Crown from liability which has not been specifically accepted by contract or statute.[403] Doctrines of equity, on the other hand, have long been held to be binding on the Crown without the necessity of a statute submitting the Sovereign to judicial authority. In the *Pawlett* case,[404] an action for redemption of a mortgage acquired by the King by way of escheat, Baron Atkyns ruled that,

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Equity '93, supra, note 157, 195 at 204–218. Such an exercise involves trying to find out whether the doctrine provides a remedy, rather than trying to find whether a justification exists for its application.

[401] See, e.g., *Tooahnippah* v. *Hickel*, 397 U.S. 598 (1970).

[402] Recognizing a damage remedy against the government in the event of a failure by the bureaucracy to implement legislative intent was one of the reasons cited by the United States Supreme Court for imposing fiduciary obligations in *United States* v. *Mitchell*, 463 U.S. 206 (1983) [hereinafter *Mitchell II*].

[403] *Chipman* v. *R.*, [1934] Ex. C.R. 152 at 159.

[404] *Pawlett* v. *Attorney General* (1667), 1 Hard. 465, 145 E.R. 550 at 552.

... the party ought in this case to be relieved against the King, because the King is the fountain and head of justice and equity; and it shall not be presumed, that he will be defective in either. And it would derogate from the King's honour to imagine, that what is equity against a common person, should not be equity against him.

CONCLUSION

The doctrine of fiduciary obligation is a creature of the system of equity. The main principles upon which is it based were developed by the Courts of Chancery prior to the end of the fifteenth century. Its purpose then, as now, was to extend the ability of the law to protect the integrity of relationships of social or economic importance. The doctrine fulfills this task by providing a code of rules which may be used to maintain the integrity of useful relationships threatened by the existence of an inherent and otherwise unregulated opportunity for one or more of the parties to the relationship to exploit the interests of another or others. The doctrine's legislative purpose makes it extremely difficult to determine whether fiduciary obligations will be imposed upon the parties to a relationship which has not already been declared to be fiduciary by authoritative judicial decision or legislative enactment. In fact, the only way in which it is possible to estimate whether a given relationship is fiduciary is to guess whether the relationship is of sufficient importance justify juridical protection, and whether adequate protection can be only be provided by the imposition of fiduciary obligations.

The content of fiduciary obligations is also difficult to determine. As befits a purely remedial doctrine, the content of the obligations which it creates depends largely upon what is required to protect the integrity of the target relationship. Determining the content of the fiduciary obligations which will be imposed to protect a given relationship requires an identification of the benefits which such relationships are reasonably expected to produce, and a determination of the extent to which those benefits are already guaranteed by other sources of regulation. If this analysis reveals lacunae in the existing regulatory scheme which expose one or more of the parties to the relationship to exploitation or

victimization at the hands of another party or other parties, and if imposing one or more of the obligations owed by trustees to beneficiaries (suitably adapted) would provide the necessary protection, fiduciary obligations will be imposed upon the alleged wrongdoer.

Where it is clear what obligations must be imposed for the protection of the relationship, the courts simply declare those obligations to have been binding upon the alleged exploiter all along and provide the victim with redress, provided, of course, that the evidence establishes violation. In cases in which the court cannot say with any confidence what the exploiter would have been expected to have done in the circumstances which actually occurred, or where the court is uncertain as to whether the exploiter has taken advantage of an unregulated opportunity for exploitation inherent in the relationship, judges declare the alleged victim entitled to timely disclosure of all circumstances which might have tempted the putative victimizer to take advantage of the opportunity for exploitation, and proof that he did not do so. Failing exculpation, the alleged victimizer is required to provide redress.

The entitlement to complete and timely notice and an exculpatory explanation, as well as the generous remedies which equity makes available for violations of its rules, are all intended to have an educative effect. Specifically, they are intended to induce other would-be victimizers who find themselves party to similar relationships to disclose spontaneously circumstances which might tempt them to depart from the standard of performance required to generate reasonably expected benefits, and to confirm or terminate the relationship or re-negotiate its terms. Where the relationship under consideration is an ongoing relationship, the entitlement to candor and the arsenal of remedies available for breach are also intended to discourage recidivism. Special rules have been formulated

to protect uniquely disadvantaged parties. Entitling alleged victims to notice and providing comprehensive remedies are not unfair to parties in a position to exploit the interests of others as long as potential defendants could predict the likelihood of liability with reasonable certainty and take measures to protect themselves against it. Otherwise, the doctrine represents an intolerable intrusion by the judiciary into private rights; it amounts to little than more than an *ex post facto* readjustment by the judiciary of an arrangement which the parties to the relationship could have but failed to make.

Imposing fiduciary obligations on the Crown for breach of its undertakings to status Indians is much less problematic. The terms of the Crown/Indian relationship are largely defined by enactment, although an understanding of their tenor requires an appreciation of the development of the relationship over the past 250 years or so. It should not be too surprising that the courts have found a way to induce bureaucratic adherence to parliamentary strictures by imposing civil liability for institutional misconduct.

Difficulties in determining the content of obligations which might be imposed really lie with the *Indian Act* itself, the statutory instrument which, to a great extent, defines the underlying structure of the relationship. Conceived in an era in which non-native society felt secure in its right to dictate cultural standards to Canadian minorities, amended piecemeal from time to time, treating all Indians uniformly as if they represented a homogenous people marching lock-step towards a common future, the Act gives Indian Affairs officials little discretion in adapting their interventions to respond to the specific needs of individual groups. The obligations which it imports can simultaneously be regarded as unwarranted paternalism by bands who have successfully integrated their

economic life into that of the surrounding non-native community, and downright unhelpful by groups with little experience or interest in doing so.

It is possible, however, to estimate with some confidence the Crown's duties to status Indians with respect to reserve land transactions. An analysis of the relationship accepted by native representatives and the government in power at the time the current version of the statute was formulated, indicates that attempts at cultural transformation are to be abandoned and that native people are to be encouraged to take charge of their internal affairs through the instrumentality of their band council. Any interpretation which accomplishes this objective and which, at the same time, respects the wording of the Act will be supported by the imposition of fiduciary liability if and to the extent that no other adequate source of regulation is available. While this may appear an obscure foundation for administrative programs which involve the expenditure of millions, they are the best the government has to go on. We have been assured that, provided that officials exercise their discretion with care and base their judgment on accepted principles, their efforts will not be condemned simply because they did not, in the event, generate the expected benefits:

> The Department should continue to exercise great care where less advanced bands are involved, but it should not be unduly alarmed about potential suits from those bands that are willing and able to make their own decisions. Courts usually operate in the real world. Absolute jurisdiction over decision making is wholly inconsistent with residual responsibility in the Department.[405]

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[405] *Westbank Report, supra*, note 374 at 443.

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