Aboriginal Peoples in Canada and the United States and the Scope of the Special Fiduciary Relationship

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I. A QUESTION OF SCOPE

NOW THAT IT IS SETTLED that there is a special fiduciary relationship between the Crown and the Aboriginal peoples of Canada,[1] it is time to start clarifying

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1 See, for example: L.C. Green, "Trusteeship and Canada's Indians" (1976) 3 Dalhousie L.J. 105; R.H. Bartlett, "You Can't Trust the Crown: The Federal Obligation of the Crown to the Indians: *Guerin* v. *The Queen*" (1984–85) 49 Sask. L. Rev. 367; B. Morse, "The Landmark *Musqueam* Case" (1985) 4 Ont. Lawyers Weekly 16; Editors, "Crown's Fiduciary Obligation Towards Native Peoples" (1985) 1 Admin. L.J. 49; J. Hurley, "The Crown's Fiduciary Duty and Indian Title" (1985) 30 McGill L.J. 559; J.I. Reynolds & L.F. Harvey, "*Re Guerin et al.* (The Musqueam Case)" in *Indians and the Law II* (B.C.: Continuing Legal Education, 1985) ch. 1; D.P. Emond, "Case Comment: *Guerin et al.*" (1985) 20 E.T.R. 61; D.M. Johnston, "A Theory of Crown Trust Towards Aboriginal Peoples" (1986) 18 Ottawa L. Rev. 308; 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; 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; R.H. Bartlett, "The Fiduciary Obligation of the Crown to the Indians" (1989) 53 Sask. L. Rev. 301; R.A. Reiter, "The Crown's Fiduciary Obligations to Indians" in *The Fundamental Principles of Indian Law*, (Edmonton: First Nations Resource Council, 1990) Part IV; B. Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261; A. Pratt, "Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?" (1993) 2 N.J.C.C. 163; M.J. Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law" (1993) 27 U.B.C.L. Rev. 19; M. Ellis, *Fiduciary Duties in Canada* (Toronto: Carswell, 1993) ch. 14, part 4; A. Lafontaine, "Fiduciary Obligations in the Context of Native Law — The Historical Context" in *UFO's — Unidentified Fiduciary Obligations: Conference Proceedings* (Winnipeg: Canadian Bar Association, May 28, 1994); P. Kennedy, "Case Law in Canada Since Guerin" in *UFO's* (above); E.J. Woodward & D. Jordan, "Who Benefits from Fiduciary Obligations?" in *UFO's* (above); G. Hannon, "Fiduciary Obligations — The Crown's Perspective" in *UFO's* (above); D.P. Owen, "Fiduciary Obligations and Aboriginal Peoples: Devolution in Action" [1994] 3 C.L.N.R. 1; R.A. Reiter, *The Law of Canadian Indian Treaties* (Edmonton: Juris Analytica, 1995); R. Dupuis & K. McNeil, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec* (Ottawa: Royal Commission on Aboriginal Peoples, 1995); P.W. Hutchins *et al.*, "When Do Fiduciary Obligations to Aboriginal Peoples Arise?" (1995) 59 Sask. L. Rev. 97.

its scope.[2] Does the relationship protect Aboriginal land and interests derived from land,[3] or does it extend further? For example, does it include rights to publicly-funded government health and other social services[4] for Aboriginal peoples?[5] Does it apply to all matters affecting Aboriginal peoples?[6] How far should it extend? At present, few options are impossible. But it may be possible to find some general patterns and consider where they might lead. To do this, I will look at the American experience as well as our own. After all, the Americans have been talking about a special government-Indian relationship for almost 180 years.

II. BACKGROUND

THE TASK OF EXPLORING the special fiduciary relationship is complicated by the lack of a clear definition of an "ordinary" fiduciary relationship. In 1985, Sir Anthony Mason described the fiduciary relationship as "a concept in search of a principle."[7]

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2 I address the question, "what interests or concerns are protected?", but refrain from determining who is bound. On this latter question, see W.A. McTavish, "Fiduciary Duties of the Crown in Right of Ontario" (1991) 25 L.S.U.C. 181 and L.I. Rotman, "Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility" (1994) 32 Osgoode Hall L.J. 735. Similarly, although the paper will refer briefly to questions of standards, it will not focus on the specific content of special fiduciary duties.

3 See Waters, *supra* note 1 at 425, querying whether the special relationship in *Guerin et al.* v. *The Queen et al.*, [1984] 2 S.C.R. 335, should be limited, at least initially, "solely to dealings in Indian reserve lands."

4 For an overview of these, see D. Gottesman, "Native People, Government Programs" in *The Canadian Encyclopaedia*, 2d ed. (Edmonton: Hurtig, 1988) 1452 and J. Woodward, *Native Law* (Toronto: Carswell, 1989). For American government services to Indians, see R. Strickland *et al.*, eds., *Felix Cohen's Handbook of Federal Indian Law: 1982 Edition* (Charlottesville, Va.: The Michie Co., 1982) at ch. 13. See also note 216, *infra*.

5 Governments are considering major cuts to social programs in their efforts to control annual deficits and accumulating public debt. Can Canadian Aboriginal peoples rely on the special fiduciary relationship to resist these cuts in the courts? (I use the term "government" or "governments" to refer to public government or governments, in contrast with Aboriginal self-government or, in the United States, tribal government.)

6 Other than Waters, most of the writers cited in note 1 suggest that the relationship and its obligations extend — or should extend — to the Crown's dealings with Aboriginal peoples generally. If so, they would go beyond land and land-related interests and might include a right to publicly-funded government services and a right to Aboriginal self-government.

7 Sir Anthony Mason, "Themes and Prospects" in P.D. Finn, ed., *Essays in Equity* (Sydney: Law Book Co., 1985) 242 at 246, quoted by La Forest J. in *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 644.

Although there has been progress in recent years,[8] the search is still far from complete.[9]

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[8] Two earlier general descriptions of fiduciary relationships have found broad support from the Court in later decisions. In the first — *Guerin et al.* v. *The Queen*, *supra* note 3 at 384 — Dickson J. quoted from E. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1 at 7, and added the comments quoted in section VI below. The other general description is that of Wilson J., dissenting, in *Frame* v. *Smith*, [1987] 2 S.C.R. 99 at 136: "[r]elationships in which a fiduciary obligation has been imposed seem to possess three general characteristics: (1) The fiduciary has scope for the exercise of some discretion or power. (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests. (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power."

Reflecting on the case law since *Guerin* and *Frame*, La Forest J. has said that "until recently the fiduciary duty could be described as a legal obligation in search of a principle ... . [However, decisions over the past ten years have] led to the development of a 'fiduciary principle' which can be defined and applied with some measure of precision": La Forest J. for himself, L'Heureux-Dubé, Gonthier JJ. and possibly Iacobucci J. in *Hodgkinson* v. *Simms et al.*, [1994] 3 S.C.R. 377 at 407. In *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 at 371–72, McLachlin J. attempted a synthesis of the general principles in *Frame*, *Norberg*, and *Hodgkinson*: see notes 9 and 105, *infra*. However, the descriptions in *Guerin* and *Frame* are neither identical nor comprehensive and have been followed by considerable disagreement as to the features which identify a fiduciary relationship. As well, *Hodgkinson* and *Blueberry* appear to fall short of consensus: see note 9, *infra*.

[9] In *The Law of Fiduciaries* (Toronto: Carswell, 1981) at 51–92, J.C. Shepherd identified over seven competing theories which have been offered at various times to explain the fiduciary principle. Despite recognition accorded to the formulations by Dickson and Wilson JJ., and the optimistic comments in *Hodgkinson*, *supra* note 8, the competition continues. In *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*, *supra* note 7 at 599, the majority held that vulnerability is indispensable to the existence of a fiduciary relationship, while La Forest J. (at 662) said it is not. In *Norberg* v. *Wynrib*, [1992] 2 S.C.R. 226 at 272–84, MacLachlin J. stressed factors such as imbalance of power, potential for interference with interests, and an undertaking by the fiduciary. However, in *M.(K.)* v. *M.(H.)*, [1992] 3 S.C.R. 6 (S.C.C.), La Forest J. said that sometimes a unilateral undertaking is unnecessary. In *Hodgkinson* v. *Simms et al.*, *supra* note 8, La Forest J. (for three and possibly four members of a seven-judge court: Iacobucci agreed (at 480) with "much" of La Forest J.'s "excellent reasons") said it is undesirable to overemphasise vulnerability (at 432), while Sopinka and McLachlin JJ., dissenting (for three judges) said vulnerability is indispensable (at 470). In *Hodgkinson*, La Forest J. described the formulation in *Frame* as a "rough and ready" although "useful" (at 409) guide for identifying one form of one form of fiduciary relationship. He distinguished between recognised categories of fiduciary relationship "that have as their essence discretion, influence over interests, and an inherent vulnerability" (at 409) and fact-based relationships involving characteristics such as "[d]iscretion, influence, vulnerability, and trust" (at 409), "where one party could have reasonably expected that the other party would act in the former's best interests ..." (at 409). Sopinka and McLachlin JJ. held the critical question to be whether there is a total assumption of power by the fiduciary, coupled with total reliance by the beneficiary. In *Blueberry*, *supra* note 8 at 372–73 and 406, McLachlin J. again stressed vulnerability, and also referred to unilateral power and trust: see note 105, *infra*, second paragraph. However, she spoke for three of seven judges. The other four did not expressly endorse her general comments, and seemed to emphasise expressed intent (i.e., the undertaking): *ibid.* See also P.D. Finn, "The Fiduciary Principle" in Youdan, *Equity, Fiduciaries and Trusts*, *supra* note 1, 1 at 54, stressing action

Instead of a definition, what follows is a rough approximation. Generally speaking, a fiduciary relationship is the equitable relationship that results when one party undertakes to act for the benefit of a second party, who depends on the power of the first to carry out the undertaking.[10] In some circumstances, a fiduciary relationship can impose an enforceable duty[11] on the fiduciary, or may produce other tangible legal consequences.[12] The relationship can result from the status of the parties or from a specific fact situation.[13] One well-known kind of status-based fiduciary relationship is a trust, which has special features of its own.[14]

But courts stress that the fiduciary relationship between Aboriginal peoples and the Crown is *sui generis* or unique.[15] Moreover, when we look at the two leading

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in another's interest and the expectations of the beneficiaries; *Canson Enterprises Ltd.* v. *Broughton & Co.*, [1991] 3 S.C.R. 534; and *McInerney* v. *MacDonald*, [1992] 2 S.C.R. 138.

10 See generally notes 8 and 9, *supra*.

11 Although there is much variation in judicial statements about the standard or content of "ordinary" fiduciary duties, one element common to most is a duty of loyalty to the beneficiary. The duties have been said to call for "loyalty, good faith and avoidance of a conflict of duty and self-interest": *Canadian Aero Service Ltd.* v. *O'Malley*, [1974] S.C.R. 592 at 606. *Guerin*, *supra* note 3, involved a special fiduciary duty to Aboriginal peoples, but Dickson J. spoke in general terms there about the duty "of utmost loyalty" owed by "a fiduciary" (at 389). See also D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984)at 710: "... one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside." *Cf. Grand Council of the Crees et al.* v. *A.G.(Canada) et al.* (1994), 112 D.L.R. (4th) 129 (S.C.C.), where the Court referred to the special fiduciary duty as a "relationship of utmost good faith" (at 148). In *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)*, *supra* note 8, both Gonthier J. (for four judges) and McLachlin J. (for three) spoke of the duty to act "in the best interests" of the band or Indians. Despite the absolute sound of the "best interests" requirement, both Gonthier J. and McLachlin J. also referred to and applied the fiduciary duty to act with "reasonable diligence."

12 E.g., a presumption of interpretation that can alter a court's construction of a document: see sections IV, V, and XVI, below.

13 See R. Flannigan, "The Fiduciary Obligation" (1989) 9 Oxford J. Legal Studies 285 at 301; Finn, *supra* note 9 at 31–33; and La Forest J. in *Hodgkinson* v. *Simms et al.*, *supra* note 8 at 380–81.

14 "A trust is an equitable relation binding on a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or *cestuis que trust*), of whom he may himself be one, and anyone of whom may enforce the obligation": D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 5, referring to a definition in D.J. Hayton, ed., *Underhill's Law of Trusts and Trustees*, 13th ed. (London: Butterworths, 1979) at 1. For another important status-based form of fiduciary relationship, see G.H.L. Fridman, *The Law of Agency*, 6th ed. (London: Butterworths, 1983) 9.

15 Section III, below.

cases in this special area — *Guerin*[16] at the subconstitutional level and *Sparrow*[17] on section 35(1) of the *Constitution Act, 1982* — each of *these* seems unique too. What are the common threads in *Guerin* and *Sparrow*? How do they differ? What do they say about the scope of the special relationship in Canada?

III. *GUERIN ET AL. V. THE QUEEN ET AL.*

GUERIN LAUNCHED THE IDEA that the Crown can owe a special enforceable fiduciary duty to Canadian Aboriginal peoples. Indian Affairs officials had arranged a surrender and lease of reserve land. Without consulting the band council, they negotiated lease terms far less favourable than those originally planned. The Supreme Court held that the Crown[18] owed the band a fiduciary duty to deal equitably with their land when surrendering it. The Court held that the Crown had breached this duty, and must pay the band ten million dollars in compensation.

Dickson and Wilson JJ. delivered the leading judgments.[19] Dickson J. said there was a fiduciary relationship between the Crown and Indians. It was not an ordinary fiduciary relationship; it was *sui generis* in nature. The relationship derived from the Indians' Aboriginal title and from the Crown's historic responsibility to protect Indian lands in transactions with third parties.[20] The responsibility was confirmed

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16 *Supra* note 3. Seven of the eight judges presiding found the Crown in right of Canada in breach of a fiduciary or trust obligation owed to the Musqueam Indian Band in regard to a 1957 surrender of part of the band's reserve land pursuant to section 18(1) of the *Indian Act*, R.S.C. 1952, c. 149, now R.S.C. 1895, c. I–5.

17 *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075. The Court found that section 35(1) of the *Constitution Act, 1982* guarantees "existing Aboriginal and treaty rights" (including land claims agreement rights) against government regulation, subject only to justified infringement, and referred the dispute back to trial for evidence relating to infringement and justification.

18 The Court was referring here to the federal Crown, although it did not expressly preclude the possibility of fiduciary obligations attaching to the Crown in right of the provinces.

19 There was no single set of majority reasons in *Guerin*. The plurality opinion was that of Dickson J., for four of the eight judges. Wilson J. spoke for three judges. Estey J. gave a separate opinion. Laskin C.J.C. did not take part in the judgment.

20 *Guerin*, *supra* note 3 at 383. Dickson J.'s statement about the general requirements for a fiduciary relationship (see text opposite note 31, *infra*) must be read together with the additional requirement (at 378–79 and 385) that where the prospective fiduciary is the Crown, the protected interest must be independent of government (here the interest in the reserve land derived from the independent Aboriginal title). In regard to the special situation of the Crown and the Indians, Dickson J. said (at 376) that "[t]he fiduciary relationship between the Crown and the Indians has its roots in the concept of Aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown."

by the specific *Indian Act* power to act on the Indians' behalf when surrendering their lands. The power gave rise to a concrete Crown fiduciary duty to the Indians.[21] This duty resembled a trust.[22] It obliged the Crown to act with "utmost loyalty"[23] in conducting the surrender. By securing a less desirable lease without proper consultation, the Crown had breached the duty.

For Wilson J., too, this was no ordinary relationship. Like Dickson J., Wilson J. said the fiduciary obligation was based on Aboriginal title and the Crown's historic responsibility for Indian lands, and was confirmed by the *Indian Act* surrender provisions.[24] She found that the Crown had a fiduciary obligation "at large"[25] which crystallised into a full trust at the time of the surrender.[26]

Estey J., the eighth Justice, rejected the notion of trusts and related fiduciary duties. He said the relationship was one of agency.[27] Estey J. regarded the agency as existing "now and historically."[28] He saw it as reflecting a "community interest in protecting the rights of the native population in those lands to which they had a longstanding connection."[29] In the result, all eight judges linked the specific duty that arose on surrender to an earlier relationship between the Crown and the Indians in regard to Indian lands. Seven of the eight treated the surrender obligation as being at least "trust-like" in nature.[30]

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21 After describing the requirements for the special fiduciary relationship, Dickson J. said (at 376) that "[t]he surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians." Later he said that "[w]hen, as here, an Indian band surrenders its interest to the Crown, a fiduciary obligation takes hold ..."(at 385). This suggests that although Aboriginal title and the Crown's historic undertaking were required for the general fiduciary relationship, a more specific provision such as the *Indian Act* surrender power is needed to give rise to an enforceable fiduciary duty.

22 See notes 50–52, *infra*. Dickson J. said the obligation also bore some resemblance to agency (at 386–87).

23 *Ibid.* at 389. *Cf.* note 11, *supra*.

24 *Ibid.* at 349.

25 *Guerin*, *supra* note 3 at 355. The content of this obligation was to hold the reserve land for the benefit of the Indian band before an *Indian Act* surrender.

26 *Ibid.*

27 Note that agency is itself a form of fiduciary relationship.

28 *Ibid.* at 391 and 395.

29 *Ibid.* at 392.

30 The differences between the approaches of Dickson and Wilson JJ. are less marked than they appear. Wilson J.'s "full-blown" (at 355) trust obligation was comparable in content to the "trust-like" (at 386) surrender fiduciary obligation of Dickson J., who neither addressed nor precluded the possibility of specific fiduciary obligations arising before a surrender. Wilson J.'s general fiduciary

IV. SCOPE OF THE *GUERIN* DUTY

THERE WAS ONE ELEMENT central to the special fiduciary duty in *Guerin* — the element of land. For Dickson J., the fiduciary duty had three key features: it was (*i*) fiduciary; (*ii*) trust-like; and (*iii*) non-public. Land was a part of all three of these features.

For the first feature, Dickson J. identified the following general criteria for the existence of a fiduciary obligation:

> ... where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.[31]

With these criteria in mind, Dickson J. appears to have found the commitment to act for another in the Crown's undertaking to protect Indian interests in their lands in transactions with third parties. This was in historical documents such as the *Royal Proclamation of 1763*, and in the more specific surrender provisions of the *Indian Act*.[32] The *Proclamation* and *Indian Act* surrender requirements also supplied the "discretionary power" which accompanied this commitment, as they gave the Crown the exclusive power to dispose of Indian lands.[33]

Because Dickson J. also stressed that the Crown's obligation to the Indian people is *sui generis*, it is unclear how closely he thought the special duty must follow these general requirements. Moreover, general fiduciary law has been evolving over the past decade,[34] and it is not clear how this will affect the special requirements in *Guerin*.[35] Certainly the *Guerin* duty was unique. The undertaking was not by a

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obligation "at large" (at 355) would presumably require a specific transaction to impose specific duties on the Crown.

31 *Guerin*, *supra* note 3 at 384. Although Dickson J. did not make the dependency of the principal on the fiduciary a prerequisite for every fiduciary obligation, at least some dependency would be the normal result of his requirement of discretionary power.

32 *Ibid.* at 383.

33 *Ibid.* at 383–84.

34 See notes 8 and 9, *supra*.

35 *Guerin* has been referred to frequently in subsequent discussions of general fiduciary requirements: see notes 8 and 9, *supra*. On the other hand, in *Canson Enterprises Ltd.* v. *Broughton & Co.*, *supra* note 9, La Forest J. said *Guerin* involved "a fiduciary relation akin to a trust," with a fiduciary who holds property and who could be liable to pay compensation "on the same basis as for a breach of trust" (at 566). He distinguished this from other situations where fiduciaries "simply owe a duty of good faith and disclosure."

private party but the Crown. The beneficiary was not an individual but a group. And the subject of the undertaking was based on Aboriginal land.

Although Dickson J. thought the fiduciary duty was not a full trust,[36] he regarded it as trust-like. Like many trusts, it related to land,[37] and its remedy resembled compensation for breach of trust.[38] In Dickson J.'s words:

> [a]s would be the case with a trust, the Crown must hold surrendered land for the use and benefit of the surrendering band. The obligation is thus subject to principles very similar to those which govern the law of trusts ...[39]

Finally, land was crucial to Dickson J.'s finding that the fiduciary duty owed by the Crown was not "public" in nature. *That* finding, in turn, was necessary for his conclusion that the duty could be legally enforced. What made it necessary was the general presumption against imposing enforceable fiduciary obligations on the Crown, especially in regard to interests it itself has created.[40] Normally, any such duty would be at most a "political trust," and would be legally unenforceable.[41] But Dickson J. held that the Indian reserve interest derived from Aboriginal title, an

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[36] *Ibid.* at 386. For Dickson J., a trust requires some form of property as its subject matter, and the Indians had none after the surrender. Relying on *Smith et al.* v. *The Queen*, [1983] S.C.R. 554, Dickson J. said that after the surrender the Indians lost their interest in the land itself: *Guerin*, *supra* note 3 at 342. See, however, Reynolds & Harvey, *supra* note 1 at 1.1.24–25, arguing that there *was* a trust *corpus* because in *Guerin*, unlike *Smith*, the surrender was only conditional (*cf.* Estey J. in *Guerin* at 347); and see Waters, *supra* note 1 at 423, arguing that the Indians' interest after the surrender *could* have been regarded as sufficient for the purposes of an ordinary trust.

[37] This was so even though Dickson J. considered that the Indians' "property" interest disappeared with the surrender: *ibid.* However their interest, entitlement, or expectation might be labelled, it still related to proceeds from land (*cf.* Reynolds & Harvey and Waters, *ibid.*).

[38] *Ibid.* at 387.

[39] *Ibid.*

[40] See P.W. Hogg, *Liability of the Crown*, 2d ed. (Toronto: Carswell, 1989) at 187–88 and note 41, *infra*.

[41] The "political trust" doctrine is a judicial presumption against construing documents so as to impose legally enforceable fiduciary duties on the Crown in regard to property, funds, or other interests created by the legislative or executive branches of government. See, for example, *Kinloch* v. *Secretary of State for India in Council* (1882), 7 App. Cas. 619; *Hereford Ry.* v. *The Queen* (1894), 24 S.C.R. 1; *Tito* v. *Waddell (No. 2)*, [1977] 3 All E.R. 129, 619 (Ch.); *Gardner et al.* v. *The Queen in Right of Ontario et al.* (1984), 7 D.L.R. (4th) 464 (Ont. H.C.); *Guerin et al.* v. *The Queen et al.*, *supra* note 3; *Penikett et al.* v. *The Queen* (1987), 45 D.L.R. (4th) 108 (B.C.C.A.); and *Callie et al.* v. *The Queen*, [1991] 2 F.C. 379 (F.C.T.D.).

interest that arose *independently* of the Crown.[42] Hence, when the interest was surrendered, the duty that arose was not a political trust.

Although Wilson J. was less specific than Dickson J. in describing the sources of the obligation, she also relied strongly on land and Aboriginal title. She said the "roots" of the obligation were in Aboriginal title.[43] She said the Crown had a pre-surrender fiduciary duty "to protect [the Indian bands' beneficial interest in their reserves] and to make sure that any purpose to which reserve land is put will not interfere with it."[44] She thought this fiduciary duty "crystallised" at the time of surrender "into an express trust of specific land for a specific purpose."[45] Like Dickson J., Wilson J. concluded that this was not a political trust because it derived from an independent non-governmental legal interest: Aboriginal title.[46]

Generally, then, the duty in *Guerin* depends on Aboriginal title or an interest derived from it. A derived interest need not be limited to *Indian Act* reserves — it might extend, for example, to benefits in land cession treaties. However, the duty would not appear to include a general right to receive government-supplied health or other social services. It is a duty defined by land.

V. R. v. *Sparrow*

IT IS WELL KNOWN THAT in *Sparrow* the Supreme Court applied the special fiduciary relationship at the constitutional level. It is less clear how the Court meant to relate what they did to *Guerin*. Mr. Sparrow, a Musqueam Indian, had challenged his conviction for violating a licence requirement under the federal *Fisheries Act*. He argued that he had an Aboriginal right to fish, protected under section 35 of the *Constitution Act, 1982*. The Supreme Court agreed, and said the federal government must justify infringing this right. Because of lack of evidence of infringement and justification, though, the case was sent back to trial.[47]

Stressing again that the Crown-Aboriginal relationship is unique,[48] the Court applied it here in another novel way. It started by noting the common law presump-

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[42] *Guerin*, *supra* note 3 at 378–79 and 385.

[43] *Ibid.* at 349.

[44] *Ibid.*

[45] *Ibid.* at 355.

[46] *Ibid.* at 351–52.

[47] See, generally, D.W. Elliott, "In the Wake of *Sparrow*: A New Department of Fisheries?" (1991) 40 U.N.B.L.J. 23.

[48] See *Sparrow*, *supra* note 17 at 1110.

tion in favour of treaties and statutes relating to Aboriginal peoples,[49] and the proposition that the honour of the Crown is involved in interpreting Indian treaties.[50] It referred, too, to the special fiduciary relationship recognised in *Guerin*.

The Court found that these factors support "a general guiding principle for s. 35(1),"[51] the principle that "the government has the responsibility to act in a fiduciary capacity with respect to Aboriginal peoples."[52] Against this background, the Court construed section 35 itself as a promise, a Crown promise to guarantee the rights contained in section 35, subject only to infringement that could be justified by meeting strict criteria.[53] Section 35 contained no mention of either infringement or justification, so the Court filled in the gaps by inferring a list of suitable criteria. But failure to meet these criteria was not the basis for an equitable

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[49] By the time of *Sparrow*, Canadian courts had developed a set of liberal canons of construction for interpreting documents that related especially to Aboriginal peoples. The most general of these presumed that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians": *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29, cited in *Sparrow*, *supra* note 17. *Nowegijick* also endorsed a more specific canon for treaties. Quoting from the American decision of *Jones* v. *Meehan*, 175 U.S. 1 (1889), the Court said treaties must be construed "in the sense in which they would naturally be understood by the Indians." Another more specific canon was expressed in R. v. *Horseman*, [1990] 1 S.C.R. 901 at 906–7, where Wilson J., dissenting, said "courts must be sensitive to the broader historical context in which [the] treaties were negotiated." Other examples of the canon include: R. v. *White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.); R. v. *Sutherland* (1980), 113 D.L.R. (3d) 374 (S.C.C.); *Simon* v. *The Queen*, [1985] 2 S.C.R. 387; R. v. *Horse*, [1988] 1 S.C.R. 187; and Cory J. in R. v. *Horseman* (above). See also R. v. *Sioui* (1990), 70 D.L.R. (4th) 427 (S.C.C.), released on the same day as *Sparrow*.

As the Court's citation of *Jones* suggests, the content of the canons was very similar to that of their American counterparts. Unlike the American presumptions, though, the canons had developed in Canada without relying on fiduciary concepts. (For a possible exception, see R. v. *Taylor and Williams* (1981), 34 O.R. (2d) 360 (Ont. C.A.), also cited in *Sparrow*). When the Supreme Court referred to *Jones* (above), it drew no link to wardship or fiduciary responsibility. In *Jones* itself, the emphasis was more on imbalance of bargaining power than on wardship: see note 155, *infra*.

[50] R. v. *Taylor and Williams*, *supra* note 49.

[51] *Sparrow*, *supra* note 17 at 1108.

[52] *Ibid.*

[53] *Ibid.* at 1107–119. Under *Sparrow*, government is required to demonstrate that it is relying on a valid legislative objective. As well, and depending on the circumstances, government may be required to (*i*) give the protected right top priority after this objective; (*ii*) ensure minimum possible infringement to achieve the objective; (*iii*) consult where appropriate with the people concerned; and (*iv*) provide compensation in cases of expropriation. In some parts of the decision, the fiduciary relationship appears to be the basis for all justification requirements, while elsewhere it appears to be directed more specifically to the other requirements.

action, as in *Guerin*. Instead, it could lead to a declaration that the offending government action was unconstitutional and void.[54]

The obligation in *Sparrow*, then, was quite different from the enforceable duty in *Guerin*.[55] The "obligation" was an obligation on government, to apply constitutionally protected rights in favour of Aboriginal people. In effect, *Sparrow* derived from the special fiduciary relationship[56] a liberal canon of construction and applied it to a constitutional enactment.[57]

VI. SCOPE OF THE *SPARROW* OBLIGATION

IF THE NATURE OF THE OBLIGATION in *Sparrow* is different, what about its scope? Does it extend to subject matter other than land? There are three possibilities: (*i*) that the *Sparrow* obligation is comprehensive, and attaches to all aspects of the relationship between Aboriginal peoples and government;[58] (*ii*) that the *Sparrow* obligation is to limited to Aboriginal land and interests derived from it, as in *Guerin*; or (*iii*) that the *Sparrow* obligation includes both Aboriginal and treaty rights.

At first glance, the decision in *Sparrow* seems to support the first possibility. In *Sparrow* the Court spoke of government's fiduciary responsibility "with respect to

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[54] By virtue of section 52 of the *Constitution Act, 1982*. In *Sparrow* itself, the Court referred the case back to trial for evidence on the issues of infringement and justification.

[55] See Hannon, *supra* note 1 at 12 and 20 for similar conclusions. In *The Law of Canadian Indian Treaties*, *supra* note 1 at 31, Reiter distinguishes between "*Guerin*-type" and "*Sparrow*-type" obligations, but adds a "general honour of the Crown" category and a "*Guerin/Sparrow*" category, and goes on suggest at 39–40 that fiduciary obligations may exist where there is "a general obligation arising out of the fundamental Crown-Indian relationship and specific duties as prescribed in legislation." Conversely, Dupuis & McNeil, *supra* note 1 at 40, suggest that *Sparrow* has extended to the legislative branch of government the enforceable compensable duty which *Guerin* imposed on the executive branch.

[56] And from other factors: see notes 49 and 50, *supra*.

[57] Compare the American approach discussed section XVI below. Bryant, *supra* note 1 at 37, wrote that one view of *Sparrow* is that the Court focussed on their own interpretation of section 35 rather than on "the [Crown's] undertaking to recognise and affirm Aboriginal rights in accordance with the general fiduciary standards of "loyalty, good faith, and avoidance of conflict of duty and self-interest." He was concerned that this view would abandon established principles of fiduciary law, permitting courts either to freeze the content of the current obligation or to fashion it as they please. Arguably, the Court *did* focus on an interpretative approach, deriving a liberal canon of interpretation rather than a *Guerin*-type enforceable duty from the special relationship. Certainly, the liberal canon approach does give courts wide flexibility to in construing section 35. But *quaere* whether the courts could have applied a full *Guerin*-type duty in the context of *Sparrow*.

[58] See the claim to this effect in Hutchins, *supra* note 1 at 11–12. See also Owen, *supra* note 1 at 15.

Aboriginal peoples."[59] It said "[t]he relationship between government and the Aboriginals is trust-like."[60] However, the Court called these broad statements "a general guiding principle for s. 35(1)."[61] Similarly, it said "the words 'recognition and affirmation' incorporate the fiduciary relationship."[62] As suggested earlier, it was inferring from the special fiduciary relationship a liberal canon of construction.[63] The object of this canon was the interpretation of the rights contained in section 35(1) of the *Constitution Act, 1982*. Section 35(1), in turn, is not global in scope. Whether the *Sparrow* obligation is limited to Aboriginal land interests depends on the "Aboriginal and treaty rights" in subsection 35(1). Let us consider the subsection 35(1) rights first. Are they limited to interests in or derived from Aboriginal title? Or do they go beyond ownership and use of land in this general sense, and incorporate all possible aspects of internal self-government?[64] If the first alternative is correct, it would be difficult to assert a right to government-funded social services on the basis of subsection 35(1) Aboriginal rights. If the protected Aboriginal rights did extend beyond ownership and use of land, it would still be necessary to demonstrate that they included a fiduciary entitlement to government-funded social services.[65]

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[59] *Sparrow*, *supra* note 17 at 1108.

[60] *Ibid.*

[61] *Ibid.*

[62] *Ibid.* at 1109.

[63] See section V, above.

[64] If Aboriginal "self-government" is defined loosely as "Aboriginal self-control," a significant degree of internal self-government is possible at common law even if Aboriginal rights are limited to the ownership and use rights associated with Aboriginal title. For example, Aboriginal title holders can agree voluntarily to regulate their own use of their land and natural resources, in any number of different ways: see *Delgamuukw et al.* v. A.G. *(B.C.) et al.*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 150–51. However, a more sweeping form of internal self-government would permit an Aboriginal governing body to impose non-consensual (i.e., coercive) controls on Aboriginal members in regard to all or most internal matters affecting them, including matters with little or no direct connection to use and occupancy of Aboriginal land. (*Cf.* M. Weber, *The Theory of Social and Economic Organization*, trans. T. Parson & A.M. Henderson (London: Collier-Macmillan, 1947) at 156).

[65] The self-government issue raises a further question: are Crown fiduciary obligations to Aboriginal peoples *consistent* with a general Aboriginal right of self-government? McMurtry & Pratt, *supra* note 1, and Pratt, *supra* note 1, claim that they are. They argue that the greater the degree of Aboriginal self-government, the more the fiduciary relationship will resemble one of agency. On the other hand, in *R.* v. *Vincent* (1993), 12 O.R. (3d) 427 at 441, the Ontario Court of Appeal wrote: "[w]e agree ... that the fiduciary role of the Crown is inconsistent with the autonomous status of free allies claimed by the Amerindian tribes." Whatever the answer to this question, where there is greater Aboriginal control, there will generally be less room for Crown discretion, and hence less scope for either trust-like or agency-like fiduciary duties.

Since *Sparrow* protects "existing" Aboriginal rights, the answer to these questions lies in the scope Canadian courts give to Aboriginal rights at common law. For the most part, the courts have centred these rights on Aboriginal interests in land. Most of the leading cases affirm Aboriginal rights that are associated with the traditional occupation and use of land or the traditional use of natural resources.[66] Aboriginal rights are said to derive from traditional Aboriginal activities, rather than activities or benefits acquired subsequent to European sovereignty,[67] and are

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[66] E.g., *St. Catharines Milling and Lumber Co. v. The Queen* (1889), 14 App. Cas. 46 (J.C.P.C.) (land); *Calder* v. A.G.*(B.C.)*, [1973] S.C.R. 313 (land); *Guerin*, *supra* note 3 (land — including both reserve and Aboriginal interests); and *Sparrow*, *supra* note 17 (fishing rights). Although the Supreme Court has yet to formulate a general definition of Aboriginal rights, it noted in *Sparrow* that Mr. Sparrow had been fishing "in ancient tribal territory" and that "the salmon fishery has always constituted an integral part of their distinctive culture" (at 1099).

As well, decisions in three different provincial appellate courts support a link between Aboriginal rights and land. In *Delgamuukw et al.* v. *A.G.(B.C.) et al.*, *supra* note 64, Macfarlane J.A., writing for the majority, said that "[t]he essential nature of an Aboriginal right stems from occupation and use. The right attaches to land occupied and used by Aboriginal peoples as their traditional home prior to the assertion of sovereignty ... . [Aboriginal rights] are integral to the distinctive culture of an Aboriginal society" (at 128–29). Wallace J.A. said "only those Aboriginal practices which relate to occupation and use of land were recognised and protected by the common law" (at 206). In *R. v. Pamajewon et al.* (1994), 21 O.R. (3d) 385, the Ontario Court of Appeal approved Macfarlane J.A.'s description of Aboriginal rights, including his statement about its essential nature. In *R. v. Adams*, [1993] C.N.L.R. 98, the majority of the Quebec Court of Appeal held that Aboriginal fishing rights are an incident of Aboriginal title to land.

On the other hand, Lambert J.A., dissenting in *Delgamuukw*, seemed to suggest that *any* traditional practice integral to the distinctive Aboriginal culture might be an Aboriginal right. This looser view prevailed in *Casimel v. Insurance Corp. of British Columbia* (1993), 106 D.L.R. (4th) 720 (B.C.C.A.) and *R. v. Williams*, [1994] B.C.J. No. 2745 (B.C.C.A.). In the latter case, though, the court held that no Aboriginal right had been proven.

Most courts have not focussed on the broader question as to whether Aboriginal self-government is a form of Aboriginal right. Instead, most have opined that any such power (as opposed to voluntary internal self-regulation) would have been inconsistent with British sovereignty or the exhaustive division of federal and provincial powers in the *British North America Act, 1867*. In *Sparrow*, *supra* note 17 at 1103, the Supreme Court said "there was from the outset never any doubt that sovereignty and legislative power ... vested in the Crown." See also *Delgamuukw*, supra note 64; *Pamajewon* (above); and *R. v. Williams* (above). *Cf.* the arguments in favour of common law Aboriginal self-government rights in Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Canada Communication Group, 1991). The federal government now recognises an inherent right of Aboriginal self-government: see Department of Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Public Works and Government Services, 1995). This, however, is a matter of policy, not law.

[67] *Delgamuukw et al.* v. *A.G.(B.C.) et al.*, *supra* note 64; *R. v. Alphonse*, [1993] 5 W.W.R. 401 (B.C.C.A.); *R. v. Vanderpeet*, [1993] 5 W.W.R. 459 (B.C.C.A.); and *R. v. N.C.T. Smokehouse*, [1993] 5 W.W.R. 542 (B.C.C.A.).

generally regarded as communal rather than individual interests.[68] Essentially "non-land" interests, such as the receipt of publicly-funded social services by Aboriginal peoples, would not appear to meet these requirements.

On the other hand, subsection 35(1) is not limited to Aboriginal rights alone. Subsection 35(1) also includes the existing treaty rights of the Aboriginal peoples of Canada, and subsection 35(3) defines treaty rights to include present and future land claims agreement rights. In a recent decision, the Supreme Court confirmed that the *Sparrow* approach applies to infringements of treaty rights as well as Aboriginal rights.[69]

Could a treaty right protected in *Sparrow* guarantee a right unconnected with land? Could it guarantee a particular kind, level or standard of government health and or other social services for treaty beneficiaries? Would this guarantee be subject only to section 35-justified limitations?

For these questions, the answers lie in the terms of the individual treaties. If the obligation in *Sparrow* applies to all treaty rights, it must include treaty rights that are not directly related to land.[70] Hence a treaty *could* contain a guarantee that might be construed as a duty to maintain social services.

Generally, though, they do not. Of all the major treaties, only Treaty No. 6 contains a provision that might be construed as promising health benefits. It says that "a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such Agent," and promises assistance in the event of "any pestilence" or "a general famine."[71] The courts have construed this promise as guaranteeing to Treaty No. 6 Indians free medicines, drugs, and

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68 Although they can be exercised personally. See *Pasco* v. *Canadian National Railway Co.* (1989), 56 D.L.R. (4th) 404 (B.C.C.A.); *Delgamuukw et al.* v. *A.G.(B.C.) et al.*, *supra* note 64; and *R.* v. *Nikal*, [1993] 5 W.W.R. 629 (B.C.C.A.).

69 *R.* v. *Badger*, [1996] 1 S.C.R. 771, discussed in Part IX below. The main majority noted (at paras. 73 and 85) that the specific infringement factors described in *Sparrow* might require modification when applied to treaty rights.

70 Can this result be reconciled with the political trust doctrine and the land-based fiduciary duty in *Guerin*? The short answer is that because the reference to "treaties" in the *Constitution Act, 1982* is unambiguous, there is no room here for an interpretative presumption such as the political trust doctrine. Moreover, a doctrine that evolved in regard to specific compensable equitable duties will not necessarily apply to presumptions of constitutional interpretation. Finally, as suggested later, it is arguable that even at the non-constitutional level, non-land treaty obligations can be reconciled with the political trust doctrine and *Guerin*: see section X, below.

71 *Treaty No. 6 Between Her Majesty the Queen and the Plains and Wood Cree Indians, at Fort Carlton, Fort Pitt and Battle River With Adhesions*, 23 and 28 August 1876. See, generally, P.A. Barkwell, "The Medicine Chest Clause in *Treaty No. 6*" [1981] 4 C.N.L.R. 1.

medical supplies,[72] but not free hospital services[73] or medical care.[74] The promise might well be interpreted more liberally today,[75] and should offer protection against unjustified infringement. On the other hand, it is not general in scope, and would not apply to people other than Treaty No. 6 Indians.

One social service promise that is in all the numbered treaties relates to education. Treaty 1, for example, promises that "[h]er Majesty agrees to maintain a school on each reserve ... whenever the Indians of the reserve should desire it."[76] This commitment, too, would likely support more than a literal interpretation today. It could offer protection against unjustified infringement — for the treaties concerned, and subject to their individual wording and context. Unlike obligations based on Aboriginal title or land, treaty obligations are limited to the terms of individual agreements. Similar protection should be available for social services promises in land claims agreements.[77]

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72 *Dreaver* v. *The King*, [1935] 5 C.N.L.C. 92 (Exch. Ct.) at 115.

73 *R.* v. *Johnston* (1966), 56 W.W.R. 565 (Sask. C.A.) at 571.

74 *R.* v. *Swimmer* (1971), 17 D.L.R. (3d) 476 (Sask. C.A.) at 481.

75 See, for example, *R.* v. *Sioui*, *supra* note 49, and *R.* v. *Wolfe*, [1995] S.J. No. 501 (Sask. C.A.). In *Wolfe*, the Saskatchewan Court of Appeal ordered that criminal prosecutions be stayed because they were based on Crown action that violated a non-land right in *Treaty No. 6* (the right to have the Crown strictly enforce alcohol protection laws). The Court of Appeal said "*Sparrow* and *Bear Island* require that this law enforcement be undertaken in a manner which fulfils the Crown's fiduciary obligations" (at 64). In *Mitchell* v. *Peguis Indian Band et al.* (1990), 71 D.L.R. (4th) 193 (S.C.C.) at 230, La Forest J. contemplated payments in areas such as education, housing, and health and welfare as possible aspects of "treaty and ancillary obligations." A more liberal interpretation of *Treaty No. 6* might or might not involve a guarantee of a particular level of services. For example, the guarantee might be construed as affording services at least comparable to those enjoyed by other Canadians. If other Canadians were being subjected generally to cutbacks, these might be held to apply to *Treaty No. 6* Indians as well.

76 *Treaty No. 1 Between Her Majesty the Queen and The Chippewa and Cree Indians of Manitoba and Country Adjacent With Adhesions*, 3 August 1871. A similar commitment is found in all the other numbered treaties. For an example of a broad judicial interpretation of another non-land treaty right, see *R.* v. *Wolfe*, *ibid.* The court referred to *Sparrow* and *Bear Island* (see Part IX, *infra*) in support of its interpretation.

77 E.g., *James Bay and Northern Quebec Agreement*, 11 November 1975, ss. 14–17 and 28–29. See also the *Agreement*'s main implementing legislation, the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976–77, c.32 and the *Loi Approuvant la Convention de la Baie James et du Nord québécois*, S.Q. 1976, c.46 (now L.R. c.67). For the other major land claims agreements, see note 215, *infra*. Courts may be less willing to find fiduciary duties — or wide-ranging fiduciary duties — in modern land claims agreements than in the traditional treaties, on the ground that the element of bargaining disadvantage is now less significant: *cf. Eastmain*, note 91, *infra*. Still, even a limited fiduciary tool might prove useful for Aboriginal peoples to help secure full implementation of land claims agreement commitments. There were many implementation problems relating to the health and social services provisions of the *James Bay and Northern Quebec Agreement*: W. Moss, "The

In summary, the scope of the *Sparrow* obligation is the scope of the section 35 Aboriginal and treaty (and land claims agreement) rights, as interpreted by the courts. The obligation extends beyond rights derived from Aboriginal title, to treaty and land claims agreement rights, but falls short of a comprehensive attachment to the Aboriginal-government relationship in general.

VII. GENERAL CHARACTER OF THE *GUERIN* AND *SPARROW* PROTECTIONS

SPARROW NEITHER REPUDIATED NOR DUPLICATED the Dickson-Wilson approach in *Guerin*.[78] In both decisions, the Court found or assumed a fiduciary relationship between the Crown and Aboriginal peoples. Although it was unique to Aboriginal peoples, the relationship was general and undeveloped in the sense that it required something more to give it specific effect.

In *Guerin*, the Court found that something more in the *Indian Act* surrender provisions. These gave the federal government special powers to act on behalf of Indian people in regard to their land, in transactions with third parties. The provisions transformed the general fiduciary relationship into a direct fiduciary duty. The duty was enforceable by the Aboriginal people concerned, in an equitable action for monetary compensation.

Although a legislative provision also triggered a more specific application in *Sparrow*, the similarity ended here. In *Sparrow*, the special fiduciary relationship led to an obligation to comply with the requirements of section 35, read subject to a presumption in favour of the Aboriginal peoples. Together with other factors, the special fiduciary relationship yielded a canon of constitutional interpretation. Unlike a statutory presumption, the effects of this canon were final and beyond Parliamentary control.

Why did the special relationship yield an enforceable federal duty in *Guerin* and a canon of constitutional construction in *Sparrow*? Although the Court offered no explanation, the circumstances of the two cases offer a possible clue. The provisions which triggered the duty in *Guerin* involved stewardship functions to be carried out on behalf of Indian people. In contrast, the provisions which triggered the liberal canon in *Sparrow* were restrictions on government's general regulatory functions. Although these required government to take special account of Aboriginal and treaty rights, they did not alter government's general role as a regulator on behalf

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Implementation of the *James Bay* and *Northern Quebec Agreement*" in B.W. Morse, ed., *Aboriginal Peoples and the Law* (Ottawa: Carleton University Press, 1985) ch. 11; and F. Cassidy & R.L. Bish, *Indian Government: Its Meaning in Practice* (Victoria: Oolichan Books, 1989) at 149–52.

[78] At least in regard to points on which Dickson and Wilson JJ. were in agreement.

of the public as a whole. The liberal canon permitted the Court to infer a stringent protection for existing Aboriginal and treaty rights while avoiding the exclusive or restricted focus of a *Guerin*-type duty.

Ironically, though, because the liberal canons of construction were already well established before *Sparrow*,[79] the Court could have applied them directly to section 35 and other provisions directly affecting Aboriginal peoples without having to link them to the special fiduciary relationship!

Finally, not only are the contexts and operation of the *Guerin* and *Sparrow* obligations different, but so is their scope. The *Guerin* duty applies to interests derived from Aboriginal interests in land, while the *Sparrow* obligation applies to section 35 Aboriginal and treaty rights.

VIII. DECISIONS SINCE *GUERIN* AND *SPARROW*

SO FAR, MOST DECISIONS SINCE *GUERIN* AND *SPARROW* have addressed the fiduciary duty in *Guerin* and the constitutional obligation in *Sparrow* as distinct forms of protection.[80] In each case, the protection extended is not all-encompassing. It focuses instead on specific kinds of interest or context.

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[79] In decisions such as *Nowegijick*, cited in *Sparrow*, *supra* note 17.

[80] See the cases listed at note 81, *infra*; *Dumont et al.* v. A.G. *(Canada)* (1991), 91 D.L.R. (4th) 654 (Man. C.A.): "[i]t is one thing for there to be a breach of a fiduciary duty, another for legislation to be unconstitutional."; and the approach in *Grand Council of the Crees et al.* v. A.G. *(Canada) et al.*, *supra* note 11, discussed below. See, however, *Delgamuukw*, *supra* note 64, and *R.* v. *Côté*, [1994] 3 C.N.L.R. 98, where the distinction between the *Guerin* and *Sparrow* protections is less clear.

A. The *Guerin* Duty

For example, most decisions which have enforced or recognised a *Guerin*-type duty are concerned in some way with Aboriginal land and related interests.[81] The duty is not limited to surrenders of reserve land, as in *Guerin* itself. It has been applied quite broadly, to include interests derived from or related to Aboriginal land as well as to Aboriginal title itself.[82] It would not be surprising to see it applied in future to land cession or land recognition treaties and land claims agreements.

Conversely, claims that go beyond Aboriginal land or related interests have had only limited success. Courts have agreed to consider fiduciary claims involving government funds for Indian housing[83] or litigation of native claims,[84] government supervision of band council elections,[85] and "protection."[86] However, they have

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[81] E.g., *Kruger et al.* v. *The Queen*, [1986] 1 F.C. 3 (F.C.A.) (Crown expropriation of reserve lands for airport; a fiduciary duty, but not breached); *Lower Kootenay Indian Band* v. *Canada*, [1992] 2 C.N.L.R. 54 (F.C.T.D.) (lease of band land: a breach of fiduciary duty, but remedy barred by limitation statute); *Delgamuukw et al.* v. *A.G.(B.C.) et al.*, *supra* note 64 (Aboriginal title: declaration of fiduciary obligation on basis of both *Guerin* duty and *Sparrow* guarantee); *Wewaikai Indian Band* v. *Canada*, [1992] F.C.J. No. 507 (F.C.T.D.) (entitlement to reserve land: interlocutory proceedings); *Hopton et al.* v. *Pamajewon et al.* (1993), 16 O.R. (3d) 390 (Ont. C.A.) (dedication of reserve land for a road, without consultation or surrender: fiduciary duty enforced by declaration); *Montana Band* v. *Canada*, [1991] 2 F.C. 273 (F.C.T.D.) (surrender of reserve land: interlocutory proceedings); *Enoch Band of Stony Plain Indians et al.* v. *The Queen*, [1993] F.C.J. No. 1254 (F.C.A.) (surrender of reserve land: interlocutory proceedings); *Holiday Park Developments Ltd.* v. *Canada*, [1994] F.C.J. No. 193 (F.C.T.D.) (Crown lease of reserve land: inappropriate form of proceedings for enforcing fiduciary duty); *Wewayakum Indian Band* v. *Canada*, [1995] F.C. No. 1202 (F.C.T.D.) (Crown management of reserve land: a fiduciary duty, but not breached, as Crown had acted "honestly and impartially" (at 568)); *Semiahmoo Indian Band* v. *Canada (District Manager)*, [1995] F.C.J. No. 1288 (F.C.T.D.) (Crown had breached its fiduciary duty in surrender of part of reserve, but remedy barred by limitation statute); *Blueberry*, *supra* note 9 (Crown breached fiduciary duties in regard to transfer and revocation of transfer of mineral rights to surrendered reserve land). There were also *dicta* about the existence of a fiduciary duty in *Canadian Pacific Ltd.* v. *Paul*, [1988] 2 S.C.R. 654, a case involving a claimed right of way across reserve land.

[82] *Ibid.*

[83] *Sandy Bay Band of Indians* v. *Minister of Indian Affairs and Northern Development* (sub. nom. *Desjarlais*), [1988] F.C.J. No. 144 (F.C.T.D.) [hereinafter *Desjarlais*].

[84] *Derrickson* v. *The Queen in Right of Canada et al.*, [1991] F.C.J. No. 1151 (F.C.T.D.). *Contra*, *Lubicon Lake Indian Band* v. *Canada (Minister of Indian Affairs and Northern Development)*, [1987] 3 F.C. 174 (F.C.T.D).

[85] *Blackfoot Band of Indian No. 146* v. *A.G. (Canada)*, [1986] F.C.J. No. 719 (F.C.T.D.).

[86] *Montana Band of Indians* v. *Canada*, [1991] 2 F.C. 30 (F.C.A.).

done so in proceedings that require a minimal onus of proof and are preliminary and tentative in nature.[87] So far, fiduciary duties based on land are the norm.

This focus on land reflects Supreme Court statements about the duty in *Guerin*. Although the Court has not ruled out other subject matter, it has tended to link the *Guerin*-type duty with Aboriginal land.[88] What may be developing is a general presumption that fiduciary duties will apply to the Crown in its dealings with Aboriginal land and property derived from land.

B. The *Sparrow* Obligation

Like the fiduciary duty in *Guerin*, the constitutional obligation in *Sparrow* is not being applied globally to all aspects of the Crown-Aboriginal peoples relationship. So far, most decisions which have declared government regulation unconstitutional under subsection 35(1) have involved Aboriginal or treaty fishing or hunting

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[87] *Desjarlais*, *supra* note 83, involved an application for an interlocutory injunction, where all that was required was that the plaintiff show that the claim raised "a serious question." *Montana*, *Derrickson*, and *Blackfoot*, *supra*, involved motions to strike out claims where the defendants had to meet the heavy burden of showing that it was "plain and obvious" or "beyond doubt" that there was no reasonable cause of action.

[88] The Supreme Court reaffirmed the importance of the tie to land for *Guerin* in later cases. For example, in *Canadian Pacific Ltd.* v. *Paul*, *supra* note 81 at 654, it said that "[i]n *Guerin* ... this Court recognised that the Crown has a fiduciary obligation to the Indians *with respect to the lands it holds for them*" (emphasis added). In *Roberts* v. *Canada*, [1989] 1 S.C.R. 322 at 337, the Court referred to "the common law relating to Aboriginal title which underlies the fiduciary nature of the Crown's obligations." In *Sparrow*, *supra* note 17, the Court said that "[t]his court found [in *Guerin*] that the Crown owed a fiduciary obligation to the Indians *with respect to the* [reserve] *lands*. The *sui generis* nature *of Indian title*, and the historic powers and responsibility assumed by the Crown constituted the basis of such a fiduciary obligation" (at 408; emphasis added).

See also *Canson Enterprises Ltd.* v. *Broughton & Co.*, *supra* note 9 at 578, describing *Guerin* as "a situation in which one person has control of property which in the view of the court belongs to another." Indian land and property related to Indian land are also stressed in *Mitchell* v. *Peguis Indian Band*, *supra* note 75 at 226: "the Crown has ... acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property they hold *qua* Indians, i.e., their land base and the chattels on that land base"; and *Norberg* v. *Wynrib*, *supra* note 9 at 291: "... Aboriginal people [are] the beneficiaries of [a] fiduciary relationship with the Crown, which consequently has obligations with respect to dealings with land subject to Aboriginal title."

rights.[89] Where allegations of unjustified infringement are made, the Court will require adequate evidence of impact on Aboriginal or treaty rights.[90]

Beyond *Sparrow* and outside section 35 constitutional situations, Canadian courts are continuing to apply the ordinary liberal canons of construction, usually without basing them on the fiduciary relationship between the Crown and Aboriginal peoples.[91] Where they talk about the rationale for the canons, they generally speak of remedying disadvantage.[92]

Like all non-constitutional presumptions, the ordinary liberal canons can be rebutted or restricted by legislation. They may have no effect where the language of a statute is unambiguous,[93] or blocks a more liberal construction.[94] They may

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89 R. v. *Jones* (1993), 14 O.R. (3d) 421 (Ont. Prov. Div.) (fishing); R. v. *McPherson*, [1993] 1 W.W.R. 415 (Man. Prov. Ct.) (hunting); R. v. *Jackson*, [1992] O.J. No. 601 (Ont. Prov. Div.) (fishing); R. v. *Joseph*, [1991] Y.J. No. 37 (Y.T. Ct.) (fishing); R. v. *Nikal*, *supra* note 68 (fishing); R. v. *Commanda*, [1990] O.J. No. 1603 (Ont. Dist. Ct.) (fishing); *Carrier-Sekani Tribal Council* v. *Canada (Min. of Environment)* [1991] F.C.J. No. 425 (F.C.T.D.) (fishing); R. v. *Muswagon*, (1992) 79 Man. L.R. (2d) 277 (Man. Q.B.) (hunting); R. v. *Agawa* (1988), 53 D.L.R. (4th) 101 (Ont. C.A.) (leave to appeal to S.C.C. refused (1990), 58 C.C.C. (3d) vi); and R. v. *Howard*, [1991] 1 O.J. No. 548 (Ont. Ct. Gen. Div.) (fishing). See, however, R. v. *Wolfe* , *supra* note 75.

90 In *Smith* v. *The Queen in Right of Canada et al.* (1994), 17 O.R. (3d) 468 at 475 (Ont. Ct. Gen. Div.), the General Division held that the principles in *Sparrow* could not be applied to "unparticularised Aboriginal rights." The applicant had claimed an unjustified infringement of an Aboriginal right to freely cross the Canada-United States border during her immigration inquiry. See also *Grand Council of the Crees*, *supra* note 11.

91 E.g., *Mitchell* v. *Peguis Indian Band*, *supra* note 75 at 91 and 98–99 (Dickson C.J.C.), and 142–43 (La Forest J.); R. v. *Norn*, [1991] A.J. No. 236 (Alta. Prov. Ct.) at 22; R. v. *Machatis*, [1991] 1 C.N.L.R. 154 (Alta. Q.B.) at 159–60; R. v. *Howard*, [1991] O.J. No. 548 (Ont. Ct. Gen. Div.); R. v. *Fiddler*, [1992] S.J. No. 673 (Sask. Prov. Ct.) at 45–46; R. v. *Littlewolf*, [1992] A.J. No. 236 (Alta. Prov. Ct.) at 20; R. v. *Alfred*, [1993] B.C.J. No. 2277 (B.C.S.C.); R. v. *Vincent* (1993), 12 O.R. (3d) 427 (Ont. C.A.) at 443; R. v. *Jones*, *supra* note 89 at 434–35 (referring, however, to *Taylor*, *supra* note 49); *Poker et al.* v. *Canada (Minister of National Revenue)*, [1994] F.C.J. No. 1505 (F.C.T.D.) at 35. In *Eastmain Band* v. *Canada (Federal Administrator)*, [1992] F.C.J. No. 1041 (F.C.A.), the Court found the main basis for applying the liberal canon to treaties to be the historic bargaining disadvantage of the Aboriginal peoples (at 10), but then appeared to suggest that the canon could be reinforced by the special fiduciary relationship (at 18–19).

92 "Underlying *Nowegijick* is an appreciation of societal responsibility and a concern with remedying disadvantage": Dickson C.J. in *Mitchell*, *supra* note 75 at 99. "From the perspective of the Indians, treaties were drawn up in a foreign language.. and incorporated references to legal concepts of a system of law with which Indians were unfamiliar": La Forest J. in *Mitchell* at 142–43.

93 R. v. *Horse*, *supra* note 49 at 202; R. v. *Sundown*, [1988] S.J. No. 49 (Sask. Q.B.) at 12; *Saugeen Indian Band et al.* v. *The Queen*, [1989] 3 F.C. 186 at 203 (F.C.T.D.), aff'd. in [1990] 1 F.C. 403 (F.C.A.); *Sturgeon Lake Indian Band* v. *Canada (Minister of Indian Affairs and Northern Development*, [1993] F.C.J. No. 853 (F.C.T.D.).

94 *Saugeen Indian Band et al.* v. *The Queen*, *supra* note 93 at 417.

have more force when applied to traditional treaties than to statutes[95] or land claims agreements.[96] For example, although a statute aimed at Indian rights will be broadly construed, it will not necessarily be interpreted as the Indians would have understood it.[97] Although a treaty will be normally construed as the Indians would have understood it, the Court has said that this presumption does not relieve it of the need to interpret the treaty to reflect the intention of both parties.[98]

Meanwhile the Supreme Court has addressed the Crown's fiduciary obligations to Aboriginal peoples in two recent decisions. In *Grand Council of the Crees*[99] the Supreme Court treated the *Guerin*-type fiduciary duty and the *Sparrow*-type obligation as two related but distinct applications of the general fiduciary relationship between the Crown and Aboriginal peoples. As well, the Court indicated that neither the duty nor the obligation is unlimited in scope.

The Crees claimed that by failing to disclose all information at a regulatory hearing, the National Energy Board had breached its fiduciary duty to them and had unjustifiably infringed their Aboriginal rights. The Court dealt first with the claim of fiduciary breach. It said:

> ... it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation ... . The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed.[100]

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95 *Mitchell* v. *Peguis Indian Band*, *supra* note 75 at 142–43. La Forest J. said that although statutes aimed at Indian rights should be construed broadly, the presumption that treaties ought to be interpreted as the Indians understood them should not apply to statutes. Treaties, he said, were the product of contractual negotiations in which one party, the Indians, were unfamiliar with the language and legal concepts employed, whereas with statutes the paramount objective is to determine the will of Parliament): R. c. *Décontie*, [1993] A.Q. No. 843 (Que. C.A.) at 27.

96 *Eastmain Band et al.* v. *Federal Administrator*, *supra* note 91 at 11, rejecting the full application of the canon to a land claims agreement. The Court said the Indian land claims agreement negotiators lacked the vulnerability of the Indians who negotiated the treaties. See also R. v. *Sioui*, *supra* note 49 at 1036.

97 *Mitchell* v. *Peguis Indian Band*, *supra* note 75 *per* La Forest J. Treaties, said La Forest J., were the product of contractual negotiations in which one party, the Indians, were unfamiliar with the language and legal concepts employed, whereas with statutes the paramount objective is to determine the will of Parliament. (La Forest J. spoke for four three members of the Court. Four of the other five concurred with La Forest J.'s general analysis of the statute in question, although they did not comment on this proposition). See also R. c. *Décontie*, *supra* note 95 at 27.

98 R. v. *Sioui*, *supra* note 49 at 1069.

99 *Grand Council of the Crees et al.* v. *A.G. (Canada) et al.*, *supra* note 11.

100 *Ibid.* at 147. The Court went on to say that fiduciary obligations should not be imposed on quasi-judicial tribunals.

The Court described the fiduciary relationship as one of utmost good faith,[101] and said this was inconsistent with the quasi-judicial responsibilities of a regulatory body such as the National Energy Board.[102] Hence the Board should not be subject to a fiduciary duty.

Turning to the infringement claim, the Court said:

> [t]his Court, in *R. v. Sparrow* ... recognised the interrelationship between the recognition and affirmation of Aboriginal rights constitutionally enshrined in s. 35(1) of the *Constitution Act, 1982*, and the fiduciary relationship which has historically existed between the Crown and Aboriginal peoples. It is this relationship that indicates that the exercise of sovereign power may be limited or restrained when it amounts to an unjustifiable interference with Aboriginal rights.[103]

In other words, when it is applied to section 35, the relationship does not generate a direct enforceable fiduciary duty. Instead, it results in an "unjustified infringement" interpretation of section 35 itself.

This distinction was evident in the way the Court approached the *Sparrow* guarantee here. For this guarantee, the Court required something different from either general allegations of prejudice or specific claims of breach of a duty of "utmost loyalty" or "utmost good faith." It required evidence of interference with the Aboriginal or treaty rights enshrined in section 35 of the *Constitution Act, 1982*. Because this evidence was lacking, the Court felt it could not make a realistic assessment of the impact of the Board's decision.

The second recent Supreme Court decision to address the special fiduciary relationship was *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs*

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[101] The Court spoke of "a relationship of utmost good faith between the Board and a party appearing before it": *ibid.* at 148. It suggested that even had there been a fiduciary duty here the Board would have met its requirements because its procedure in relation to the claimants had been fair.

The standard for most "ordinary" fiduciary duties normally requires loyalty: see *supra* note 11. Similarly, for the special fiduciary relationship, Dickson J. had said in *Guerin* that "[a fiduciary's] duty is that of utmost loyalty to his principal": see *supra* note 23. The Court gave no indication that it was now departing from *Guerin*, and adopting a new lower standard for fiduciary duties involving Aboriginal peoples. But the suggestion that the duty could be discharged merely by compliance with fair procedure does suggest a different level of obligation than in *Guerin*. Perhaps what is being suggested is that compliance with fair procedure is all that will be required where government must balance between Aboriginal and other concerns in an adjudicatory context, and that where the adjudicatory body is an independent quasi-judicial tribunal, like the Board, the presumption of procedural fiduciary duties may be rebutted altogether. This would not preclude fiduciary obligations by government in non-adjudicatory situations.

[102] *Grand Council of Crees*, *supra* note 11 at 148.

[103] *Ibid.* at 149.

and Northern Development).[104] Following two surrenders of reserve land, the Department of Indian Affairs transferred both the surface interests and the mineral rights in the land to the Department of Veterans Affairs. The mineral rights transfer was not expressly authorised by the band, and contravened a long-standing departmental policy to lease rather than sell reserve mineral rights. Although it became clear later that these rights were valuable, the department failed to exercise its statutory power to revoke the transfer.

The Supreme Court found that the Crown had breached two fiduciary duties, both grounded in the surrender and post-surrender process. The first breach resulted from the mineral rights transfer; the second resulted from the failure to revoke it. Although the Court's two leading judgments differed as to the surrender that had generated the first fiduciary duty[105] and in their approaches to the duties themselves,[106] the subject matter of the fiduciary duties was clearly Indian land and

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[104] *Supra* note 8, allowing an appeal and cross-appeal from (1993), 100 D.L.R. (4th) 504 (F.C.A.), which had dismissed an appeal and cross-appeal from [1988] 1 C.N.L.R. 73 (F.C.T.D.). Gonthier J. gave the reasons for four of the seven judges; McLachlin J. wrote for the other three.

[105] The band first surrendered the mineral rights in reserve land to the Crown in trust "to lease" for their benefit. Five years later the band surrendered the reserve to the Crown in trust "to sale or lease." Gonthier J. for four judges found that the band had intended to include the mineral rights in the second surrender, so that the second surrender superseded the first. He concluded, though, that in light of the long-standing lease policy and the lack of express band authorisation to sell the mineral rights, the Crown had breached its fiduciary duty to act in the band's best interests when it transferred these rights rather than leasing them for the band. McLachlin J., for the other three judges, said the second surrender should not be interpreted so as to affect the mineral rights. Hence, the first surrender's "lease" restriction on mineral rights still applied, and by violating it the Crown had breached its fiduciary duty to the Indians.

[106] Both Gonthier and McLachlin JJ. agreed that the Crown had not violated its fiduciary duty in the surrender or transfer of the surface rights. They noted that the Crown had provided the band with adequate information and had done nothing to prejudice the band's decision (at 36 and 52). McLachlin J. said the surface transfer price to the Department of Veteran's Affairs fell within the range of the appraisals, and was not unreasonable (at 66). Both judges agreed that the failure to revoke the mineral rights transfer was a continuing fiduciary breach that shielded the band from the limitation statute. Both judges seemed to agree that beyond the duty to comply with the surrender terms there was a duty to act in the band's best interests. For Gonthier J., the "sale or lease" discretion in the second surrender was modified by this "best interests" requirement. McLachlin J. said she would have considered this requirement in regard to the second surrender had she not found an enforceable violation of the "lease" term in the first (at 97).

Beyond this, the two judges seem to differ in their basic approaches to describing fiduciary duties. McLachlin J. related the duties here to general fiduciary law. She said that "[g]enerally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person" (at 52), and added that the heart of the fiduciary obligation is that "[t]he person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care" (at 52). Although Gonthier J. said he agreed with McLachlin J.'s analysis of the surface rights surrender (at 23), his approach to the fiduciary obligation seemed quite different. For Gonthier J. the key to the obligation was not vulnerability

resources connected to Indian land. *Guerin* was the only decision cited by Gonthier J. for the plurality; it was the main decision cited by McLachlin J. for the other three judges.

There was no mention of *Sparrow*. Once again, the Court seemed to sense a difference between a specifically enforceable trust-like duty on one hand, and a liberal canon of constitutional interpretation on the other. *Blueberry's* main concern was the former.[107]

IX. FUTURE SCOPE OF *GUERIN* AND *SPARROW* PROTECTIONS

DESPITE THEIR COMMON FIDUCIARY LANGUAGE, then, the context and operation of the obligations in *Guerin* and *Sparrow* are quite distinct. If the first is an enforceable equitable duty while the second is the result of a constitutional canon of interpretation, there is no reason why the two should be identical in scope.

However, this does not necessarily mean that the scope of the existing approaches will remain unchanged. Indeed, it is quite possible that the courts might decide to expand the scope of the *Guerin* duty by applying it to treaties. This could be done by extending rather than abandoning the present rationale in *Guerin*. The change could be reconciled with the political trust doctrine, and could claim some support on policy grounds. Most Canadian treaties involved cession or recognition of Aboriginal land, or dealt with Aboriginal land interests,[108] and can be explained solely in terms of land. Some, though, do not.[109] These "non-land" treaties cannot avoid the political trust doctrine by supplying a legally recognised interest independent of government. However, the political trust doctrine is itself no more than a presumption.[110] Treaties might be held to signify the Crown's own *intention* to be equitably bound, despite presumptions to the contrary. Solemn and consensual,

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but expressed intent. Gonthier J. said the Crown was subject to a fiduciary duty because it had taken on trust-like obligations in the surrender documents. "Thus," he concluded, "for lack of a better label, I think that it is appropriate to refer to these surrenders as trusts in Indian land" (at 36).

[107] There was a *non*-constitutional liberal canon in *Blueberry*, *supra* note 8. Gonthier J. said that the *sui generis* nature of Aboriginal title requires courts to "go beyond the usual restrictions imposed by the common law" (at 358), and give effect to "the guiding principle that the decisions of Aboriginal peoples should be honoured and respected" (at 363). Ironically, this (for Gonthier J.) meant giving full effect to the surrender that gave the Crown technical authority to sell the mineral rights.

[108] Note 205, *infra*.

[109] See *Native Rights in Canada*, 2d ed. (Toronto: Indian-Eskimo Assn. of Canada, 1972) at ch. 12; A.J. Hall, "Indian Treaties" in *The Canadian Encyclopaedia*, *supra* note 4, 1056.

[110] *Supra* note 41.

Indian treaties are as central to the historic Crown-Aboriginal relationship as the Crown's responsibility to protect Aboriginal land.

A fiduciary presumption in favour of treaty promises would not necessarily impose fiduciary duties in all situations. Some treaty promises might be too abstract or general to be enforced as concrete duties. Moreover, courts might be reluctant to infer fiduciary duties in situations involving modern land claims agreements. For example, some of these may have involved less inequality of bargaining power than most treaties.[111] Or an agreement might provide explicitly for alternative dispute resolution procedures.[112] In other cases, there may be little control or discretion delegated to the Crown.

Although it is not yet clear that non-land treaty promises can generate fiduciary duties, there are some straws in the wind. When the Supreme Court in *Sparrow* approved the proposition that the honour of the Crown is at stake in Indian treaties, it did so without relying specifically on the text of the *Constitution Act, 1982*.[113] The Federal Court has suggested that the presumption against Crown fiduciary obligations that involve public funds might not apply to treaty commitments.[114] In *Bear Island*, the Supreme Court observed in *obiter* that "[i]t is conceded that the Crown has failed to comply with some of its obligations under this agreement, *and thereby breached its fiduciary obligations to the Indians.*"[115]

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[111] *Cf. Eastmain Band et al.* v. *Federal Administrator*, *supra* note 91 at 11, rejecting the full application of the liberal canons of construction to a land claims agreement.

[112] E.g., *Vuntut Gwitchin First Nation Final Agreement between the Government of Canada, the Vuntut Gwitchin First Nation and the Government of the Yukon*, 29 May 1993, Chapter 26: Dispute Resolution.

[113] R. v. *Sparrow*, *supra* note 17 at 1107–8, approving the statement to this effect in R. v. *Taylor and Williams*, *supra* note 49 at 367. Ironically, though, *Sparrow* applied the fiduciary notion to help justify interpreting a constitutional provision liberally, not to impose an enforceable equitable duty like that in *Guerin*: see section V, above.

[114] *Thomas and Peguis Indian Band* v. *Canada (Minister of Indian Affairs and Northern Development)*, [1991] 2 F.C. 433 (F.C.T.D.) at 449.

[115] *Ontario (Attorney-General)* v. *Bear Island Foundation* (1991), 83 D.L.R. (4th) 381 at 384 (S.C.C.). In *Ontario* v. *Bear Island Foundation*, [1995] O.J. 164 at 44–45, the General Division of the Ontario Court said this statement was "no more than an acknowledgment by the court of a submission made to it, that negotiations were ongoing between the parties." Yet if the Supreme Court had had any reservations about the proposition that treaty violations could involve breaches of fiduciary obligations, it could have said so, whatever the agreement of the parties to the contrary. The Court's main finding in *Bear Island* was that although the Temagami Indians had a right to the lands in question, this right had subsequently been extinguished by a treaty. The issue of treaty violations and another issue were not resolved here as they were the subject of negotiations between the parties. For a provincial appellate court decision applying a *Sparrow*-type fiduciary interpretation to a non-land treaty right, see R. v. *Wolfe*, *supra* note 75.

Are courts are considering widening the constitutional presumption in *Sparrow* as well? In the recent *Badger* decision the main majority made it clear that the *Sparrow* test applies to treaty rights as well as Aboriginal rights.[116] The two other majority judges said a *Sparrow*-type approach could apply to documents such as the Natural Resources Transfer Agreements, and referred in broad terms to "the Crown's fiduciary obligation toward Aboriginal peoples" and to "the relationship between the Crown and Aboriginal peoples." On the other hand, these two judges were interpreting a document they considered to replace treaty rights. Moreover, neither their approach nor that of the main majority altered the focus of the *Sparrow* test as a general interpretive principle rather than a specific enforceable legal duty like that in *Guerin*. If fiduciary language had been avoided, this distinction would have been clearer.

X. FIVE TENTATIVE CONCLUSIONS: CANADA

1. The *Guerin* fiduciary duty and the *Sparrow* obligation are related but distinct applications of the special fiduciary relationship between the Crown and Canadian Aboriginal peoples.

2. Nowhere have the courts rejected the possibility of subjecting the Crown to specific enforceable fiduciary duties in regard to subject matter other than Aboriginal land. On the other hand, *Guerin*, the background of the special relationship, and the case law all suggest that Aboriginal land has a special significance in this relationship. Since fiduciary duties are judicial presumptions, it may be possible to capture this special significance in the following proposition:

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[116] R. v. *Badger*, *supra* note 69. The question in *Badger* was whether Treaty 8 Indians had a right to hunt for food on privately owned lands within the treaty area. This involved considering if the original treaty rights had been replaced by the Natural Resources Transfer Agreements (N.R.T.A.), or if the rights had merely been modified by the Agreements. In the latter case the treaty rights continued, and were subject to subsection 35(1) of the *Constitution Act, 1982*.

Sopinka J. for himself and Lamer C.J. felt that the N.R.T.A. had replaced the treaty rights, so that the only relevant constitutional enactment was the N.R.T.A. They said (at para. 9) that "[t]he key interpretative principles which apply to treaties are first that any ambiguity in the treaty will be resolved in favour of the Indians and, second, that the treaties should be interpreted in a manner that maintains the integrity of the Crown, particularly the Crown's fiduciary obligation toward Aboriginal peoples. These principles apply equally to the rights protected by the N.R.T.A.; the principles arise out of the nature of the relationship between the Crown and Aboriginal peoples with the result that, whatever the document in which that relationship has been articulated, the principles would apply to the interpretation of that document."

The five-judge main majority held that since the N.R.T.A. had modified but not replaced the treaty rights, the rights continued and could be construed in the light of subsection 35(1) of the *Constitution Act, 1982*. Although the main majority referred generally to the importance of maintaining the integrity of the Crown in its "dealing with Aboriginal people," they went on to refer specifically to treaty or Aboriginal rights (at para. 41).

Apart from section 35 of the *Constitution Act, 1982*, the Crown is presumed to be subject to fiduciary duties to Aboriginal peoples in regard to Aboriginal land and interests derived from or related to Aboriginal land; and the Crown is subject to equitable remedies in the event of breaches of these duties.[117]

3. Although the *Sparrow* obligation is attributed partly to the special fiduciary relationship, it is not a fiduciary duty directly enforceable by Aboriginal people. It is an obligation imposed on government to apply section 35 of *Constitution Act, 1982* generously, an obligation imposed through a liberal canon of judicial interpretation. This approach is based not only on the special fiduciary relationship, but also on common law presumptions in favour of Aboriginal and treaty rights. As a result of this approach, section 35 has been held to guarantee existing Aboriginal and treaty rights, subject to infringements that can be justified by strict judicial criteria, and infringements that cannot be justified will be declared unconstitutional.[118]

4. It may be that courts will expand the scope of the duty in *Guerin* by finding that promises in Aboriginal treaties and similar documents can enforced by equitable actions, apart from section 35 and apart from any tie to land or land-related interests. If they do this, the second proposition above will have to be extended to include treaties and similar documents.

5. Outside section 35 of the *Constitution Act, 1982*, a number of liberal canons of construction apply uniquely to Aboriginal peoples. These reflect a general presumption that government documents which relate especially to Aboriginal peoples should be construed in their favour. This presumption is broad enough potentially to include constitutional provisions such as those in *Sparrow*.

From these principles it follows that the obligations derived from the special fiduciary relationship are finite rather than general in scope. This suggests, for example, that there is no general enforceable Crown duty to provide government-funded social services for Canadian Aboriginal peoples, and no general constitutional protection against their infringement. There could be protection for these services as treaty rights under *Sparrow*, and possibly as treaty rights even apart from *Sparrow*, but this would depend on the wording of individual treaties.

These conclusions are all very tentative. *Guerin* is little more than a decade old, *Sparrow* is even younger, and the law is still in a fluid and unsettled state. In contrast, the idea of a government fiduciary obligation to Indian peoples has been in place for nearly two centuries in American law. What is its nature and scope? Can Canadian courts learn from the American approach? Does it suggest that government fiduciary obligations should include the provision of government services for Aboriginal peoples?

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[117] Sections III, V, VI, X, and XI, above.

[118] Sections IV, V, VII, VIII, X, and XI, above.

XI. LOOKING SOUTH[119]

A COMMON IMPERIAL PARENT, the resort to Indian treaties in both the Canada and the United States, and similarities between the Royal Proclamation of 1763[120] and the American *Trade and Intercourse* Acts,[121] all suggest that the American special fiduciary experience may be worth considering.[122] There are similarities, too, in more general legal and equitable concepts in each country.

On the other hand, there are significant differences too. Arguably, several historical and constitutional factors have been more favourable to a broad fiduciary notion in the United States than in Canada. First, Indian tribes in the United States are regarded as exercising tribal sovereignty[123] and until the late 19th century most

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[119] For some commentaries on the American special relationship, see Strickland *et al.*, *supra* note 4 at ch. 3; Note, "Rethinking the Trust Doctrine in Federal Indian Law" (1984) 98 Harv. L. Rev. 422; R.P. Chambers, "Judicial Enforcement of the Federal Trust Responsibility to Indians" (1975) 27 Stan. L. Rev. 1213; D. Getches & C. Wilkinson, *Federal Indian Law: Cases and Materials*, 2d ed. (St. Paul, Minn.: West Publishing, 1986) Chapter 3; C. F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy*, (New Haven: Yale University Press, 1987) at 78–86; M. Allen, "Native American Control of Tribal Natural Resource Development in the Context of the Federal Trust and Tribal Self-Determination" (1989) 16 B.C. Envt'l. Aff. L. Rev. 857; D. Getches, "The U.S. Law of Fiduciary Obligations" in *UFO's*, *supra* note 1; M.C. Wood, "Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited" (1994) Utah L. Rev. 1471.

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

[121] For the 1802 Act, see F.P. Prucha, ed., *Documents of United States Indian Policy*, 2d ed. (Lincoln: University of Nebraska Press, 1990) at 17–21.

[122] For some comparative studies, see Green, Hurley, Johnston, and Reynolds & Harvey, *supra* note 1; M.A. Donohue, "Aboriginal Land Rights in Canada: A Historical Perspective on the Fiduciary Relationship" (1990) Am. Indian L. Rev. 369; and M.D. Wells, "*Sparrow* and *Lone Wolf*: Honouring Tribal Rights in Canada and the United States" (1991) 66 Wash. L. Rev. 1119. For more general comparative studies, see E.M. Morgan, "Self Government and the Constitution: A Comparative Look at Native Canadians and American Indians" (1984) 12 Am. Indian L. Rev. 39; G. D. Meyers, "Different Sides of The Same Coin: A Comparative View of Indian Hunting and Fishing Rights in the United States and Canada" (1991) 10 U.C.L.A. J. Envtl. L. & Policy 67; R.W. Johnson "Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians" (1991) 66 Wash. L. Rev. 643; P. Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 Stan. L. Rev. 1311; and J.M. Silveri, "A Comparative Analysis of the History of United States and Canadian Federal Policies Regarding Native Self-Government" (1993) 16 Suffolk Transnational L. Rev. 618.

[123] At least since *Worcester* v. *Georgia*, 31 U.S. 405 (1832), American Indians have been regarded as separate political entities, with an inherent right of tribal sovereignty or self-government. This is an internal right, limited mainly to tribal territory and to some activities of tribal members outside this territory. It is residual in the sense that is subject to displacement or modification by fiduciary obligation laws. See also Strickland *et al.*, *supra* note 4 at ch. 4. In contrast, no general right of self-government has been judicially recognised for Canadian Aboriginal peoples: see note 66, *supra*.

Indians in the United States lacked full American citizenship.[124] Conceivably, American courts may have felt a special need for legal concepts to link tribes and their members and their lands to the ultimate sovereignty and ownership of the United States.[125] Second, American treaties are much more likely than their Canadian counterparts to use the language of "protection."[126] Third, Congress itself had rather modest-sounding constitutional powers in relation to Indians.[127] The fiduciary notion was a possible means of augmenting them. Fourth, American courts lack the leverage afforded by entrenched Aboriginal and treaty rights. They may feel a greater need than their Canadian counterparts for special fiduciary protective mechanisms.

Because of these and other differences, comparisons involving the two countries must be drawn with great caution. To compound the challenge, the American experience is complex. The special fiduciary concept in the United States has had

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[124] *Ontario (Director of Support and Custody Enforcement)* v. *Nowegejick*, [1989] O.J. No. 178 (Ont. Prov. Ct. Fam. Div.) at 11: "[in post-revolutionary America], Indians were not citizens of the United States by birth and owed no formal allegiance to that country, save as required by any treaty obligations ... . Citizenship was finally conferred by an act of Congress in 1924: see An Act to authorise the Secretary of the Interior to issue certificates of citizenship to Indians (1924), 43 Stat. 253, Pub. L. 68–233 [now 8 U.S.C. §1401] ... . Not so in British North America where the Indian has always been regarded as a British subject." (However, registered Indians in Canada lacked the right to vote in federal elections until 1960.) See also *Iowa Mutual Insurance Co.* v. *La Plante*, 480 US 9 (1987) at 17 and L. Baca, "The Legal Status of American Indians" in W.C. Sturtevant, ed., *Handbook of North American Indians* (Washington, D.C.: Smithsonian Institution, 1988) vol. 4 at 195.

[125] *Cf.* Chambers, *supra* note 119 at 1218–19.

[126] One study identified 83 American treaties committing the United States to the "protection" of signatory tribes, assuming their "guardianship," or similar trust-like obligations: G.H. Hall, *The Federal-Indian Trust Relationship* (Washington, D.C.: Institute for the Development of Indian Law, 1979) at 73–82. Non-fee simple Indian land in the United States is commonly referred to as Indian "trust land": *ibid.* at 12. The main "trust" language in Canada was in older versions of the *Indian Act*, and here it centred on Indian reserve land: see D.G. Smith, ed., *Canadian Indians and the Law: Selected Documents, 1663–1972* (Toronto: McClelland & Stewart, 1975) at section C.

[127] Article I, Section 8, Clause 3 (the Indian Commerce Clause): "the Congress shall have the power ... [t]o regulate commerce ... with the Indian tribes." Article II, Section 2, Clause 2 (the Treaty Clause): "[the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur ... ." Article VI, Clause 2 (the Supremacy Clause): "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

ambiguous beginnings, a paradoxical middle period, and an evolving recent past.[128] Terms of equity, such as "guardian," "trust," and "fiduciary," tend to be used almost interchangeably.[129] The case law is voluminous and far from consistent. There are controversies about the source of the fiduciary obligations, their content, and the appropriate scope of application.

XII. VAGUE BEGINNINGS

JUDICIAL RECOGNITION OF A GOVERNMENT-INDIAN fiduciary obligation in the United States is generally attributed to two early nineteenth century decisions by Chief Justice Marshall, *Cherokee Nation* v. *Georgia*[130] and *Worcester* v. *Georgia*.[131] Marshall C.J. spoke eloquently of guardians, protection, and guarantees, but it is far from clear that he intended these terms to impose legal obligations on the United States government. Certainly he did not impose them in these two cases.

In *Cherokee Nation*, the Cherokee sought protection against draconian Georgia legislation that threatened to carve up their land and abolish their laws. The Cherokee argued that the Supreme Court could hear their claim because they were a "foreign state."[132] Marshall C.J. held that although they were a state, the Cherokee were not a foreign state, so the Court lacked jurisdiction over their claim. To support this conclusion, Marshall C.J. said the relationship between the Indians and the United States resembled that between wards and guardian.[133] Like a guardian,

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[128] Chambers said the concept of a special fiduciary obligation has gone through three phases: a beginning in two early nineteenth century decisions, a middle period where the concept was used to enhance federal power over Indians, and a modern period: *supra* note 119 at 1246–47. Although Chambers was writing in 1975, the characterisation is still useful.

[129] *Cf.* the observations of Green, *supra* note 1 at 110.

[130] 30 U.S. 1 (1831). Marshall C.J. gave the majority opinion of the Court, holding that the Cherokee were a state but not a foreign state: see text below. Johnson J. felt that the Cherokee were neither a foreign state nor a state. Baldwin J., dissenting, for himself and Story J., considered that the Cherokee were both a state and a foreign state.

[131] *Supra* note 123. Marshall C.J. again gave the opinion of the majority. M'Lean J. gave a separate concurring opinion Baldwin J. dissented on technical grounds, but said his opinion on the merits remained the same as in the *Cherokee* case, *ibid.*

[132] *Supra* note 130 at 8.

[133] *Ibid.* at 12: "[t]hough the Indians ... have an unquestionable ... right to the lands they occupy ... it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. ... They look to our government for protection; rely

the United States had extensive control over the Cherokee — a degree of control that was inconsistent with their status as a foreign state.[134]

Five points are worth noting. First, Marshall C.J. did not say the situation was one of guardianship but that it resembled guardianship. Second, it was not the guardian's obligations but the guardian's control that was relevant. Third, Marshall C.J. was unclear about the precise source of this guardianship-like relationship.[135] Fourth, it was unclear if Marshall C.J. intended the subject matter of the relationship to be Indian land, Indian self-government, the content of individual treaties, or something else.[136] Fifth, it was unclear if this was to be a moral relationship, or one that was legally enforceable, at least in some respects.[137]

In *Worcester* v. *Georgia*, too, there is a gap between the Court's broad imagery and its actual disposition of the case. The question was whether the state of Georgia could punish a missionary for residing on Cherokee land. Marshall C.J. said "[t]he general law of European sovereigns" obliged a colonial power to protect Indians from encroachments and other basic threats on land it claimed.[138] He said the United States assumed this pledge of protection in the treaties and in federal statutes.[139]

However, when it came to deciding whether the Georgia law should be upheld, the Court was more specific. It suggested that the treaties with the Cherokee should

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upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great Father."

[134] *Ibid.* Marshall C.J. went on to describe the Indians as "completely under the sovereignty and dominion of the United States" (at 17).

[135] "[In *Cherokee* and in *Worcester*,] Chief Justice Marshall never articulated the source of the fiduciary duties owed by the United States to the Indians": Chambers, *supra* note 119 at 424. Was the relationship grounded in the treaties, in the Indian commerce power of Congress, in federal statutes such as the *Trade and Intercourse* Acts, or in government policy? Comments by Marshall C.J. in *Cherokee* and *Worcester* raise all these possibilities.

[136] *Cf.* Chambers, *ibid.* at 425: "[n]either opinion in the *Cherokee* cases indicated ... whether the purpose of the 'trust' was to protect tribal property, to buttress the tribes' political and social structures, to achieve some combination of these, or to do something else entirely [note omitted]."

[137] Marshall C.J. implied that if the Court had jurisdiction here, it might have been more willing to protect Cherokee land than other broader concerns. In *Worcester*, *supra* note 123 at 14, he suggested that making an enforceable decision on matters beyond title to land "savors [*sic*] too much of the exercise of political power to be within the proper province of the judicial department." *Cf.* Green, *supra* note 1.

[138] *Ibid.* at 432.

[139] *Ibid.* at 436.

be construed in their favour,[140] to counteract their bargaining disadvantage when the treaties were negotiated.[141] Doing this, the Court found that the Cherokee treaties had guaranteed wide land rights and powers of internal self-government.[142] It found that Congress had enacted laws to protect the Cherokee and their lands from outside interference.[143] The Court said the Constitution gave Congress exclusive jurisdiction over commerce with the Indian tribes.[144] The Georgia laws violated these safeguards, and interfered with this exclusive power. The Court annulled the laws because they were "repugnant to the Constitution, laws, and treaties" of the United States.[145]

If it was intended to be more than a rhetorical device, just what did the guardianship responsibility do? Did it focus outward, helping shield the Cherokee from state laws? Did it focus inward too, imposing limitations on federal power? Did it *confer* federal power in some situations? Had it a general interpretative role, contributing to a liberal interpretation of treaties?

Of the four options above, the first is most closely tied to the result in *Worcester*. However, the decision's wide language of protection makes it difficult to rule out the other options altogether. In fact, all four of these options have been asserted

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[140] *Ibid.* at 434. Marshall C.J., speaking of the *Treaty of Hopewell* in particular, but also referring in general terms to "the Indians" and to "the spirit of ... all subsequent treaties" and 455 (M'Lean J.). M'Lean J. said that "[t]he language used in treaties with the Indians should never be construed to their prejudice" and that "[h]ow the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

[141] *Ibid.* at 432–33 (Marshall C.J.), and 455 (M'Lean). Marshall C.J. observed that the Indians could not write, probably could not read, and would have been unaware of the more subtle distinctions in the English language. M'Lean referred to them as "unlettered."

[142] *Ibid.* at 433–36. Marshall C.J. used the presumption explicitly to de-emphasise the importance of the treaty words "allotted" (rather than "marked out"), "hunting grounds" (rather than "full use"), and "managing all their affairs" (a reference to the right of the United States to manage the Indians' affairs). He may also have been using it more implicitly elsewhere. For example, he surmised that the reference to a "boundary" between the United States and the Cherokee Nation amounted to a recognition of "national character" and "self-government" (435–36). Interpreted more literally, "boundary" might merely delineate an area of land ownership, rather than a political border.

[143] E.g., the *Trade and Intercourse* Acts, note 204, *infra*. See *Worcester*, *supra* note 123 at 436 (Marshall C.J. and 451 (M'Lean J.).

[144] Marshall C.J. said that federal powers in this regard were "not limited by any restrictions on their free actions": *ibid.* at 438.

[145] *Ibid.* at 440 (Marshall C.J.). See also M'Lean J. at 465. The Georgia laws were also inconsistent with the Cherokees' tribal sovereignty, but it was the repugnancy to the constitutionally paramount treaties and federal statutes which *protected* this tribal sovereignty, that was enforced by the Court.

at different times in post-*Worcester* decisions on the special fiduciary relationship between the United States government and American Indian tribes.[146]

XIII. FROM PROTECTION TO POWER

ONE HARVEST FROM THE CHEROKEE CASES was an apparent enhancement of federal power. In *Kagama*,[147] the Supreme Court upheld Congress's power to apply federal criminal laws to Indians who committed crimes against other Indians on Indian reservations.[148] A decade earlier, the Court had stressed the broad scope of federal authority over Indian treaties and commerce with the Indian tribes.[149] But in *Kagama* it found little help in specific provisions of the Constitution. Instead, it said the power derived from the federal government's responsibility as guardian for the Indians.[150] This might seem a paradoxical[151] result of a concept of protection. However, as we have seen, the special relationship was ambiguous from the beginning.

Kagama was followed by a still more restrictive decision in *Lone Wolf*.[152] Although Congress had approved a sale of tribal lands in violation of a treaty requirement, the Court gave it a green light to proceed. The Court said the federal guard-

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[146] The four options considered in this paper — fiduciary pre-emption (focussing outward), fiduciary duties (focussing inward), fiduciary power (conferring federal power), and the liberal construction canons — are not exhaustive. For another classification, including some additional fiduciary applications, see Powell J., dissenting, for himself and Rehnquist and O'Connor JJ., in *United States* v. *Mitchell*, 463 U.S. 206 (1983) at 235, note 9 [hereinafter *Mitchell II*].

[147] *United States* v. *Kagama*, 118 U.S. 375 (1886).

[148] As well as appearing to enhance federal power over Indians, this finding had a pre-emptive effect in regard to state laws. Because Congress had jurisdiction, the state did not.

[149] *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876) at 194 (stressing breadth of treaty power) and 197 (stressing breadth of Indian commerce power). There was no talk of guardianship in *Forty-Three Gallons*. The Court said at 193–94 that "[Marshall C.J.'s exposition in *Worcester*] was based on the power to make treaties and regulate commerce with the Indian tribes."

[150] *Ibid.* at 383–84: "[i]t seems to us that this [federal legislation] is within the competency of congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States — dependent largely for their daily food; dependent for their political rights ... . From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power." The Court added that the power must lie with the federal government "because it never has existed anywhere else" (at 385).

[151] And perhaps unnecessary, in light of *Forty-Three Gallons*, *supra* note 149.

[152] *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).

ianship role implies that Congress has plenary power over Indian property and Indian treaties, power enough to permit its action here.[153]

XIV. LIBERAL CONSTRUCTION

AFTER *WORCESTER*, THE CASE LAW continued the presumption that treaties should be construed in favour of Indians. Originally, the presumption was attributed mainly to the Indians' weaker bargaining power when the treaties were negotiated.[154] Increasingly, though, it was attributed to the government's protective or guardianship role as well.[155] In *Choctaw*,[156] the Court referred to the federal government's protective duty to its "weak" Indian "wards," and observed that "[i]t had accordingly been said in ... *Worcester* that 'the language used in treaties with the Indians should never be construed to their prejudice.' "[157] The "liberal construction" presumption was being treated as another application of the special fiduciary relationship between the federal government and American Indian tribes.

XV. MODERN SHIFTS

IN THE TWENTIETH CENTURY, American courts have reshaped some of the consequences of the government-Indian fiduciary relationship. After a period of popularity earlier in the century,[158] the broad fiduciary power concept of *Kagama* and the

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[153] *Ibid.* at 567.

[154] *Cherokee* and *Worcester*, discussed above. See also *The Kansas Indians*, 72 U.S. 737 (1866) at 760, quoting (without elaboration) M'Lean J.'s statement in *Worcester* that the language used in treaties should never be used to the Indians' prejudice, and attributing the statement to Marshall J.

[155] As well as *Choctaw Nation*, below, see *Jones* v. *Meehan*, *supra* note 49 at 10–11. In *Jones*, though, the emphasis was less on wardship than on imbalance of bargaining power.

[156] *Choctaw Nation* v. *United States*, 119 U.S. 1 (1886).

[157] *Ibid.* at 28. *Choctaw* went on to refer to the imbalance of bargaining power.

[158] Federal fiduciary power in relation to Indians: *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294 (1902) at 306; *Tiger* v. *Western Investment Company*, 221 U.S. 286 (1911) at 310–17; *Heckman* v. *United States*, 224 U.S. 413 (1912) at 437; *U.S.* v. *Pelican*, 232 U.S. 442 (1914) at 449–51; *U.S.* v. *Nice*, 241 U.S. 591 (1916) at 597; *Brader* v. *James*, 246 U.S. 88 (1918) at 96; *Sunderland* v. *United States*, 266 U.S. 226 (1924) at 233; *United States* v. *Candelaria*, 271 U.S. 432 (1926) at 439; *U.S.* v. *Ramsey*, 271 U.S. 467 (1926) at 469; *U.S.* v. *Jackson*, 280 U.S. 183 (1930) at 190; and *Board of County Commissioners of Creek County* v. *Seber*, 318 U.S. 705 (1943) at 715(fiduciary power and fiduciary pre-emption).

For federal fiduciary pre-emption of state laws, see: *United States* v. *Rickert*, 188 U.S. 432 (1903) at 437–38; *Jaybird Mining* v. *Weir*, 271 U.S. 609 (1926) at 612–13; and *Board of County Commissioners of Creek County* v. *Seber*, 318 U.S. 705 (1943) at 715 (fiduciary power and pre-emption).

fiduciary aspect of pre-emption went into decline. Courts now base federal Indian power and pre-emption more directly on specific constitutional provisions such as the Commerce Clause, the Treaty Clause, and the Supremacy Clause,[159] and less on the special relationship. They refer to the relationship when speaking of judicial control of federal legislation in regarding Indians, but this form of control is narrowly conceived and rarely invoked.[160]

The modern focus is on the liberal canons of construction and on fiduciary duties that bind the federal executive. The canons of construction are now well established as a distinct consequence of the special fiduciary relationship.[161] They

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[159] *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973) at 171, note 7 (Commerce Clause and Treaty Clause); *United States* v. *Antelope*, 430 U.S. 641 (1971) at note 6 (Commerce Clause); *Antoine* v. *Washington* 420 U.S. 194 (1975) at 201 (Supremacy Clause); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980) at 142 (Commerce Clause and tribal sovereignty — although the latter is dependent on the former, federal statutes and treaties must be interpreted against the "backdrop" of tribal sovereignty); and *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) at 764 (Commerce Clause and "in recognition of" tribal sovereignty). All except *Antelope* are pre-emption cases.

Although the special trust relationship is not normally used now as the source of the pre-emption power, the relationship is sometimes cited as a basis for construing federal laws or treaties liberally. This, in turn, helps ensure that state laws are in fact pre-empted. The usual modern approach to pre-emption appears to be as follows. Federal laws can pre-empt state laws because of specific constitutional provisions (such as the Treaty, Commerce, and Supremacy clauses) that support federal power. However, because of the liberal canons of construction and the tradition of tribal sovereignty, federal statutes and treaties are generally construed as supporting tribal rather than state laws on Indian lands. The liberal canons of construction are generally attributed to the trust relationship.

[160] In *Morton* v. *Mancari*, 417 U.S. 535 (1974) at 554, the Court said an Indian hiring preference in a federal statute did not offend the due process clause because it was "reasonably and directly related to a legitimate, non-racially based goal," that of promoting Indian self-government. It added that "[a]s long as the special treatment can be tied rationally to the fulfilment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed" (at 555). In *United States* v. *Sioux Nation*, 448 U.S. 371 (1980) at 415 (1980), the Court noted that the power of Congress to control and manage Indian affairs is not absolute, and that where Congress took treaty-protected tribal land without providing adequate compensation it was not acting as a guardian and was therefore subject to review under the constitutional due process provision. The Court did not overturn *Lone Wolf*, seemed to be influenced by the fact that Congress had expressly referred this issue to the judiciary, and limited this kind of review to cases involving Congressional taking of treaty-protected lands: *ibid.* at 414. See also *Delaware Tribal Business Commission* v. *Weeks*, 430 U.S. 73 (1977) at 83 and 85. It appears that judicial review of federal legislative power will be restricted mainly to due process challenges, and to provisions that cannot be said to rationally related to a broad notion of federal responsibility. So far, it has not resulted in the invalidation of any federal statute.

[161] See, for example, *Minnesota* v. *Hitchcock*, 185 U.S. 373 (1902) at 396; *United States* v. *Winans*, 198 U.S. 371 (1905) (imbalance of power; no express reference to the special relationship); *Choate* v. *Trappe*, 224 U.S. 665 (1912) at 675: "[d]oubtful expressions are to be resolved in favour of a weak and defenceless people who are wards of the nation, dependent on its protection and good faith";

are aspects of a general presumption that government documents relating especially to Indians should be construed in their favour.[162]

Enforceable fiduciary duties are another possible consequence of the government-Indian fiduciary relationship. A turning point in their development was the 1919 decision in *Lane*.[163] Here the Supreme Court enjoined the Secretary of the Interior from selling Indian lands as if they were public lands. That, said the Court, "would not be an exercise of guardianship, but an act of confiscation."[164] As the century progressed, decisions began to stress the fiduciary's duty of loyalty, and the language of guardianship was joined by the language of trust.

Because of the very different possible applications of the fiduciary relationship, it is necessary to look beyond the relationship to see what consequence is intended. For example, the relationship may be held to produce only a liberal construction canon, rather than a duty. In *Gila River* (1970),[165] the Court of Claims said there must be more than the special relationship to impose on government an enforceable obligation.[166] It said here that language must spell out such a relationship. As will

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Alaska Pacific Fisheries v. *United States*, 248 U.S. 78 (1918); *United States* v. *Payne*, 264 U.S. 446 (1924); *Carpenter* v. *Shaw*, 280 U.S. 363 (1930); *United States* v. *Santa Fe Pacific R.*, 314 U.S. 339 (1941); *Tulee* v. *Washington*, 315 U.S. 681 (1942); *Squire* v. *Capoeman*, 351 U.S. 1 (1956); *Antoine* v. *Washington*, 420 U.S. 194 (1975); *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980); *Oneida County* v. *Oneida Nation of New York*, 470 U.S. 226 (1985); *McNabb* v. *Bowen*, 829 F.2d 787 (9th Cir. 1987); and *Hagen* v. *Utah*, 114 S. Ct. 958 (1994) at 971: "[the] trust relationship is the genesis of the 'eminently sound and vital canon' ... that statutes passed for the benefit of Indians 'are to be liberally construed, doubtful expressions being resolved in favor [*sic*] of the Indians" (Blackmun J. dissenting).

[162] As in Canada, the most general canon requires that Indian treaties and statutes relating to Indians should be construed liberally, with ambiguous provisions interpreted in their favour. As well, some canons relate specifically to treaties. One requires that treaties should be construed as the Indians themselves would have understood them. Another requires that treaties be interpreted in their historical context. See also note 161, *supra*, and Strickland *et al.*, *supra* note 4 at 221–25; W.C. Canby, "The Status of Indian Tribes in American Law Today" (1987) 62 Wash. L. Rev. 1 at 19–21 (discussing the rule of "sympathetic construction"). For the application of the canons in Canada, see notes 34 and 100–107, *supra*.

[163] *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919).

[164] *Ibid.* at 113. See also *United States* v. *Creek Nation*, 295 U.S. 103 (1935) at 110.

[165] *Gila River Pima-Maricopa Indian Community et al.* v. *United States*, 427 F.2d. 1194 (1970), cert. denied 400 U.S. 819 (1970) [hereinafter *Gila River* (1970)].

[166] *Ibid.* at 1198: "[i]t is true that the word "fiduciary" and the expression "guardian-ward relationship" have been used by the courts to describe generally the nature of the relationship existing between the Indians and the Government. However, in the absence of some language in a treaty, agreement, or statute spelling out such a relationship, the courts seem to have meant merely that the relationship between the Indians and Government is "similar to" or "resembles" such a legal relationship and that doubtful language in the treaty or statute under consideration should be interpreted in

be seen below, though, even where the relationship is not made explicit, American courts may be prepared sometimes to presume that the federal executive is subject to enforceable duties.

XVI. Scope of Fiduciary Duties

WHERE A FIDUCIARY DUTY is enforced directly against the federal executive branch, what is its scope? In most cases where the fiduciary duty is legally enforced, the subject matter of the obligation has been Indian tribal property, whether as interests in land or natural resources or as treaty proceeds or tribal property income.[167] In non-property cases, the obligation generally requires a treaty promise[168] or a specific commitment in some other government document.[169] In its 1980 *Navaho Tribe* decision, the Court of Claims held that:

...[w]here the Federal Government takes on, or has control or supervision over, tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless

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favour of the weak and dependent Indians": Durfee J., quoting from *Gila River Pima-Maricopa Indian Community et al.* v. *United States*, 140 F.Supp. 776 (Ct.Cl. 1956) at 780–81 [hereinafter *Gila River* (1956)].

[167] Including not only interests in Indian land, but Indian water and game rights, and tribal money and trust find income. See, e.g., *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919) (land); *United States* v. *Creek Nation* 295 U.S. 103 (1935) (land); *Seminole Nation* v. *United States*, 316 U.S. 286 (1942) (treaty trust funds); *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10 (1944) at 19–20 (land); *Manchester Band of Pomo Indians* v. *United States*, 363 F.Supp. 1238 (N.D. Cal. 1973) (trust funds from Indian land income); *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F.Supp. 252 (D.D.C. 1973) (water interests); *Cheyenne-Arapaho Tribes of Indians* v. *United States*, 512 F.2d 1390 (Ct. Cl. 1975) (trust funds from tribal claims judgments or produced from tribal activities); *Coast Indian Community* v. *United States*, 550 F.2d 639 (Ct. Cl. 1977) (right-of-way); *Jicarilla Apache Tribe* v. *Supron Energy Corp.*, 479 F.Supp. 536 (D.N.M. 1979) (oil and gas leases); *Navaho Tribe of Indians* v. *United States*, 224 Ct.Cl. 171 (1980) at 183 (land); *Mitchell II*, *supra* note 146 at 225 (forestry and timber). Although many of these decisions were made pursuant to the *Indian Claims Commission Act of 1946*, 25 U.S.C. §70 (1978) and other special jurisdictional statutes, the Court of Claims considered that such statutes added little to the "settled doctrine" that the United States, "as regards its dealings *with the property of the Indians*, is a trustee [emphasis added]": *Menominee Tribe* v. *United States*, 101 Ct.Cl. 10 (1944) at 19; re-affirmed in *Navaho Tribe of Indians* v. *United States*, 624 F.2d 981 (1980) at 987.

[168] See *Fort Sill Apache Tribe of Oklahoma* v. *United States*, 477 F.2d. 1360 (Ct.Cl. 1973) at 1366, cert. denied 416 U.S. 993 (1974), where the Court looked for a treaty duty but found none. Often the property and treaty elements will overlap, since tribal property often derives from commitments in treaties or similar agreements. E.g., *Seminole Nation* v. *United States*, 316 U.S. 286 (1942) (treaty trust funds for educational purposes).

[169] E.g, *White* v. *Califano*, 437 F.Supp 543 (D. Ct. S.D. 1977) (a specific statutory obligation — in the court's view — to provide health services). See note 179, *infra*.

Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute or other fundamental document about a trust fund, or a trust, or fiduciary connection.[170]

In *Mitchell II*,[171] the United States Supreme Court held the Secretary of the Interior to an enforceable trust duty not to mismanage Indian forest and timber resources. They held that breach of this duty could result in a claim for monetary compensation. [172] The relevant legislation did not impose specific trust obligations on government, although it did refer to the need to consider the best interests and benefit of the Indians. But even apart from this, the legislation gave government comprehensive control over Indian timber. The Court approved the passage quoted above from *Navaho Tribe*.[173] The government's detailed control over the natural resources of the Indians took this situation beyond the more general trust relationship which obtains between the United States and the Indian people[174] and gave rise to the enforceable duty.

Since most treaty promises involve tribal money or other property, they too, would normally trigger the presumption referred to in *Navaho Tribe*.[175] Conversely,

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[170] *Navaho Tribe of Indians* v. *United States*, *supra* note 167 at 987. *Cf. Gila River* (1970), *supra* note 165, where the Court of Claims had suggested that, as a general rule, there must be treaty or statutory language "spelling out" a fiduciary relationship in order to create fiduciary obligations.

[171] *Mitchell II*, *supra* note 146 at 224–25, decided one year before the Supreme Court of Canada's decision in *Guerin et al.* v. *The Queen et al.*, *supra* note 3.

[172] In *Mitchell I* — *United States* v. *Mitchell*, 445 U.S. 535 (1980) — Quinault Tribe members had argued that by mismanaging their timber resources the federal government had breached a fiduciary duty it owed them under the *General Allotment Act* of 1867. The Supreme Court held that the Act did not impose any federal timber management duties, but did not rule out the possibility of liability under other statutes. In *Mitchell II*, *supra* note 146, the tribe members based their claim on federal timber management acts and regulations pursuant to them, and succeeded.

[173] *Mitchell II*, *ibid.*, approving the statement at note 162, *supra*. After quoting from *Navaho Tribe*, *supra* note 165, the Supreme Court added that "[o]ur constructions of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people."

[174] The Court held that the specific compensable duty was "reinforced" by the more general trust relationship between the federal government and the Indian people: *ibid.* The general relationship may be seen as a form of threshold requirement, to which government control of Indian property must be added to give rise to a compensable duty.

[175] By extension, it is arguable that treaty promises generally should be able to raise the presumption if they involve subject matter sufficiently tangible to form the subject matter of enforceable duties. This proposition has not yet been established. See, however, *Fort Sill Apache Tribe of Oklahoma* v. *United States*, *supra* note 168, where the Court was willing to consider even an implicit non-property, non-money treaty duty, but found none; and *Lincoln et al.* v. *Vigil et al.*, 113 S.Ct. 2024 (1993) at 2033, below, where the Supreme Court appeared to draw a general distinction between "gratuitous appropriations" on one hand and money appropriated to fulfil treaty obligations on the other.

where tribal land and money are not involved, the courts require specific statutory or other evidence of a government duty to the Indians. In *Gila River*, the Court of Claims referred to the passage from *Navaho Tribe*, and added:

> [i]f no tribal money or property is involved, however, and the issue is whether the United States has a general obligation to educate Indians, the existence of a special relationship for that purpose depends upon the proper interpretation of the terms of the authorizing statute, treaty, or Executive order.[176]

In *Fort Sill*, the Court of Claims rejected a claimed fiduciary duty to protect "tribal well-being, cultural advancement, and maintenance of tribal form and structure."[177] It said there could be no special obligation to protect interests such as these in the absence of individual treaty or statutory requirements.[178] The District Court found a fiduciary obligation to provide health services in *White* v. *Califano*.[179] It stressed, though, that it was not basing this obligation on an historical or general trust responsibility, but on a specific statutory recognition of this responsibility.[180] In *McNabb*, the Court of Appeals relied on the statutory provision in *White* to

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[176] *Gila River Pima-Maricopa Indian Community* v. *United States*, 9 Cl.Ct. 660 (1986) at 677 [hereinafter *Gila River* (1986)]. Compare earlier *Gila River* decisions in which the Court of Claims required specific evidence of government intention to create a trust as a prerequisite to any fiduciary duty: *Gila River* (1970), *supra* note 165, quoting *Gila River* (1956), *supra* note 166.

[177] *Fort Sill Apache Tribe of Oklahoma* v. *United States*, *supra* note 168.

[178] *Ibid.* at 1364. Although *Fort Sill* attributed the concern with land to the *Trade and Intercourse Act* of 1834 and the jurisdictional section of the *Indian Claims Commission Act*, decisions such as *Mitchell II*, *supra* note 146, and *Lincoln*, *supra* note 175, suggest that this approach may transcend specific statutes. See also note 167, *supra*.

[179] *Supra* note 169.

[180] *Ibid.* at 557: "when we say that the trust responsibility requires a certain course of action, we do not refer to a relationship that exists only in the abstract but rather to a congressionally recognised duty to provide services for a particular category of human needs." The provisions to which the District Court referred included the following:

(*i*) Section 2(a) of the *Indian Health Care Improvement Act* of 1976 (P.L. 94–437; 25 U.S.C. §1601):

> The Congress finds that
>
> (a) Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique relationship with, and resulting responsibility to, the American Indian people; and

(*ii*) Section 3 of the Act (P.L. 94–437; 25 U.S.C. §1602):

> The Congress hereby declares that it is the policy of this Nation, in fulfilment of its special responsibilities and legal obligations to the American Indian people, to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with all resources necessary to effect that policy.

Quaere whether these provisions will be considered sufficiently specific and explicit to impose fiduciary health duties after *Lincoln et al.* v. *Vigil et al.*, *supra* note 175. See below.

support a fiduciary obligation to provide health services for an indigent Indian child.[181]

Some decisions do not fit easily into this pattern. A prime example is *Morton v. Ruiz*.[182] There, the Supreme Court held that a Bureau of Indian Affairs policy to limit general welfare assistance to Indians on reservations[183] was invalid because it had not been published as required in the Bureau's own policy guidelines.[184] The Court said a denial of assistance pursuant to this "on-reservation" policy was invalid too. It was "inconsistent with the distinctive obligation of trust /incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Ruiz* did seem to impose a fiduciary obligation to provide non-treaty benefits unrelated to tribal property in the absence of an express government commitment. On the other hand, the circumstances of this case were unusual, to say the least.[185]

The Supreme Court had a recent opportunity to clarify the scope of non-property fiduciary obligations in *Lincoln* v. Vigil.[186] The Indian Health Service had decided to discontinue a clinical services program in the southwestern United States for handicapped Indian children. The funds were to be reallocated to a similar nationwide program. The legislation authorised the Indian Health Service to spend

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[181] *McNabb et al.* v. *Bowen et al.*, 829 F.2d. 787 (9th Cir. 1987) at 792–94, relying on *Indian Health Care Improvement Act*, *supra* note 180, and the relevant legislative history. *Cf. Blue Legs* v. *Bureau of Indian Affairs*, 867 F.2d. 1094 (9th Cir. 1987). *Blue Legs* also relied in part on the fiduciary language of the *Indian Health Care Improvement Act*, but leaned on some much broader provisions. Had *Blue Legs* relied on the broader provisions alone, there would be little left of the distinction between tribal property and money on one hand, and other subject matter on the other.

[182] 415 U.S. 199 (1974). See also *Blue Legs*, *supra* note 181.

[183] Mr. Ruiz, an Indian, lived fifteen miles outside his tribe's reservation. When Mr. Ruiz's union went on strike, the state of Arizona denied him welfare assistance. Arizona had a policy of refusing assistance to striking workers, so Mr. Ruiz turned to the federal government for help. When seeking appropriations from Congress, the Bureau had said that Indians living near reservations were within their service boundaries. In practice, though, they adopted an unpublished "on-reservation" requirement for general welfare assistance. The Court suggested that the representations to Congress raised "legitimate expectations" on the part of claimants.

[184] It was also argued that this was contrary to the procedural requirements of the *Administrative Procedures Act*.

[185] For example, it is arguable that there *had* been an express government commitment in this case. When it was applying for Congressional appropriations, the Bureau had said it *would* provide off-reservation assistance. If, however, this did not constitute a commitment, then the invalidation of the Bureau's policy guideline did not result from a breach of a fiduciary duty, but from the result of a judicial application of the liberal canons of construction. The court inferred a requirement that the Bureau's policy comply with the publication procedures in its policy guidelines. Since this requirement was not met, both the policy and the assistance denial based on this policy were invalid.

[186] *Lincoln et al.* v. *Vigil et al.*, *supra* note 175.

such moneys "as Congress may from time to time appropriate for the benefit, care and assistance of the Indians," for the "relief of distress and conservation of health."[187] Congress had allocated the funds in a lump-sum appropriation. The original program beneficiaries argued that the decision to discontinue the program violated the federal trust responsibility to Indians. The Court of Appeals agreed, and said the termination was invalid.[188]

The Supreme Court reversed the Court of Appeals decision. It said that no fiduciary obligation had been violated because the Health Service had not withdrawn the funds absolutely but had simply reallocated them among other Indian people. Taking this approach, the Court side-stepped the need to determine if there *were* any fiduciary duty here. However, it did leave some hints as to its own thoughts on this issue. It pointed out that the Court of Appeals had found a trust relationship "[a]lthough the court concededly could identify no statute or regulation even mentioning the Program."[189] Evidently it regarded the presence or absence of an express legislative commitment as significant. After affirming that a special relationship exists between the federal government and the Indian people, the Court continued:

> [w]e have often spoken of this relationship, see, e.g., *Cherokee Nation* v. *Georgia* [citation omitted] (Indians' "relation to the United States resembles that of a ward to his guardian"), and the law is "well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity." *United States* v. *Cherokee Nation of Oklahoma*, [citation omitted]; see also *Quick Bear v. Leupp* [citation omitted] (distinguishing between money appropriated *to fulfil treaty obligations*, to which trust relationship attaches, and "gratuitous appropriations").[190]

In these brief comments lies the germ of a possible general policy on fiduciary duties. The Court appears to be distinguishing between tribal property and treaty obligations on one hand, and other government actions (such as "gratuitous appropriations") on the other. Where the federal government has undertaken to supervise or control Indian property or has made treaty commitments to Indians, it may be that the Court will presume the existence of a fiduciary duty, even in the absence of express language imposing an obligations. In other situations, fiduciary duties would require express language imposing specific statutory obligations in a trust-like context. The Court would be building on cases like *Quick Bear*, *Navaho Tribe*, and

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[187] *Snyder Act*, 25 U.S.C. §1601, s. 13.

[188] *Vigil et al.* v. *Rhoades et al.*, 953 F.2d. 1225 (10th Cir. 1992).

[189] *Supra* note 186 at 2030.

[190] *Ibid.* at 2032–33 (emphasis added).

Mitchell II. If this is the approach envisaged, or if some alternative framework is in mind, more discussion from the highest American court would be helpful.[191]

XVII. SUMMARY OF THE AMERICAN SITUATION

IN AMERICAN INDIAN LAW, the fiduciary notion is a multi-purpose tool. In its long history, it has supported fiduciary-based pre-emption, fiduciary-based power, fiduciary duties, fiduciary-based canons of interpretation, or a combination of these applications. The price of this versatility has been inconsistency and conceptual incoherence. Only recently have courts made serious efforts to rationalise the basis of fiduciary duties, and to distinguish situations which attract them from those which attract a more generalised favourable presumption of interpretation.

Fiduciary duties are generally seen as trust-like. They are an application of the special fiduciary relationship that are based on the twin principles of property and promises. They are owed by the federal executive to Indians in regard to government commitments with regard to Indian tribal lands or other property,[192] or as a result of government commitments to Indians in treaties, agreements, or legislation.[193] Where Indian property and perhaps treaty promises are involved, government commitments need not be express.[194] Beyond these duties (and sometimes confused with them), lie a looser application of the special fiduciary relationship. These are the liberal construction canons, a set of general interpretative

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[191] Even *Ruiz*, *supra* note 182 was treated rather cryptically in *Lincoln*. The Court stressed that it was the Bureau's failure to abide by its own procedures that had invalidated its eligibility rule in *Ruiz*, and seemed to hint that *Ruiz* should be limited to its own facts. *Ruiz* did indeed have some unusual aspects, but more explanation would have been useful here too.

[192] "Other property" is broadly defined to include interests in natural resources and interests derived from lands, such as tribal trust funds and other tribal money.

[193] In a sense, a government commitment is necessary to support all trust obligations, but this can be implied where Indian property is involved. Where Indian property is not involved, the commitment must normally be found in specific government undertakings. Johnston, *supra* note 1 at 322, suggested that in *Cramer* v. *United States*, 261 U.S. 219 (1937), "the land was not protected by either treaty or statute." However, although the Indians' right of possession in that case was not expressly conferred by treaty or statute, it was protected by an exception to a government patent. In Chambers, *supra* note 119 at 1234, the District Court's *Pyramid Lake* decision was cited as evidence that the federal government can be subject to a trust obligation independently of specific individual legal instruments. See also Donohue, *supra* note 122 at 378. However, in *Pyramid Lake*, Gesell J. said that the Secretary of the Interior's own regulations recognised his trust obligations: *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 354 F.Supp. 252 (Ct. Cl. 1972) at 256, note 4.

[194] This proposition is well established in regard to Indian land, which is broadly defined in this context. It is only implicit in regard to treaty promises.

presumptions in favour of Indians. They apply to all treaties and statutes dealing especially with Indians, but fall short of imposing enforceable obligations.

Until the United States Supreme Court makes a definitive statement of principle in this area, no summary can be more than tentative. Yet much of the case law takes the direction outlined here, and a similar approach has been suggested in the Court of Claims. This could be consolidated now by a clear statement from the top.

XVIII. Application to Canada

As Canadian courts start to apply special fiduciary principles in this country, they may find it useful to consider their history in the United States. The American experience suggests that the special fiduciary relationship should be handled with care. Versatile and potent, it is an equitable jellyfish that can spawn many different applications with minimal overall coherence. Canadian courts should strive for conceptual clarity from the beginning, to avoid a difficult reconstruction task later. Had there been more consensus as to what Chief Justice Marshall meant in the 19th century, the American situation would have been far less complex in the later years. Legal complexity helps no-one — not Aboriginal peoples, not government, and not the public at large. But American courts are starting to reconstruct, and they may be close to developing a general principle for applying fiduciary duties.

For its part, the Canadian experience shows that it is possible to apply the liberal canons of construction in favour of Aboriginal peoples without relying on the government-Aboriginal fiduciary relationship. Although the Supreme Court departed from this tradition in regard to section 35 of the *Constitution Act, 1982*, the canons manage elsewhere without fiduciary support.

Overall, despite the different contexts and traditions of the two countries, recent American developments contain parallels with the general thrust of Canadian case law. In both countries, courts have the opportunity to develop a coherent approach to applying the special relationship.

XIX. A Suggested Approach

If it is not prescribed or excluded by explicit statutory language, where should the special fiduciary relationship apply? This question cannot be addressed on an *ad hoc* basis. Too many interests, Aboriginal and other, depend on it. Courts must develop general presumptions and principles of intended meaning. Indeed, they have already started to do this in both the United States and Canada. The challenge now is to simplify, to clarify some of the main trends in both countries, and to

consider their rationales. Although the suggestions here focus mainly on Canadian law, they should have some general application to the American situation too.[195]

First, courts could simplify the law in both countries by freeing the liberal canons of construction from the special fiduciary relationship. They should be able to apply the canons to all government documents affecting Aboriginal peoples in particular, without worrying about whether fiduciary elements are present.[196]

The rationale behind the liberal canons goes beyond fiduciary commitments, Aboriginal property safeguards, and treaty promises. Their general purpose is to help counteract an imbalance[197] that was created when foreigners took over most of North America from the Aboriginal peoples, with consequences that haunt us all today.[198]

Freeing the liberal canons of construction would not require a massive adjustment in Canada. The canons already apply independently in all situations outside section 35 of the *Constitution Act, 1982*. For that provision, the Supreme Court attached a fiduciary label to what is really a liberal interpretation of a constitutional guarantee. The label was not strictly necessary, confuses the section 35 obligation with *Guerin*-type fiduciary duties, and could be easily de-emphasised. More change would be needed in the United States, where there is a general tendency to attribute the canons to the special fiduciary relationship. But American courts have been de-emphasising the fiduciary element in federal jurisdiction and pre-emption: perhaps they could free the liberal canons as well.

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[195] The suggestions here could not be applied in the same way in both countries. Courts would have to accommodate the significant differences of context referred to in section 13. For example, the wider "protection" commitments in many American treaties, and the American political tradition of acknowledging tribal sovereignty, could generate broader fiduciary duties than in Canada. On the other hand, there is no close American counterpart to section 35 of the *Constitution Act, 1982*. As well, the existing case law in each country would affect the suggestions differently. For example, it would be easier to "de-link" the liberal canons of construction from the special fiduciary relationship in Canada than in the United States: see below.

[196] This proposal would leave courts free to impose fiduciary duties after having construed a document liberally — if the requirements for fiduciary duties were also met. An alternative to this proposal would be to ground all applications of the canons on the special relationship, as in the United States. However, it would then be necessary to limit the application of the canons to the subject matter of the special relationship: Aboriginal lands and related interests, and promises in treaties and similar documents.

[197] *Supra* notes 92 and 141. *Cf.* C.R. Sunstein, "Interpreting Statutes in the Regulatory State" (1989) 103 Harv. L. Rev. 405 at 460, describing the liberal canons of construction as "responding to obvious disparities in bargaining power and inequitable treatment of Native Americans in the past."

[198] Land was taken, illnesses were spread, traditions were disturbed, treaties were imposed when Aboriginal bargaining power was minimal, and, some might say, little was given in return. For an impassioned account of the impact of the takeover in North and South America, see R. Wright, *Stolen Continents: The "New World" Through Indian Eyes* (Toronto: Penguin, 1992).

Second, courts should clarify that in the absence of express language, the special fiduciary relationship and its fiduciary duties are limited to Aboriginal land and related interests, and to promises in treaties and similar agreements.[199] This seems to be the direction of the law in both countries.[200] What is needed now is to articulate this approach and the rationales that support it.

There is historical support for this approach. The special fiduciary relationship is based on an historical commitment made by government to Aboriginal peoples. Arguably, the essence of this commitment was to act on behalf of Aboriginal people in regard to their lands, and to honour promises made to them in their treaties.

Protection of Indian interests in Aboriginal land was central[201] in the two foundation documents of Canadian and American Aboriginal law, respectively,[202] the *Royal Proclamation of 1763*[203] and the American *Trade and Intercourse Acts*.[204]

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[199] In later parts of this section, unless the context suggests otherwise, references to "Aboriginal land" will include interests related to or derived from Aboriginal land, and references to "treaties" will include land claims agreements and agreements or other documents similar to treaties.

[200] Although it is harder to generalise for treaties and similar agreements than for land and related interests. In Canadian law especially, specific enforceable fiduciary duties in relation to treaty promises are a future possibility rather than a present reality: see section IX, above.

[201] An important and related sub-theme was regulation of Indian and non-Indian trade: see notes 202 and 203, *infra*.

[202] *The Royal Proclamation of 1763* was referred to in early cases on American Indian law (e.g., *Johnson et al.* v. *M'Intosh*, 21 U.S. 543 (1823) at 594 and *Mitchel* v. *U.S.*, 34 U.S. 711 (1835) at 746–49) but is not often cited in modern American cases.

[203] D.W. Elliott, ed., *Law and Aboriginal Peoples of Canada*, 2d ed. (Carleton University Press: Ottawa, 1994) at 29 (endnotes incorporated): "[a]ccording to the Supreme Court of Canada, the objectives of the Proclamation were ... to provide a solution to the problems created by the greed which hitherto some of the English had all to often demonstrated in buying up Indian land at low prices. The situation was causing dangerous trouble among the Indians and the Royal Proclamation was meant to remedy this ...": *R.* v. *Sioui*, supra note 49 at 457.

The Proclamation set aside a huge tract of land in North America, and reserved it to the Indian people "as their Hunting Grounds" (paras. 1 and 2). It prohibited grants or purchases of this land (paras. 1, 3 and 5) or settlement on it (para. 3) without a licence, and required that all non-Indians without a licence must leave (para. 4). It imposed similar restrictions on Indian reserve lands within British colonies or proprietary governments (paras. 1,3,4, and 5). These lands could be purchased only by the Crown after a public meeting or by a proprietary government acting on instructions of the Crown (para. 5). In Indian territory outside the colonies, government and military officers were required to apprehend fugitives from justice (para. 6). A general provision required a licence for all trade with the Indians (para. 7). Nearly all these provisions are directed at protecting the Indians' possession or use of the lands reserved to them." See also B. Slattery, *The Land Rights of Indigenous Canadian Peoples as Affected by the Crown's Acquisition of their Territories* (Saskatoon: University of Saskatchewan Native Law Centre, 1979); J. Stagg, *Anglo-American Relations in North America to 1763 and An Analysis of The Royal Proclamation of 7 October, 1763* (Ottawa: Research Branch, Department of Indian Affairs and Northern Development, 1981) at 355–73; and O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Norman: University of

Moreover, after the earlier peace treaties and a period of land cessions for annuities and cash, the question of reserved Indian land and continuing Indian land use rights became an important element of treaties in both countries.[205] The foundation documents might also support wider concerns, such as Aboriginal[206] or tribal self-government.[207] Any such concerns might well benefit from guarantees related to land. But the main focus of the express guarantees in the *Proclamation* and the *Trade and Intercourse Acts* was surely Aboriginal land, and interests related to it.

Oklahoma Press, 1992) at 187–88.

[204] See, for example, *Trade and Intercourse* Act, U.S. Statutes at Large, 2:139–46 (30 March 1802, replacing the temporary Acts of the same name of 1790, 1796, and 1799), and the *Trade and Intercourse Act*, U.S. Statutes at Large, 4:729–35 (30 June 1834, replacing the 1802 Act). They are reproduced in Prucha, *supra* note 121 at 17–21 and 64–68, respectively. See also F.P. Prucha, *American Indian Policy in the Formative Years: Indian Trade and the Intercourse Acts, 1790–1834* (Cambridge: Harvard University Press, 1962).

[205] For Canada, see *Native Rights in Canada*, 2d ed. (Toronto: Indian-Eskimo Assn. of Canada, 1972) Part IV; G. Brown & R. Maguire, *Indian Treaties in Perspective* (Ottawa: Department of Indian Affairs and Northern Development, 1979); A.J. Hall, "Indian Treaties" in *The Canadian Encyclopedia*, *supra* note 4 at 1056–59; B.W. Morse, ed., *Aboriginal Peoples and the Law* (Ottawa: Carleton University Press, 1985), chs. 4 and 5; Dickason, *supra* note 203 at 188–91; and J.S. Frideres, ed., *Native Peoples in Canada*, 4th ed. (Scarborough, Prentice-Hall, 1993) at ch. 3.

For the United States, see F. Prucha, *American Indian Policy in the Formative Years* (Lincoln: University of Nebraska Press, 1970); Strickland *et al.*, *supra* note 4 at 62–107; and R.M. Kvasnicka, "United States Indian Treaties and Agreements" in W.C. Sturtevant, ed., *Handbook of North American Indians* (Washington, D.C.: Smithsonian Institution, 1988) vol. 4, 195; and F.P. Prucha, *American Indian Treaties: The History of a Political Anomaly* (Berkely: University of California Press, 1994) at 136 (1812 to the 1830s), 235 (the 1840s and 1850s), and 262–63 (the 1860s). Although formal treaty making ended in the United States in 1871, "the federal government continued to deal with Indian tribes after 1871 by agreements, statutes, and executive orders that had legal ramifications similar to treaties": Strickland *et al.* (above) at 107.

[206] As suggested at note 67, *supra*, Aboriginal interests in land can themselves afford a significant degree internal self-control. Lafontaine claims that the Proclamation goes well beyond this. He says that "recognition of political rights, such as the right to self-government, is just as evident in the Proclamation as the protection of territorial rights": *supra* note 1 at 10. However, most of Lafontaine's examples of "self-government" — such as power to decide whether or not to surrender land, what land to surrender, and the time and manner of surrender, and the right to the free use of one's land — can be simply explained as incidents of an interest in land. The Proclamation's reference to "the several Nations or Tribes with whom we are connected" and its requirement of surrenders to the British government might or might not acknowledge Aboriginal self-government in a general or political sense. What the latter provision does suggest unequivocally is an intent to control and protect the sale of Indian land: see note 203, *supra*. On the current Canadian judicial position on Aboriginal self-government, see note 66, *supra*.

[207] Strickland, *supra* note 4 at 238. The *Trade and Intercourse Acts* referred to "any nation or tribe of Indians within the United States": *ibid.*, referring to the 1790 Act. Their main thrust, though, was protection of the Indian's use and sale of their lands, with special emphasis on regulating trade with the Indians: see note 204, *supra*.

Beyond the foundation documents, in both Canada and the United States the main source of ongoing government commitments were Indian treaties and equivalent agreements.[208] Implicit in the *Royal Proclamation* and the *Trade and Intercourse Acts*, and underlying the entire treaty-making process, is the undertaking that treaty promises will be kept.[209]

There are also practical reasons for associating special fiduciary duties with Aboriginal land and treaty promises. The reasons relate to the nature of fiduciary duties, to the complex situation of a government fiduciary, and to the capacities of courts themselves.

Fiduciary duties can be strong medicine. As the Supreme Court of Canada has said, a fiduciary duty can have "draconian consequences."[210] It can be enforced by a broad range of remedies, including damages awards or positive injunctive relief. It can have far-reaching effects when applied to the wide sphere of government responsibility. The stronger the sanction, the stronger the argument for care in using it. Moreover, fiduciary duties are normally unidirectional. Typically, they require loyalty to a single beneficiary or group of beneficiaries.[211] Governments, on the other hand, are normally accountable to the public as a whole, and are expected to serve

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[208] *Supra* note 205.

[209] "Great nations, like great men, should keep their word": Black J., dissenting, in *F.P.C.* v. *Tuscarora Indian Nation*, quoted by Blackmun J., dissenting, in *Hagen* v. *Utah*, *supra* note 161 at 971. See also Chambers, *supra* note 119 at 1219, suggesting that the treaties were a key source of the guardianship concept in *Cherokee* and *Worcester* (although there may have been other sources as well: see note 135, *supra*); and R.S. Kronowitz *et al.*, "Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations" [1987] 22 Harv. C.R.—C.L.L. Rev. 509 at 547–56, stressing the importance of the treaties. *Cf.* Canadian references to the "honour of the Crown": see notes 34 and 94, *supra*.

[210] *Hodgkinson* v. *Simms et al.*, supra note 8 at 467, where Sopinka and McLachlin JJ. said courts and writers have been "concerned for the need for clarity and aware of the draconian consequences of a fiduciary obligation." See also Sopinka J. in *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*, *supra* note 7 at 595: "[t]he consequences attendant on a finding of a fiduciary relationship and its breach have resulted in a judicial reluctance to do so except where the application of this blunt tool is really necessary." At 596, he added, "... equity's blunt tool must be reserved for situations that are truly in need of the special protection that equity affords." See also Sopinka J. in *Norberg* v. *Wynrib*, *supra* note 9. Sopinka J.'s second comment above was also approved in *Norberg* by McLachlin J. at 289, although McLachlin J. felt there truly *was* need for a fiduciary duty.

[211] *Supra* note 11. For general American standards, see *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport Inc.*, 472 U.S. 559 (1985) at 570; *Restatement (Third) of Trusts*, P.I.R., s. 170 (1990 Main Vol.), "Duty of Loyalty." See also *Seminole Nation* v. *United States*, 316 U.S. 286 (1942) at 297 and *U.S.* v. *Mason*, 412 U.S. 391 (1973) at 398, holding that where government is trustee for the Indian people, it is subject to the standards of a private trustee.

multiple interests. Although it may be justifiable sometimes to restrict government's wider responsibilities, this should be done with caution.[212]

The need for restraint would be compounded if the subject matter of fiduciary duties were government's own assets. State assets are the property of all citizens. They should be managed without favouring any one group over the others. It is hardly surprising that there is a political trust doctrine in Canada and a "gratuitous appropriations" exclusion in the United States.

Where courts impose mandatory duties on government, their task is easier where these duties are tangible and specific. It is far more difficult where the subject matter of the duties involves multi-party negotiation, policy planning, or interest balancing. Courts have adjudicatory functions, evidentiary constraints, are unaccountable and have limited capacity to fashion many-sided compromises. The further the issues from the concrete fields of Aboriginal property or specific treaty commitments, the greater the need for judicial caution.

For similar reasons, courts should make it clear that the special fiduciary relationship is too broad and general to generate enforceable fiduciary duties by itself. To trigger these duties, there must be specific government powers to act on behalf of Aboriginal people in regard to their lands or treaty interests. Where these

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[212] Even where the scope of special fiduciary duties is limited to Aboriginal land and treaties, as suggested here, courts may consider it necessary to modify the application of the fiduciary duty to accommodate the special responsibilities of government. In the United States, see *Nevada* v. *United States*, 463 U.S. 110 (1983) at 141–42, where, in an adjudicatory context involving competing water rights interests, the government's fiduciary duty may be discharged by procedural fairness. Compare *Nevada* with *Seminole Nation* and *Mason*, *ibid.* See also R. Cooter & B.J. Freedman, "The Fiduciary Relationship: Its Economic Character and Legal Consequences" (1991) 66 N.Y.U.L. Rev. 1045 at 1047, distinguishing between "misappropriation" and "negligent mismanagement," and suggesting that while the former is governed by a duty of loyalty, the latter requires a duty of care. By these criteria, many government responsibilities would be subject to only to the lower standard. In Canada, see: *Kruger* v. *The Queen*, [1985] 3 C.N.L.R. 15 (F.C.A.) at 43 (Urie J.) and 54–56 (Stone J.), where it was held that the Indians' interest must be weighed against the public interests in air transport and avoiding improvident expenditures of public funds, and that the Crown must act "honestly, prudently, and for the benefit of the Indians" (at 41); and *Grand Council of the Crees et al.* v. *A.G. (Canada) et al.*, *supra note* 11 at 148–49, where it was held that fiduciary duties do not apply to independent quasi-judicial tribunals, and in other adjudicatory contexts fiduciary duties may be discharged by procedural fairness (see note 110, *supra*). In *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)*, *supra* note 8, the Court curiously imposed on the Crown the absolute requirement to act in the band's "best interests," notwithstanding that it appeared to be satisfied with "reasonable diligence" at other points in the judgment: see note 11, *supra*. Where the Department of Indian Affairs had transferred surface rights in surrendered lands to another government department, McLachlin J. did not require Indian Affairs to obtain the highest appraised price; it was sufficient that the sale price fell "within a range established by the appraisals": *ibid.* at 66.

The wider the potential scope of special fiduciary duties, the more courts feel compelled to modify or lower special fiduciary standards. A narrower scope, combined with general access to the liberal canons and to safeguards such as the rules of natural justice, would seem a simpler route.

powers or promises do exist, there will be a presumption in favour of enforceable fiduciary obligations. I believe this to be the general direction of the case law in both Canada and the United States; the need now is to make it clear.

Finally, it should clarified that in the absence of explicit language, both the liberal canons of construction and enforceable fiduciary duties are judicial presumptions. They should be rebuttable,[213] and should focus on fleshing out ambiguity rather than manufacturing entire new structures of law.

Under this approach, courts would start with the liberal canons of construction. To impose enforceable fiduciary duties as well, something more would be required. The special relationship would provide a start, but there must also be specific government powers on behalf of Aboriginal peoples, in relation to Aboriginal lands or treaty promises. In these situations, there would be a presumption in favour of enforceable fiduciary duties.

This approach would not prevent courts from enforcing fiduciary obligations in regard to Aboriginal social services or self-government.[214] However, they would have to be contained in treaties or similar agreements or in specific legislative commitments. The approach would not prevent new transfers of control of the administration of Aboriginal social services to Aboriginal people.[215] It would let

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[213] For example, by explicit wording in a treaty, or by evidence that rights other than subsection 35(1) Aboriginal or treaty rights are involved. Subsection 35(1) rights would be subject, as now, to justified infringement, but on the simple basis that very strong evidence would be required to displace the presumption in their favour.

[214] That is, self-government in the more stringent sense referred to in note 67, *supra*. A large measure of land-based consensual self-regulation is already available by virtue of Aboriginal title: *ibid.*

[215] For some of these initiatives in Canada, see the *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27 and other measures described in Cassidy & Bish, *supra* note 77; the governmental and justice system described in E.J. Dickson-Gilmore, "Resurrecting the Peace: Traditionalist Approaches to Separate Justice in the Kahnawake Mohawk Nation" in R.A. Silverman & M.O. Nielsen, eds., *Aboriginal Peoples and Canadian Criminal Justice* (Toronto: Butterworths, 1992), ch. 20. See also the governmental participation and self-government provisions of the modern land claims agreements: *James Bay and Northern Quebec Agreement* (11 November 1975); *Northeastern Quebec Agreement* between the Naskapi Band of Schefferville and the signatories to the *James Bay and Northern Quebec Agreement* (31 January 1978; *Inuvialuit Final Agreement* on the Western Arctic Claim (5 June 1984); *Comprehensive Land Claim Agreement between Her Majesty in Right of Canada and the Gwich'in as represented by the Gwich'in Tribal Council* (22 April 1992); *Final Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty in Right of Canada* (16 December 1991, political accord signed 30 October 1992, post-accord agreement signed 25 May 1993); four Yukon First Nation Agreements, signed 29 May 1993, each with accompanying First Nation Self-Government Agreements: the *Vuntut Gwitchin First Nation Final Agreement*; the *Na'cho N'y'ak Dun First Nation Final Agreement*; the *Teslin Tlingit First Nation Final Agreement*; and the *Champagne and Aishihik First Nations Final Agreement*; and, in the Northwest Territories, the *Sahtu Dene and Métis Agreement*, signed 6 September 1993.

For recent American initiatives, see D.H. Getches, " 'Negotiated Sovereignty': Intergovern-

courts supply a clear core of fiduciary protection without taking the focus from more direct or democratic forms of action. In both Canada and the United States, few issues have a higher claim than ensuring better social and economic conditions and greater governmental control for Aboriginal peoples.[216] But these issues cannot be resolved from above by judicial fiat, fiduciary or otherwise. They require consultation, Aboriginal participation, negotiation, and consent. They require the broader resources, power, and potential of the democratic process. For these critical needs, we need budgets, ballot boxes, and political action more than equitable doctrines and writs.

The approach suggested here would help draw a balance between the role of courts and government, between government's public interests and its private obligations, between enforceable duties and favourable presumptions, and between equitable flexibility and conceptual coherence. Would this be asking too much?

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mental Agreements with American Indian Tribes as Models for Expanding First Nations' Self-Government" (1993) 1 Rev. Const. Studies 120.

[216] For economic, social and related conditions of Aboriginal peoples in Canada, see J. Silman, ed., *Enough is Enough: Aboriginal Women Speak Out* (Toronto: The Women's Press, 1987); A. Blue, "Native People, Social Conditions" in *The Canadian Encyclopedia, supra* note 4, 1459; H. McCue, "Native People, Education" in *The Canadian Encyclopedia* (above), 1450; J.A. Price, "Native People, Economic Conditions" in *The Canadian Encyclopedia* (above), 1449; O. Schaefer, "Native People, Health" in *The Canadian Encyclopedia* (above), 1452; G. York, *The Dispossessed: Life and Death in Native Canada* (Toronto: Lester, 1989); P. Comeau & A. Santin, *The First Canadians: A Profile of Canada's Native People Today* (Toronto: James Lorimer, 1990); R. Hunter & R. Calihoo, *Occupied Canada: A Young White Man Discovers His Unsuspected Past* (Toronto: McClelland & Stewart, 1991); L. Krotz, *Indian Country: Inside Another Canada* (Toronto: McClelland & Stewart, 1992); M. Boldt, *Surviving as Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993); J.S. Frideres, *Native Peoples in Canada: Contemporary Conflicts*, 4th ed., (Scarborough: Prentice Hall, 1993); and D. Smith, *The Seventh Fire: The Struggle for Aboriginal Government* (Toronto: Key Porter Books, 1993).

For American conditions, see V. Deloria, Jr., ed., *American Indian Policy in the Twentieth Century* (Norman: University of Oklahoma Press, 1985); The Harvard Project on American Indian Development, *Economic Welfare in Indian Country 1868–1968* (Cambridge: Harvard University Press, 1989); R. Strickland, "Indian Law and the Miner's Canary: The Signs of Poison Gas" (1991) 39 Clev. St. L. Rev. 483; J.P. Kant & S. Cornell, "The Redefinition of Property Rights in American Indian Reservations: A Comparative Analysis of Native American Economic Development" in L.H. Legters & F.J. Lyden, eds., *American Indian Policy: Self-Governance and Economic Development* (Westport, Conn.: Greenwood Press, 1994) 121; and tables in M.H. Reddy, ed., *Statistical Record of Native North Americans* (Detroit: Gale Research International, 1993).