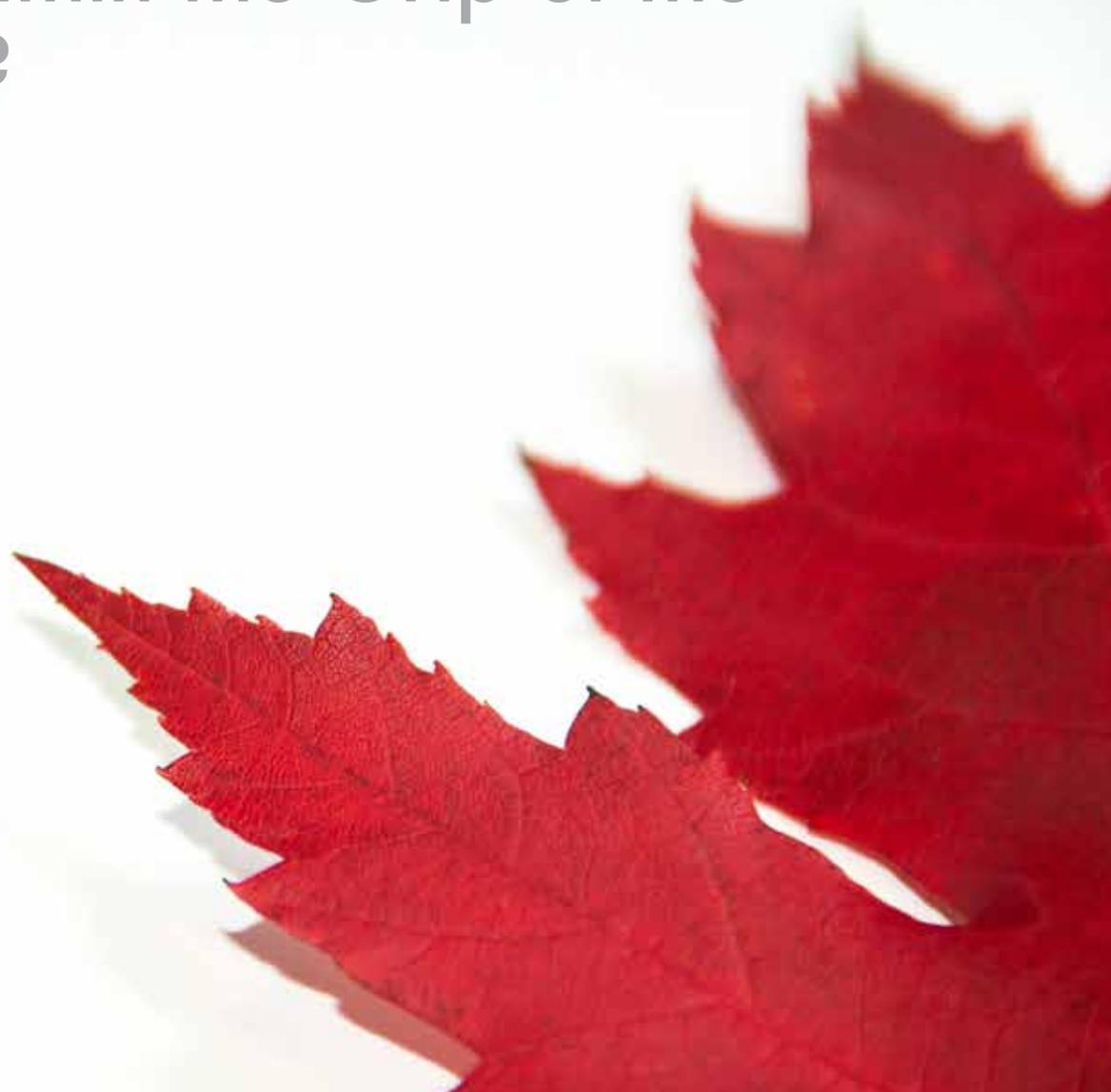


Canada in International Law at 150 and Beyond | Paper No. 6 – January 2018

# The Crown Fiduciary Duty at the Supreme Court of Canada Reaching across Nations, or Held within the Grip of the Crown?

Ryan Beaton





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## About the Series

Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's past, present and future in international law and governance. "Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" is a series of essays, written in the official language chosen by the authors, that provides a critical perspective on Canada's past and present in international law, surveys the challenges that lie before us and offers renewed focus for Canada's pursuit of global justice and the rule of law.

Topics explored in this series include the history and practice of international law (including sources of international law, Indigenous treaties, international treaty diplomacy, subnational treaty making, domestic reception of international law and Parliament's role in international law), as well as Canada's role in international law, governance and innovation in the broad fields of international economic, environmental and intellectual property law. Topics with an economic law focus include international trade, dispute settlement, international taxation and private international law. Environmental law topics include the international climate change regime and international treaties on chemicals and waste, transboundary water governance and the law of the sea. Intellectual property law topics explore the development of international IP protection and the integration of IP law into the body of international trade law. Finally, the series presents Canadian perspectives on developments in international human rights and humanitarian law, including judicial implementation of these obligations, international labour law, business and human rights, international criminal law, war crimes, and international legal issues related to child soldiers. This series allows a reflection on Canada's role in the community of nations and its potential to advance the progressive development of global rule of law.

"Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" demonstrates the pivotal role that Canada has played in the development of international law and signals the essential contributions it is poised to make in the future. The project leaders are Oonagh Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); Valerie Hughes, CIGI senior fellow, adjunct assistant professor of law at Queen's University and former director at the World Trade Organization; and Mark Jewett, CIGI senior fellow, counsel to the law firm Bennett Jones, and former general counsel and corporate secretary of the Bank of Canada. The series will be published as a book entitled *Reflections on Canada's Past, Present and Future in International Law/Réflexions sur le passé, le présent et l'avenir du Canada en matière de droit international* in spring 2018.

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## About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

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## About the Author

**Ryan Beaton** is a legal scholar whose primary interests include constitutional law, Aboriginal law, Indigenous land rights and legal philosophy. His research focuses on the challenge posed by the evolving conception of Aboriginal title to traditional notions of state sovereignty.

Ryan is currently pursuing his Ph.D. in law at the University of Victoria, as a 2017 scholar of the Pierre Elliott Trudeau Foundation. He is also conducting historical and legal research as part of a team preparing an Aboriginal title claim. In 2014–2015, he was a law clerk for Chief Justice Beverley McLachlin at the Supreme Court of Canada. The year prior to that he was a law clerk at the Court of Appeal for Ontario. In 2013, Ryan received his J.D. from Harvard Law School.

In 2011, Ryan completed a Ph.D. in philosophy at the University of Toronto. His dissertation examines the secularization of German moral philosophy in the works of Kant, Schopenhauer and Nietzsche. He also holds an M.Sc. in mathematics, having completed a master's thesis on the set-theoretic interpretation of Fregean arithmetic.



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## Introduction

Beginning with *Guerin v R*<sup>1</sup> in 1984, the Supreme Court of Canada has imposed a fiduciary duty on the Crown in its dealings with Aboriginal land.<sup>2</sup> The doctrine of a Crown fiduciary duty came to anchor the constitutional framework developed by the courts for reconciling “the pre-existence of aboriginal societies with the sovereignty of the Crown.”<sup>3</sup> There is ambiguity and tension running through this judicial doctrine, revolving around the question: Is the goal reconciliation *across* legal systems and the distinct societies in which they are grounded, or *within* a constitutional system grounded fundamentally in the Crown’s assertion of sovereignty? The case law developed over the past three decades does not provide a clear or consistent answer. This paper aims to provide an overview of the current state of the law and the tension running through it between contrasting political visions: on the one hand, a nation-with-nation (or “transnational”) vision of reconciliation and, on the other, a vision of reconciliation achieved under the umbrella of Crown sovereignty.

As a preliminary statement, one might say that the nation-with-nation vision is currently ascendant at the level of political and judicial rhetoric, while the vision of unilateral Crown sovereignty continues to govern in practice. That is, the Crown fiduciary obligation is often presented as a legal principle that governs the conduct of the Crown in “nation-to-nation, government-to-government, and Inuit-Crown”<sup>4</sup> relationships with Canada’s First Nations; yet the application of this principle in actual cases is, for the most part, comprehensible only on the

assumption of a sovereign-to-subjects relationship of the Crown to Canada’s Indigenous peoples.

The specific aims of this paper are: to provide essential historical and case law background on the Crown fiduciary duty; to tease apart the elements of the Crown fiduciary duty that can be traced to a transnational<sup>5</sup> or nation-with-nation vision of Indigenous–Crown relationships from those elements that belong to a subjects-to-sovereign vision, and to show how these distinct visions inform the legal battle lines in current court cases; and to suggest one way in which the judicial doctrine of the Crown fiduciary duty might bring the application of that principle more in line with the nation-with-nation aspirations now voiced by courts and governments alike.

Finally, it is worth noting that the Crown fiduciary duty has recently gone transnational in a different sense: in *Proprietors of Wakatu v AG*,<sup>6</sup> in reasons released in February 2017, a majority of the New Zealand Supreme Court adopted and adapted the Crown fiduciary duty elaborated by the Supreme Court of Canada to the context of Indigenous–Crown relations in New Zealand, and in particular Crown dealings impacting Indigenous territories. The reasons of the majority in *Wakatu* provide a helpful point of comparison and contrast with the Supreme Court of Canada’s jurisprudence on the Crown fiduciary duty.

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## *Guerin* at the Supreme Court of Canada: Crown Fiduciary Duty and the Royal Proclamation of 1763

This section gives a brief historical overview of the Crown fiduciary duty in the Supreme Court of Canada’s case law. For the purposes of this paper,

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1 [1984] 2 SCR 335, 13 DLR (4th) 321 [*Guerin* cited to SCR].

2 The terms “Aboriginal” or “Indian” are used where the context adopts, or refers to, the use of those terms in Canadian federal or provincial law. Otherwise, the terms “Indigenous” or “First Nations” are used.

3 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 186, 153 DLR (4th) 193 [*Delgamuukw* cited to SCR] quoting *R v Van der Peet*, [1996] 2 SCR 507 at para 31, 137 DLR (4th) 289 [*Van der Peet*].

4 See the commentary to principle number 1 of the 10 “Principles respecting the Government of Canada’s relationship with Indigenous peoples,” announced July 14, 2017: “The Government of Canada is committed to achieving reconciliation with Indigenous peoples through a renewed, nation-to-nation, government-to-government, and Inuit-Crown relationship based on recognition of rights, respect, co-operation, and partnership as the foundation for transformative change.” The principles and commentary are available online: Department of Justice of Canada <[justice.gc.ca/eng/csjsjc/principles-principes.html](http://justice.gc.ca/eng/csjsjc/principles-principes.html)>.

5 See Robert Hamilton, “Indigenous Legal Traditions and Histories of International and Transnational Law in the Pre-Confederation Maritime Provinces” CIGI, *Canada in International Law at 150 and Beyond*, Paper No 4, 2018.

6 [2017] NZSC 17 [*Wakatu*].

the essential jurisprudential history of the Crown's fiduciary duty can be boiled down to five cases, around the main axes of which all other cases turn: *Calder*,<sup>7</sup> *Guerin*,<sup>8</sup> *Sparrow*,<sup>9</sup> *Haida*<sup>10</sup> and *Tsilhqot'in*.<sup>11</sup> Before turning to these cases, however, it will be helpful to consider relevant passages from the Royal Proclamation of 1763,<sup>12</sup> which the court has come to recognize as a foundational document governing Crown dealings with Indigenous land.

The Royal Proclamation established a regime of land cessions in which Indigenous territory could be surrendered only to the Crown and only with the consent of the people surrendering it. The Royal Proclamation barred private purchase of Indigenous land "not having been ceded to, or purchased by Us," including "within those Parts of Our Colonies where We have thought proper to allow Settlement." Where the Crown had thought proper to allow settlement, cessions were allowed on a voluntary basis to the Crown, in accordance with the following conditions: "if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, that same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie."<sup>13</sup>

The Crown largely respected this regime of voluntary surrender prior to Confederation, at least in Upper Canada, and it formed the policy of the federal government through the first

years of Confederation.<sup>14</sup> However, adoption of the Indian Act<sup>15</sup> in 1876 signalled a new era of Crown-Indigenous relationships, since that act clearly expressed Parliament's view that it possessed sovereign authority over "Indians, and Lands reserved for the Indians" through section 91(24) of the British North America Act, 1867.<sup>16</sup>

From the late nineteenth century through the middle of the twentieth, amendments were introduced to the Indian Act that increasingly authorized the extraction of resources from, and the taking of, Indigenous land without first securing Indigenous consent.<sup>17</sup> Broadly speaking, the Royal Proclamation's consent-based regime of negotiation between Indigenous representatives and the Crown was overtaken by the Crown's unilateral assertion of sovereignty and Canada's embrace of supreme law-making power through section 91(24).<sup>18</sup> In British Columbia, notably, treaty negotiations were abandoned prior to that province's entry into Confederation, and resumed only in the late twentieth century, with the exception of Treaty 8,<sup>19</sup> which was concluded in 1899 and covers a portion of the northeast corner of the province.

The resumption of Indigenous-Crown treaty negotiations was triggered by court decisions that recognized, at least in part, the claims of Indigenous peoples to legal rights in their traditional territories. In the 1960s the Nisga'a of northwestern British Columbia took their struggle for control over their traditional lands to the Canadian courts, leading to the Supreme Court of Canada's landmark ruling in *Calder*.

Six of the seven justices in *Calder* accepted that Aboriginal title survived the assertion of Crown sovereignty in British Columbia. Those six justices split evenly on the question whether Aboriginal title had been extinguished in the province,

7 *Calder v British Columbia (AG)*, [1973] SCR 313, 34 DLR (3d) 145.

8 *Guerin*, *supra* note 1.

9 *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow* cited to SCR].

10 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511, 245 DLR (4th) 33 [*Haida*].

11 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257, 374 DLR (4th) 1 [*Tsilhqot'in*]. There is, of course, some arbitrariness in selecting precisely these five cases. No doubt other short lists are possible. For instance, *Delgamuukw* is notably absent here although some aspects of that case are discussed below. I have selected these five cases because I believe they can tell us the story of the Crown fiduciary duty in a way that brings forward what is most relevant to the state of the law today.

12 George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, Appendix II, No 1 [*Royal Proclamation*].

13 *Ibid*.

14 See Darlene Johnston, *The Taking of Indian Lands in Canada: Consent or Coercion?* (Saskatoon: Native Law Centre, University of Saskatchewan, 1989) at 67-73.

15 *The Indian Act, 1876*, SC 1876, c 18.

16 *Now the Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*], s 91(24).

17 See Johnston, *supra* note 14 at 75-88.

18 For alternative readings of section 91(24), see Joshua Nichols, "Sui Generis Sovereignities: The Relationship between Treaty Interpretation and Canadian Sovereignty" CIGI, *Canada in International Law at 150 and Beyond*, Paper No 1, January 2018.

19 Treaty No 8, made 21 June 1899, online: <[www.aadnc-aandc.gc.ca/eng/1100100028805/1100100028807](http://www.aadnc-aandc.gc.ca/eng/1100100028805/1100100028807)>.

although all seemed to accept that Aboriginal title was grounded in prior Indigenous occupation of the land, not solely in the Royal Proclamation or other Crown acts or legislation. A majority of the court thus found that Aboriginal land rights had their ultimate source outside the British and Canadian legal systems in the Indigenous occupation of land prior to the arrival of Europeans, but concluded nonetheless that the Crown had legislative power to extinguish those rights. A majority of the court in *Calder* ultimately denied the Nisga'a claims for recognition of legal rights to their land on the ground that British Columbia had not yet waived sovereign immunity and had not consented to the courts' jurisdiction to hear the case.

The decision in *Calder* set the stage for *Guerin*, decided in 1984. The factual background to *Guerin* was set in motion when the Musqueam Indian Band surrendered part of its reserve land to the Crown for the Crown to lease to a private golf club on the band's behalf. Crown representatives subsequently negotiated the lease of the land to a third party on terms different from those discussed with the band council. A majority of the court concluded that the Crown thereby violated a fiduciary duty it owed to the band.

Justice Dickson, writing for himself and Justices Beetz, Chouinard and Lamer, explained that this fiduciary duty was grounded in the Royal Proclamation:

An Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the Band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. It is still recognized in the surrender provisions of the *Indian Act*. *The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.*<sup>20</sup>

On the facts of the *Guerin* litigation, the issue of consent-based surrender versus unilateral Crown extinguishment was not in play. It was accepted that the Musqueam Indian Band had consented to the surrender of part of its legal interests in its reserve land; the dispute turned

on the terms of the surrender and how the Crown had represented the band's interests.

Justice Dickson described the Crown fiduciary duty in the following terms:

[T]he *sui generis* interest which the Indians have in the land...gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.<sup>21</sup>

Thus, the Crown fiduciary duty as originally described in *Guerin* had two, and only two, essential features: it was triggered by the surrender of land to the Crown, and it required the Crown to deal with the land for the benefit of the Indigenous group surrendering it. Although the context may be "*sui generis*," the Crown fiduciary obligation was "nonetheless in the nature of a private law duty."<sup>22</sup> What is unique about this fiduciary relationship is that the Crown (more precisely, the Crown-in-Parliament) was assumed to have the legislative power simply to extinguish (prior to the adoption of the Constitution Act, 1982<sup>23</sup>) or infringe (after 1982) the Aboriginal legal interests that the fiduciary relationship otherwise required the Crown to protect. This raised the question of what the court would make of the fiduciary duty in a case where the Crown relied squarely on this presumed legislative power to extinguish or infringe Aboriginal legal interests. The contours of the court's answer came in 1990 in *Sparrow*.

<sup>21</sup> *Ibid* at 382, para 93 [emphasis added].

<sup>22</sup> *Ibid* at 385, para 100.

<sup>23</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Constitution Act, 1982*].

<sup>20</sup> *Guerin*, *supra* note 1 at 376, para 81 [emphasis added].

*Sparrow* was a criminal case dealing not with Aboriginal title but with the Aboriginal right to fish. The defendant was charged with violating the federal Fisheries Act<sup>24</sup> by fishing with a net longer than was permitted under that act. A unanimous court found that he was exercising an Aboriginal right to fish at the time of the alleged violation. The court thus had to determine whether section 35(1) of the Constitution Act, 1982<sup>25</sup> protected his Aboriginal right to fish from the operation of the relevant Fisheries Act regulation.

Citing *Guerin*, the court in *Sparrow* found, as “a general guiding principle for s. 35(1),” that “the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples.”<sup>26</sup> As the court recognized, however, it now had to determine the effect of this fiduciary duty on federal legislative powers. The essence of the court’s solution is contained in the following passage:

[W]e find that the words “recognition and affirmation” incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867. These powers must, however, now be read together with s. 35(1). In other words, *federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.*<sup>27</sup>

Parliament therefore no longer has the power to extinguish Aboriginal rights unilaterally under section 91(24).<sup>28</sup> Yet the overall result is a major deformation of the fiduciary relationship. As

described in *Guerin*, the fiduciary relationship required the Crown to deal with surrendered land in the best interests of the Indigenous people voluntarily surrendering it. In *Sparrow*, the court accepted that the Crown(-in-Parliament) may exercise legislative power in a way that infringes Aboriginal rights over the objections of the rights-holders, and yet still fulfill its fiduciary obligations so long as the Crown can provide a justification sufficient to satisfy the courts. This Crown obligation is no longer recognizably fiduciary “in the nature of a private law duty,” as it was in *Guerin*.<sup>29</sup>

*Guerin* and *Sparrow* laid the foundation for the court’s doctrine of Crown fiduciary duty on which the section 35 case law has largely been built. Before dissecting this case law into the elements of competing political visions (nation-with-nation treaty federalism versus unilateral Crown sovereignty), significant subsequent developments in *Haida* and *Tsilhqot’in* should be briefly noted.

In *Haida* the court addressed the question of the Crown’s obligations when contemplating action with the potential to adversely affect asserted but “as yet unproven Aboriginal rights and title claims.”<sup>30</sup> The court held that the Crown “must respect these potential, but yet unproven, interests.”<sup>31</sup> However, this requirement does not flow from the Crown fiduciary duty. Rather, in the case of “unproven” Aboriginal rights and title claims, the Crown has a duty to consult with and, where appropriate, accommodate the interests of, Aboriginal claimants; this duty “is grounded in the honour of the Crown.”<sup>32</sup>

The court in *Haida* clarified the relationship between the Crown duty to consult and accommodate, on the one hand, and the Crown fiduciary duty, on the other, bringing both under the umbrella of the honour of the Crown: “while the Crown’s fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown’s honour is engaged in its relationship with Aboriginal peoples, the duty to consult is distinct from

24 RSC 1985, c F-14.

25 *Constitution Act, 1982*, supra note 23. Section 35(1) provides: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

26 *Sparrow*, supra note 9 at 1108, para 59.

27 *Ibid* at 1109, para 62 [emphasis added].

28 The court reaffirmed this point in *Van der Peet*, supra note 3 at para 28, and in *Mitchell v MNR*, 2001 SCC 33 at para 11, [2001] 1 SCR 911, 333 DLR (4th) 197. For a detailed analysis of *Sparrow*, see Brian Slattery, “Aboriginal Rights and the Honour of the Crown” (2005) 29 SCLR (2d) 433.

29 *Guerin*, supra note 1 at 385, para 100.

30 *Haida*, supra note 10 at para 50.

31 *Ibid* at para 27.

32 *Ibid* at para 16.

the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests.”<sup>33</sup>

*Haida* thus signals that the court now conceives “the honour of the Crown” as the master concept governing Crown conduct in its relationships with Indigenous peoples: “In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably.”<sup>34</sup> Moreover, although both the Crown’s fiduciary obligations and its duties of consultation and accommodation flow from the honour of the Crown, an important legacy of *Haida* would seem to be a gradual displacement of the Crown’s fiduciary duty by the duty to consult and accommodate. Thus, the duty to consult and accommodate has come to be applied to proposed Crown infringements of treaty rights, which are *established* section 35 rights.<sup>35</sup>

Finally, in 2014 the court issued its decision in *Tsilhqot’in*, for the first time recognizing Aboriginal title over a specific territory. The court stated, as it had in previous cases, that Aboriginal title constitutes a burden on the underlying title of the Crown,<sup>36</sup> which, as the court explained, “is what is left when Aboriginal title is subtracted from it.”<sup>37</sup> In practical terms, underlying Crown title is made up of two elements: “a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands, and the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act*, 1982.”<sup>38</sup>

The court here is trying to make the underlying title of the Crown bear the weight of the conflicting political visions at the root of the fiduciary relationship between First Nations and the Crown, visions reflected respectively in the Royal Proclamation regime of voluntary surrender and in the Crown’s unilateral assertion

of sovereignty. But the court’s attempt in this case pushes the doctrine of Crown fiduciary duty to the breaking point, leading the court to statements such as the following: “The Crown’s underlying title in the land is held for the benefit of the Aboriginal group and constrained by the Crown’s fiduciary or trust obligation to the group.”<sup>39</sup>

The Crown’s underlying title may well be constrained, on the court’s doctrine, by the Crown’s fiduciary or trust obligation to Aboriginal title holders. However, the very fact that it can be constrained by a fiduciary duty owed to the title holders underscores the point that underlying title is not itself “held for the benefit of” the Aboriginal title holders. Indeed, underlying title is precisely, on the court’s own telling, the source of the Crown’s power to *infringe* Aboriginal title *against the will* of the title holders, if the Crown can justify doing so in the broader public interest. In other words, according to the court, underlying title is an expression of Crown sovereignty, not fiduciary duty. That the Crown’s fiduciary duty “constrains” this power suggests that the fiduciary duty is subordinate to Crown sovereignty. This subordination is especially clear in the two-step analysis of Crown fiduciary obligations introduced in *Osoyoos*,<sup>40</sup> discussed below.

As a final point on *Tsilhqot’in*, recall that the Crown fiduciary duty, as explained in *Guerin*, was triggered by the surrender of Indian land. To the extent the Crown held the surrendered interest in the course of subsequent dealings, its fiduciary duty required that it do so in the best interests of those who surrendered it. That is a genuine fiduciary duty with respect to a surrendered interest in land. It creates an awkward fit, to say the least, to attempt to shift the object of this fiduciary duty to an underlying title that was never surrendered by the Aboriginal title holders and that the court describes as a source of legislative power to infringe the title holders’ interests.<sup>41</sup>

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33 *Ibid* at para 54.

34 *Ibid* at para 17.

35 See e.g. *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40, 411 DLR (4th) 571 [Clyde River]. This case is discussed below under the heading “Triggering the Crown Fiduciary Obligation.” See also *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388, 259 DLR (4th) 610.

36 *Tsilhqot’in*, *supra* note 11 at para 69.

37 *Ibid* at para 70.

38 *Ibid* at para 71.

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39 *Ibid* at para 85.

40 *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746, 206 DLR (4th) 385 [Osoyoos cited to SCC].

41 The court clearly has in mind a legislative power. Yet, perhaps because the court is intent on grounding this power in a property right (i.e., in underlying Crown title), the court is led to characterize the power as a right, stating that underlying Crown title includes “the right to encroach on Aboriginal title if the government can justify this”: *Tsilhqot’in*, *supra* note 11 at para 71.

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## Fault Lines in Recent and Current Case Law

This section considers three specific elements in the court's Aboriginal title doctrine, noting the particular ways in which each of these elements is caught up in the court's overall ambivalence between a nation-with-nation vision and affirmation of unilateral Crown sovereignty. The three elements are: the legal source of the Aboriginal interests the fiduciary duty is meant to protect; the circumstances or actions that trigger the fiduciary duty; and the Royal Proclamation imposition of restrictions on the alienability of Indigenous land. The ways in which the court's ambivalence plays out in current or recent cases are identified for each of these three elements.

### Sources of Aboriginal Legal Interests: Prior Existence of Aboriginal Legal Systems, "Crystallization" and the Assertion of Crown Sovereignty

The basic premise of this paper is that there is ambivalence in the court's doctrine as to whether the fiduciary duty reaches across distinct legal systems or whether it functions entirely within the legal system based on the assertion of Crown sovereignty. The discussion of the sources of Aboriginal legal interests in the case law illustrates this ambivalence perhaps most strikingly.

As indicated above, both *Calder* and *Guerin* point to legal interests existing prior to the arrival of Europeans as a source of Aboriginal title. Chief Justice Lamer reiterated this point with force in *Delgamuukw*: "[A]boriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law."<sup>42</sup>

However, later in the same reasons, he was at pains to explain that Aboriginal title could not pre-date the assertion of Crown sovereignty:

[F]rom a theoretical standpoint, aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law. Aboriginal title is a burden on the Crown's underlying title. However, the Crown did not gain this title until it asserted sovereignty over the land in question. Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted.<sup>43</sup>

To be sure, it would make no sense to speak of the Crown's underlying title, nor of Aboriginal title as a burden on the Crown's underlying title, before that underlying title existed. However, if Aboriginal title is simply the form in which the common law cognizes pre-existing Indigenous legal interests in land, there is no good reason to conclude that those pre-existing legal interests are produced through the Crown's assertion of sovereignty<sup>44</sup> — unless we wish to bring those interests entirely within the legal system established by assertion of Crown sovereignty, with the Crown fiduciary duty attaching only to such "internal" legal interests. In practical terms, it makes legal sense to say that the Crown-in-Parliament has the unilateral power to extinguish or infringe interests that are creatures of the legal system established by the Crown; it is less clear that there is any compelling legal argument for a unilateral power of the Crown-in-Parliament to extinguish or infringe legal interests belonging to independent legal systems that pre-date the assertion of Crown sovereignty.

The reasons in *Delgamuukw* thus seem to give with one paragraph what they take away with another: Aboriginal title has roots in Indigenous legal systems that pre-date Crown sovereignty, but Aboriginal title exists only as a burden on the underlying Crown title produced at the moment Crown sovereignty is asserted.<sup>45</sup>

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42 *Delgamuukw*, *supra* note 3 at para 126.

43 *Ibid* at para 145.

44 For a detailed critique of this "conjuring" of Crown sovereignty, see John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37:3 *Osgoode Hall LJ* 537-96.

45 For a slightly different view on the relation of Indigenous legal systems to Aboriginal title, see Kent McNeil, "Indigenous Law and Aboriginal Title", *Osgoode Legal Studies Research Paper No 2/2017*, 12 August 2016. McNeil focuses on Indigenous legal systems as evidence in support of Aboriginal title, rather than as an independent source of Aboriginal title.

This ambivalence finds a mirror image in the court's statements regarding the origin of Crown sovereignty. In *Tsilhqot'in*, the court stated both that "[t]he doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation of 1763*" but nonetheless that "[a]t the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province [of British Columbia]."<sup>46</sup> Yet acquisition through mere assertion relies on the doctrine of *terra nullius*, or similar doctrines positing a hierarchy of civilizations.

How one conceives the source of Aboriginal title can make a notable difference in how we conceive of the Crown fiduciary duty with respect to the interests protected by such title. The Royal Proclamation regime is one of First Nations holding territory under their own jurisdiction, which they may choose to surrender to the Crown. The court in *Guerin* added that when a First Nation chooses to surrender interests in land, the Crown's fiduciary duty is triggered and it must then dispose of those interests for the benefit of the First Nation. If, by contrast, we insist on Crown assertion of sovereignty as the moment that produced Aboriginal rights and title as "burdens" on underlying Crown title, then we are liable to think of the Crown as standing most fundamentally in a governmental capacity, as opposed to a fiduciary one, with respect to the protected interests. This divide between the "governmental capacity" and "true fiduciary" approaches provides one of the major fault lines in recent case law relating to the Crown fiduciary duty.

In particular, there is a clear break between the Crown fiduciary duty described in *Guerin* and the Crown obligations described in cases like *Osoyoos*, *Wewaykum*,<sup>47</sup> and *Tsilhqot'in*. *Guerin* describes a genuine fiduciary duty that binds the Crown to deal with Aboriginal legal interests for the benefit of those holding the interests. The court in *Osoyoos* faced the task of reconciling the Crown fiduciary duty with the Crown's powers of expropriation under the Indian Act<sup>48</sup> (used in conjunction with

the provincial powers of expropriation in British Columbia's Water Act,<sup>49</sup> on the facts of *Osoyoos*).

The majority in *Osoyoos* noted the Crown's position that the fiduciary duty could not be reconciled with the power of expropriation: "the Attorney General contends that a fiduciary obligation to impair minimally the Indian interest in reserve lands is inconsistent with the principles of fiduciary law which impose a duty of utmost loyalty on the fiduciary to act only in the interests of the person to whom the duty is owed."<sup>50</sup> The majority, however, felt that the Crown duty and power could be reconciled through a "two-step process":

This two-step process minimizes any inconsistency between the Crown's public duty to expropriate lands and its fiduciary duty to Indians whose lands are affected by the expropriation. In the first stage, the Crown acts in the public interest in determining that an expropriation involving Indian lands is required in order to fulfill some public purpose. *At this stage, no fiduciary duty exists.* However, once the general decision to expropriate has been made, the fiduciary obligations of the Crown arise, requiring the Crown to expropriate an interest that will fulfill the public purpose while preserving the Indian interest in the land to the greatest extent practicable.<sup>51</sup>

*Osoyoos* thus describes a two-step process in which the Crown first makes a decision, unfettered by any fiduciary duty, to infringe an Aboriginal legal interest, and only then is bound to ensure minimal infringement necessary to achieve its ends.

In *Wewaykum*, Justice Binnie explained that "[t]he Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting."<sup>52</sup> He further explained that the extent of the Crown's fiduciary duty must be tailored to whether it is acting primarily in a governmental capacity or as true fiduciary. *Tsilhqot'in* states that the Crown may infringe Aboriginal title against the will of the title holders, so long as the infringement passes a proportionality analysis.

46 *Tsilhqot'in*, *supra* note 11 at para 69.

47 *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245, 220 DLR (4th) 1 [*Wewaykum*].

48 RSC 1952, c 149 (now *Indian Act*, RSC 1985, c I-5).

49 RSC 1948, c 361.

50 *Osoyoos*, *supra* note 40 at para 51.

51 *Ibid* at para 53 [emphasis added].

52 *Wewaykum*, *supra* note 47 at para 96.

In sum, Justice Dickson stated in *Guerin* that the Crown fiduciary duty is “in the nature of a private law duty”<sup>53</sup> and judged the Crown’s conduct by the measure of a private law fiduciary duty. By contrast, *Osoyoos*, *Wewaykum*, and *Tsilhqot’in*<sup>54</sup> move away from that strict standard, allowing the Crown to pursue interests opposed to the Aboriginal legal interests which it is meant to protect as a fiduciary, so long as it maintains some sense of proportion between those opposed sets of interests. Not surprisingly, in current cases invoking the Crown fiduciary duty, we often see the argument turn to whether the Crown conduct at issue was pursued in a “governmental capacity,” thus attenuating any fiduciary obligations, or rather “in the nature of a private law” fiduciary.

For instance, when the Supreme Court of New Zealand in *Wakatu* drew on the Supreme Court of Canada’s doctrine, Chief Justice Elias took as a central issue whether at material times “the Governor was acting in a ‘governmental’ capacity in relation to the land” or “for the benefit of the Maori proprietors.”<sup>55</sup> Referring to the Canadian doctrine, she noted in particular that “[t]he Supreme Court of Canada has continued to accept the distinction applied in *Guerin* between the fiduciary responsibilities of the Crown when acting on behalf of Indian bands in dealings with land in which they have interests and its governmental responsibilities when pre-existing interests are not involved.”<sup>56</sup> She then reviewed the application of this distinction in *Wewaykum* and *Manitoba Métis Federation*.<sup>57</sup> The distinction was also at the heart of

arguments in *Williams Lake Indian Band*,<sup>58</sup> currently pending at the Supreme Court of Canada.<sup>59</sup>

## Triggering the Crown Fiduciary Obligation: Surrender or Assertion of Sovereignty?

One finds a further, closely related ambivalence in the case law as to whether the Crown fiduciary duty is triggered by the *surrender* of Indigenous legal interests or rather by the Crown’s *assertion* or *exercise* of sovereignty. In *Wewaykum*, the court acknowledged that Justice Dickson had stated in *Guerin* that the fiduciary duty arose upon surrender, but insisted that that statement should not be read too strictly: “In *Guerin*, Dickson J. said the fiduciary ‘interest gives rise *upon surrender* to a distinctive fiduciary obligation on the part of the Crown’ (p. 382). These dicta should not be read too narrowly. Dickson J. spoke of surrender because those were the facts of the *Guerin* case. As this Court recently held, expropriation of an existing reserve equally gives rise to a fiduciary duty [citing *Osoyoos*].”<sup>60</sup>

Justice Dickson’s position in *Guerin* — that the duty is triggered by surrender — fits most easily with the understanding of the fiduciary duty reaching across distinct legal systems, because this position is consistent with the Royal Proclamation regime of voluntary surrender. Under that regime, as explained above, First Nations held their interests in land under their own customs and legal systems until such time as they chose to surrender those interests to the Crown. In that sense, the interests in land are voluntarily handed over from one legal system to another, roughly speaking. By contrast, the view that the Crown’s fiduciary duty is triggered through unilateral Crown assertion or exercise of sovereignty fits more easily with the view that the Crown stands, from the moment of such unilateral assertion or exercise, in a governmental capacity with respect to the interests of First Nations in their lands. The latter position is particularly clear in *Osoyoos*, where the court clearly subordinates the fiduciary duty to Crown exercise of sovereignty. In line with the position taken in *Osoyoos*, note that the court in *Haida* describes the honour of the Crown as binding the Crown

53 *Guerin*, *supra* note 1 at 385, para 100. See also at 376, para 79, where Justice Dickson qualifies his disagreement with Justice Wilson as to whether the Crown held the Indians’ reserve interest in trust: “This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.”

54 *Tsilhqot’in* deals with land held under Aboriginal title, while *Guerin*, *Osoyoos*, and *Wewaykum* deal with reserve lands. However, Justice Dickson made clear in *Guerin* that the Aboriginal interest is the same in both cases: “It does not matter, in my opinion, that the present case is concerned with the interest of an Indian band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases” (*Guerin*, *supra* note 1 at 379, para 86).

55 *Wakatu*, *supra* note 6 at para 289.

56 *Ibid* at para 354.

57 *Manitoba Métis Federation v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623, 355 DLR (4th) 577.

58 *Williams Lake Indian Band v Canada (Minister of Aboriginal Affairs and Northern Development)* (26 April 2017), 36983 (hearing of appeal).

59 As at 24 January 2018.

60 *Wewaykum*, *supra* note 47 at para 98 [emphasis in *Wewaykum*].

“from the assertion of sovereignty to the resolution of claims and the implementation of treaties.”<sup>61</sup>

This is not to suggest that these contrasting views on what triggers the Crown fiduciary duty amount to technical legal positions from which doctrinal conclusions may straightforwardly be deduced. It suggests only that the second view — that the Crown fiduciary duty is triggered by assertion or exercise of sovereignty — lends itself more easily to supporting the erasure of the requirement of Indigenous consent for surrender of lands and, accordingly, to seeing the Crown as standing in a governmental (as opposed to fiduciary) relationship with First Nations.

Together with the ambivalence described above under the heading “Sources of Aboriginal Legal Interests,” the ambivalence as to the trigger for the Crown fiduciary duty plays out in debates over the justification analysis found in recent Aboriginal title cases. If we take seriously the idea that the interests protected by Aboriginal title find their source in independent Indigenous legal systems and that the Crown fiduciary duty is triggered only upon voluntary surrender of those interests, then it seems hard to justify any unilateral Crown infringement of Aboriginal title unless we rely on *terra nullius* or some related doctrine of European superiority. However, if we focus on Crown assertion of sovereignty as producing (or “crystalliz[ing]”<sup>62</sup>) Aboriginal title and on Crown assertion or exercise of sovereignty as triggering its fiduciary duty, then it is easier to conceive the Crown acting in a governmental capacity over interests that fall entirely under its sovereign power, thus making plausible the notion of “justifiable infringement” by the Crown.

Consider in this light the fact that in recent cases the court has used the *Haida* spectrum of required Crown consultation, explicitly designed for application to claimed yet “unproven” Aboriginal rights and title, in its analysis of the justification for Crown infringement of *established* rights. As discussed above, the court in *Haida* articulated a Crown duty of consultation and accommodation flowing from the honour of the Crown. Part of the court’s reasoning was that an unproven claim is an insufficiently precise legal interest to form the object of a Crown fiduciary duty.

61 *Haida*, *supra* note 10 at para 17 [emphasis added].

62 *Delgamuukw*, *supra* note 3 at para 145.

As the court explained: “Pending [negotiated] settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns.”<sup>63</sup>

Yet the *Haida* spectrum of required Crown consultation now seems to govern the court’s justification analysis for Crown infringements of *established* section 35 rights as well. In *Clyde River*, the court characterized the duty to consult in these terms: “The duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown....It has both a constitutional and a legal dimension....Its constitutional dimension is grounded in the honour of the Crown....And, as a legal obligation, it is based in the Crown’s assumption of sovereignty over lands and resources formerly held by Indigenous peoples (*Haida*, at para. 53).”<sup>64</sup>

As discussed above, *Haida* stressed the importance of the duty to consult in protecting *claimed yet still unproven* Aboriginal interests. In *Clyde River*, the court ties this duty to established section 35 rights, and grounds the duty squarely in “the Crown’s assumption of sovereignty.” Indeed, the court is explicit that where *established* section 35 rights are at issue, this should factor into the *Haida* analysis: “As this Court explained in *Haida Nation*, deep consultation is required ‘where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high’ (para. 44). Here, the appellants had *established treaty rights* to hunt and harvest marine mammals.”<sup>65</sup>

If the *Haida* analysis governs the court’s analysis of Crown justification for infringing established treaty rights, will it not also govern in the case of established Aboriginal title? This seems to

63 *Haida*, *supra* note 10 at para 45. As Gordon Christie presciently commented, “[e]fforts by the Court to turn the Crown’s mind to its obligations to preserve Aboriginal interests in the interim through a process of consultation and accommodation have been balanced by a jurisprudence that preserves ultimate Crown power over decision-making”: Gordon Christie, “Developing Case Law: The Future of Consultation and Accommodation” (2006) 39 UBC L Rev 139 at 184.

64 *Clyde River*, *supra* note 35 at para 19.

65 *Ibid* at para 43 [emphasis in original].

be an open question. In *Tsilhqot'in*, the court suggested a qualitative break between the justification analysis applicable to claimed title and that applicable to established title:

Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast, where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.<sup>66</sup>

Yet the court goes on to explain that this fiduciary duty “infuses an obligation of proportionality into the justification process,” which the court finds comparable to that imposed by the *Haida* spectrum.<sup>67</sup> The court did, however, add one further element to the fiduciary duty in the case of established Aboriginal title: “[T]he Crown’s fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations....This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.”<sup>68</sup> It is important to note that the case law is not yet settled as to whether the *Haida* analysis will govern the court’s justification analysis in the case of Crown infringements on Aboriginal title, although it is perhaps leaning that way.

In sum, while the court’s foundational cases on the Crown fiduciary duty point in principle to a duty that reaches across legal systems, straddling the respective jurisdictions of Indigenous nations and the Crown, in application we often find the court subordinating that duty to the Crown’s unilateral assertion of sovereignty.

<sup>66</sup> *Tsilhqot'in*, *supra* note 11 at para 80.

<sup>67</sup> *Ibid* at para 87.

<sup>68</sup> *Ibid* at para 86. This sustainability requirement is discussed further under the heading “Nation-with-Nation Relationship and Minimum Justification for Proposed Crown Infringements”, below.

## The Royal Proclamation and Crown Sovereignty: To what Extent is the Court Prepared to Adjudicate Crown Assertions of Sovereignty?

As discussed above under the heading “*Guerin* at the Supreme Court of Canada,” the court in *Guerin* traced the Crown fiduciary duty to the restrictions imposed by the Crown on the alienability of Indigenous land to third parties. As Justice Dickson explained, “[t]he Crown first took this responsibility upon itself in the Royal Proclamation of 1763.”<sup>69</sup> The court has also stated that at the time of the Royal Proclamation, “both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.”<sup>70</sup>

Clearly, by the time of Confederation and Parliament’s exercise of authority under section 91(24) of the *Constitution Act, 1867*, notably the adoption of the *Indian Act* in 1876, Canada no longer viewed First Nations as sovereign.<sup>71</sup> Hence the anomaly lurking in the background of *Guerin*, and finally confronted in *Sparrow*, that the Crown fiduciary duty seems to be subsumed within a framework of Crown sovereignty that allows the Crown to extinguish or infringe those interests it must otherwise guard as a fiduciary. The court has grappled with this situation under various descriptions, including the two-step process developed in *Osoyoos* and the “many hats” characterization relied on in *Wewaykum*, both of which are noted above under the heading “Sources of Aboriginal Legal Interests.”

The court, however, has also indicated its willingness to question the very sovereign claims made by the Crown, which necessarily underlie Parliament’s broad assertions of power over First Nations. In *Sparrow*, for instance, the court strikingly staked out the authority to adjudicate Crown sovereign claims, quoting with approval Professor Lyon: “Section 35 calls

<sup>69</sup> *Guerin*, *supra* note 1 at 376, para 81.

<sup>70</sup> *R v Sioui*, [1990] 1 SCR 1025 at 1052–53, para 68, 70 DLR (4th) 427.

<sup>71</sup> See e.g. Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol 1, *Looking Forward, Looking Back* (Ottawa: Royal Commission on Aboriginal Peoples, 1996) at 259–62; Johnston, *supra* note 14 at 75–88.

for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.”<sup>72</sup> In *Taku River Tlingit*, the court boldly qualified Crown sovereignty as “*de facto*”: “The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty.”<sup>73</sup>

Typically, courts have avoided wading into such waters by invoking the principle that a court cannot question the sovereignty of the state from which it derives its authority. Thus, in *Johnson v M’Intosh*,<sup>74</sup> Chief Justice John Marshall of the United States Supreme Court shut the door on the possibility that U.S. courts might question the legitimacy of U.S. sovereignty over Indigenous territories:

We will not enter into the controversy whether agriculturists, merchants, and manufacturers have a right on abstract principles to expel hunters from the territory they possess or to contract their limits. *Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted....It is not for the courts of this country to question the validity of this title or to sustain one which is incompatible with it.*<sup>75</sup>

Similarly, in *Coe*,<sup>76</sup> before the High Court of Australia, Justice Jacobs stated that a challenge to a nation’s sovereignty was “not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged.”<sup>77</sup>

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72 *Sparrow*, *supra* note 9 at 1106, para 54, citing Noel Lyon, “An Essay on Constitutional Interpretation” (1988) 26:1 *Osgoode Hall LJ* 95 at 100.

73 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 42, [2004] 3 SCR 550, 245 DLR (4th) 193. See also, e.g., *Haida*, *supra* note 10 at para 32: “This process of reconciliation flows from the Crown’s duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.”

74 *Johnson v M’Intosh*, 21 US (8 Wheat) 543 (1823).

75 *Ibid* at 588–89 [emphasis added].

76 *Coe v Commonwealth of Australia*, [1979] HCA 68, 53 ALJR 403.

77 *Ibid* at para 3 of Justice Jacobs’ reasons.

In *Wakatu*, Chief Justice Elias forestalls the issue by drawing an explicit contrast between the Crown’s claims to sovereignty in New Zealand and in North America, indicating that in New Zealand the Crown “distinctly recognized the proprietorship of the soil in the natives and disclaimed alike all territorial rights, and all claims of sovereignty, which should not be founded on a free cession by them.”<sup>78</sup> It is unclear whether the court in *Wakatu* would have addressed the issue in any case; however, the Chief Justice’s position allows for judicial restraint insofar as it attempts to avoid the clash between Crown assertions of sovereignty and Indigenous claims to unceded territory.

What does the Supreme Court of Canada mean when it says it is prepared to question sovereign claims made by the Crown? In practice, the meaning has been very modest: in the context of *Sparrow* and the court’s other Aboriginal rights cases, it has meant that the court will review exercises of Crown sovereignty that infringe Aboriginal rights (claimed or established) and impose procedural safeguards in accordance with the honour of the Crown (covering both the Crown duty to consult and fiduciary duty). We might call the result a judicially mediated form of Crown sovereignty, or a procedural legitimation of Crown sovereignty (in contrast to the substantive justifications previously provided by such doctrines as *terra nullius*, which the court has now explicitly rejected). As typified by the two-step process in *Osoyoos*, this is a very weak form of questioning claims of Crown sovereignty: the court there concluded that the Crown’s decision to exercise its powers of expropriation was unfettered by any fiduciary duty; the fiduciary duty requires only that the Crown not expropriate more than necessary to achieve its goals.

More generally, to the extent the doctrines of Crown fiduciary duty and duty to consult and accommodate allow the court to question sovereign claims made by the Crown, this really only amounts to an after-the-fact judicial review of particular exercises of Crown sovereignty. As noted above under the heading “Triggering the Crown Fiduciary Obligation,” that would seem to be true even in the case of proposed Crown action that would infringe *established* Aboriginal and treaty rights and

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78 *Wakatu*, *supra* note 6, at footnote 130 (quoting a letter from Lord Stanley to the New Zealand Land Company, dated 10 January 1843). For the explicit contrast with the Crown’s claims in North America, see *Wakatu* at paras 340–44.

Aboriginal title. This situation leaves tremendous imbalance in bargaining power between the Crown and First Nations as to the justifiability of any proposed infringements, since First Nations must negotiate in the shadow of Crown power to act “in the face of disagreement,”<sup>79</sup> subject only to judicial review that is costly and risky for First Nations.

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## Nation-with-Nation Relationship and Minimum Justification for Proposed Crown Infringements

Elements of the court’s section 35 doctrine supporting a nation-with-nation vision of Indigenous–Crown relationships, and the federal government’s professed commitment to “nation-to-nation, government-to-government, and Inuit-Crown”<sup>80</sup> relationships with Canada’s First Nations, suggest a fairly modest question: Should the Crown not have to justify any proposed infringements of Aboriginal and treaty rights *before* it carries them out? At a minimum, should it not have to do so where the proposed infringements are actively opposed by the rights holders or title holders?

Clearly, such a requirement of prior *justification* would still fall short of the “free, prior and informed *consent*” required in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),<sup>81</sup> which the current Trudeau government has endorsed without reservation. Nonetheless, prior justification would at least be a step toward the UNDRIP standard. In the absence of action by Parliament and provincial legislatures, could the court require prior justification on the basis of its current case law? The answer would appear to be “yes”; moreover, such a step would

be quite modest, particularly in light of the court’s bold statements regarding its readiness to question Crown sovereign claims.

There are various ways in which the court could formulate a requirement of prior justification, and this author does not presume to develop an ideal formulation here. However, it is opportune to note one possibility that would go no further than what the court required for proposed “infringements” of judges’ salaries in *Reference re Remuneration of Judges of the Provincial Court (PEI)*.<sup>82</sup>

In the *Remuneration Reference*, the court addressed the constitutionality of various forms of reduction in judges’ salaries in different provinces. Although the majority resolved the issues before it by reference to section 11(d) of the Charter,<sup>83</sup> since the parties and interveners had grounded their arguments in that section,<sup>84</sup> the majority nonetheless engaged in an extended discussion of a broader “unwritten norm” of judicial independence that informed the express constitutional provisions on that point.

In particular, the majority concluded that “the express provisions of the *Constitution Act, 1867* and the *Charter* are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*.”<sup>85</sup> Moreover, such unwritten norms may be used to “fill out gaps in the express provisions” of the Constitution: “the preamble is not only a key to construing the express provisions of the *Constitution Act, 1867*, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.”<sup>86</sup>

Against this background, a majority of the court reached the conclusion that provinces were constitutionally obligated to

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79 See note 63, *supra*.

80 See the commentary to principle number 1 of the 10 “Principles respecting the Government of Canada’s relationship with Indigenous peoples,” *supra* note 4.

81 GA Res 61/295, UNGAOR, 61st Sess, Supp No 49 vol III, UN Doc A/61/49 (2007), arts 10, 11, 28, 29, 32.

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82 [1997] 3 SCR 3, 150 DLR (4th) 577 [*Remuneration Reference* cited to SCR].

83 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

84 *Remuneration Reference*, *supra* note 82 at para 1019.

85 *Ibid* at para 109.

86 *Ibid* at para 95.

establish independent commissions to make recommendations on the salaries of judges:

[A]s a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, *any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective, and objective*, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation. What judicial independence requires is an independent body, along the lines of the bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration.... *Governments are constitutionally bound to go through the commission process. The recommendations of the commission would not be binding on the executive or the legislature. Nevertheless, though those recommendations are non-binding, they should not be set aside lightly, and, if the executive or the legislature chooses to depart from them, it has to justify its decision — if need be, in a court of law.*<sup>87</sup>

If the unwritten norm of judicial independence, informing the express provision in section 11(d) of the Charter, requires such independent commissions, why shouldn't the unwritten norms/principles informing honourable Indigenous-Crown negotiations require the same, or something similar? To adapt the italicized phrases in the quotation above, the court might conclude that "any proposed infringements of Aboriginal rights require prior recourse to a special process, which is independent, effective, and objective, for determining the legitimacy of the Crown's proposed infringements"; that "[g]overnments are constitutionally bound to go through the [special] process"; and that "if the executive or the legislature chooses to depart from [the process recommendations], it has to justify its decision — if need be, in a court of law." In the Aboriginal

context, perhaps the Crown, including Parliament and provincial legislatures, should in fact be bound by the decisions of such independent tribunals.

In the *Remuneration Reference*, the court also commented on the composition of the independent commissions it determined were constitutionally required: "The commission should have members appointed by the judiciary, on the one hand, and the legislature and the executive, on the other."<sup>88</sup> Similarly, tribunals established to assess the legitimacy of proposed Crown action affecting Aboriginal rights should have members drawn from (or nominated by) Indigenous communities as well as federal and provincial governments.

Finally, such independent tribunals might prove to be vital, flexible, and creative institutions for the interpretation of international documents such as UNDRIP, and the incorporation of such documents into Canadian law. Tribunals enforcing prior justification might also be sites for developing the principle of sustainability announced in *Tsilhqot'in*: the court in *Tsilhqot'in* indicated that *both the Crown and Aboriginal title holders* are prohibited from using the land in ways that would deprive future generations of the enjoyment of the land.<sup>89</sup> Such a principle could form the basis for reciprocal fiduciary obligations on the part of the Aboriginal title holders and the Crown, and form one ground of review undertaken by independent tribunals faced with proposed infringements.

As always, the devil would be in the details with such tribunals. If properly designed and implemented, they might conceivably stimulate greater cooperation and good faith negotiation between First Nations and the Crown *prior* to any adjudication of proposed infringements. If poorly designed, they might amount to little more than an additional layer of Crown-designed institutional management, perhaps in line with the court's recent acceptance of the role of the National Energy Board in evaluating the adequacy of consultation and accommodation prior to project approval.<sup>90</sup> The aim in this brief section has been simply to note that there are tools in the case law as it stands that would empower the courts to take modest steps toward reconciling the court's case law

<sup>88</sup> *Ibid* at para 172.

<sup>89</sup> *Tsilhqot'in*, *supra* note 11 at paras 74, 86.

<sup>90</sup> *Clyde River*, *supra* note 35; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41, 411 DLR (4th) 596.

<sup>87</sup> *Ibid* at para 133 [emphasis added].

with many of the court's foundational principles favouring nation-with-nation relationships. Perhaps that would stimulate Parliament and the provincial legislatures to do the same.

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## Conclusion

The Canadian judicial doctrine of a Crown fiduciary relationship with Indigenous peoples has long been torn between a nation-with-nation vision and a vision of perfected Crown sovereignty. Perhaps more accurately, the Supreme Court of Canada has developed the legal doctrine as part of an attempt to reconcile these two political visions, but such reconciliation has been too much to ask of legal doctrine. The legal doctrine is shot through with ambivalence that can be traced back to the clash of contrasting political visions. This paper has described three examples of this ambivalence in the court's case law: first, as to the roots of Aboriginal title, with the court occasionally emphasizing prior Aboriginal occupation and pre-existing systems of Aboriginal law, while at other times focusing on Crown assertion of sovereignty "crystallizing" Aboriginal title as a burden on underlying Crown title; second, as to the trigger for the Crown fiduciary duty, in *Guerin* pointing to the voluntary surrender by a First Nation, while in subsequent cases shifting to the assertion or exercise of Crown sovereignty; and third, as to the court's readiness to question sovereign claims made by the Crown, which the court on occasion has announced quite boldly but applies fairly conservatively in the form of procedural restrictions on the exercise of Crown sovereignty.

The vision of nation-with-nation relationships between First Nations and the Crown clashes profoundly with the vision of unilateral acquisition of Crown sovereignty that has been dominant in Canadian law since Confederation. Reconciling the two, or moving more seriously toward the nation-with-nation vision, will require political and community leadership at many levels. However, the courts have tools with which they can contribute to this process. One fairly modest step the courts, or at least the Supreme Court of Canada, could take to ease the grip of unilateral Crown sovereignty over Indigenous territory, in particular in British Columbia in the absence of treaties, is set out above under the heading "Nation-with-Nation Relationship and Minimum Justification for Proposed Crown Infringements." The suggested independent tribunals composed of both Indigenous and Crown representatives might prove a more fruitful forum than Canadian courts for resolving issues that go to the legitimacy of Crown sovereignty and its exercise over unceded Indigenous territory.



ON CANADA'S PAST, PRESENT AND FUTURE  
IN INTERNATIONAL LAW

# REFLECTIONS

# RÉFLEXIONS

SUR LE PASSÉ, LE PRÉSENT ET L'AVENIR DU CANADA  
EN MATIÈRE DE DROIT INTERNATIONAL

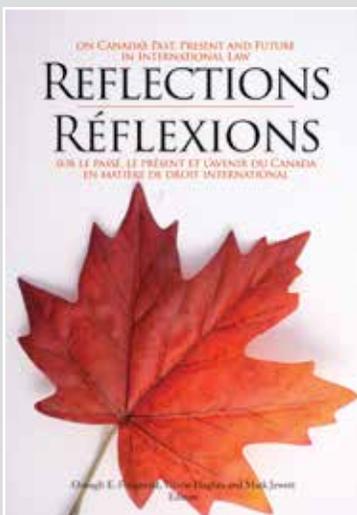
Oonagh E. Fitzgerald, Valerie Hughes and Mark Jewett,  
Editors



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