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THE CROWN'S FIDUCIARY OBLIGATIONS IN THE ERA OF ABORIGINAL SELF-GOVERNMENT

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This article confronts the contention that the Crown's fiduciary obligations are incompatible with Aboriginal self-government. Relying on Supreme Court decisions, it argues instead that the Crown has a fiduciary duty to support Aboriginal autonomy. Consequently, past infringements of the inherent right of self-government by imposition of the band council system violated the Crown's fiduciary obligations. The appropriate remedy for this breach is restitution, involving federal assistance to enable First Nations to restore and maintain their capacity to govern themselves in accordance with their own traditions and present-day aspirations.

Cet article vient battre en brèche l'argument voulant que les obligations fiduciaires du gouvernement sont incompatibles avec l'autonomie gouvernementale des Autochtones. Invoquant divers arrêts de la Cour suprême, il fait plutôt valoir qu'il incombe à la Couronne une obligation fiduciaire de promouvoir l'autonomie autochtone. Par conséquent, les violations antérieures du droit inhérent à l'autonomie gouvernementale qui découlent de la mise en place du système du conseil de bande représentaient autant de manquements aux obligations fiduciaires de la Couronne. La restitution est la réparation qu'il convient d'accorder pour remédier à ces manquements, et la

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restitution exige une assistance fédérale afin de permettre aux Premières nations de rétablir puis d'entretenir leur capacité à se gouverner elles-mêmes, suivant leurs propres traditions et aspirations actuelles.

The Aboriginal peoples of Canada generally assert that they have an inherent, constitutionally-protected right of self-government that entitles them to establish and maintain their own governmental and legal systems. They claim that they have a government-to-government relationship with the federal and provincial governments. At the same time, they commonly maintain that their relationship with the Crown is fiduciary in nature, and that the Crown owes them fiduciary obligations in a variety of contexts. Are the government-to-government and fiduciary relationships compatible? Or is this simply a matter of Aboriginal peoples wanting to have it both ways?

This article examines these questions, and contends that the fiduciary relationship has an important, ongoing role to play in the era of Aboriginal self-government. After discussing leading Supreme Court of Canada decisions on the Crown's fiduciary obligations to the Aboriginal peoples, the article relates this case law to Aboriginal autonomy. It seeks to demonstrate that interference with that autonomy can amount to an infringement of the inherent right of self-government and a breach of the Crown's fiduciary obligations. Unless the infringement is justified in accordance with standards that the Supreme Court has established, Aboriginal peoples should be entitled to a remedy for the breach. The article concludes that the appropriate equitable remedy in this context is restitution, involving federal assistance to Aboriginal peoples to restore and implement their inherent right of self-government.

1. The Crown's Fiduciary Obligations

Ever since the Supreme Court of Canada first recognized in *Guerin v. The Queen*¹ that the Crown owes legally-enforceable fiduciary obligations to the Aboriginal peoples, the law on this matter has been in

¹ [1984] 2 S.C.R. 335 [*Guerin*]. For background and detailed discussion, see Leonard I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996); James I. Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* (Saskatoon: Purich Publishing, 2005). More generally, see Law Commission of Canada and Association of Iroquois and Allied Indians, eds., *In Whom We Trust: A Forum on Fiduciary Relationships* (Toronto: Irwin Law, 2002).

a state of transition. *Guerin* involved the federal Crown's obligations in the context of a surrender of Indian reserve lands – a situation in which the Crown has a duty to act in the best interests of the First Nation whose lands are involved. But governments also have an obligation to avoid, if possible, courses of action that are not directly in relation to reserve lands or other interests of Aboriginal peoples, but may negatively impact their Aboriginal or treaty rights. Because these rights have been constitutionally protected since the enactment of section 35(1) of the *Constitution Act, 1982*,² even Parliament and the provincial legislatures have to respect the Crown's fiduciary obligations in order to be able to justify any infringement of these rights. This was the unanimous opinion of the Supreme Court in *R. v. Sparrow*,³ a decision that has since been affirmed and elaborated upon in subsequent Supreme Court judgments.⁴

Since *Guerin*, claims for breach of the Crown's fiduciary obligations have been advanced by Aboriginal peoples in a variety of contexts, including negotiation and implementation of land claims agreements and other treaties, accounting for proceeds from sale or lease of reserve lands, expropriation of reserve lands, residential schools, and the conduct of litigation.⁵ In its decision in *Wewaykum Indian Band v. Canada*,⁶ a case involving the setting aside of lands for Indian reserves, the Supreme Court expressed concern over the number

² Section 35(1) provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

³ [1990] 1 S.C.R. 1075 [*Sparrow*].

⁴ See e.g. *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Côté*, [1996] 3 S.C.R. 139 [*Côté*]; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*]; *R. v. Marshall* [No. 2], [1999] 3 S.C.R. 533.

⁵ For some recent examples, see *Stoney Band v. Canada*, 2005 FCA 15, [2005] 2 C.N.L.R. 371, leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 122 (September 15 2005) (no fiduciary duty owed by Crown to adversary in conduct of litigation); *Gladstone v. Canada (A.G.)*, 2005 SCC 21, [2005] 1 S.C.R. 325 (no fiduciary duty owed in context of seizure of herring spawn by fisheries officers); *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3 (breach of Crown's fiduciary obligations in the context of residential schools not established); *Canada (Information Commissioner) v. Canada (Minister of Industry)*, 2006 FC 132, [2006] 2 C.N.L.R. 18 (Crown has a fiduciary duty to release census records needed to validate an Aboriginal land claim); *Ermineskin Indian Band and Nation v. Canada*, 2006 FCA 415, [2007] 2 C.N.L.R. 51, aff'd 2009 SCC 9, (2009), 384 N.R. 203 (Crown's fiduciary obligations regarding oil and gas revenues from reserve lands); *Manitoba Métis Federation Inc. v. Canada (A.G.)*, 2007 MBQB 293, [2008] 2 C.N.L.R. 52 at paras. 617-33 (no fiduciary duty owed to the Métis in relation to the land grant provision in the *Manitoba Act, 1870.*, S.C. 1870, c. 3, reprinted in R.S.C. 1985, App. II, No. 8).

⁶ 2002 SCC 79, [2002] 4 S.C.R. 245 [*Wewaykum*].

and range of fiduciary obligation claims being made in the courts. After explaining that the fiduciary relationship arises from “the degree of economic, social and proprietary control and discretion asserted by the Crown” over Aboriginal peoples and their interests,⁷ Binnie J., delivering the unanimous decision of the Court, observed:

But there are limits. The appellants seemed at times to invoke the “fiduciary duty” as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.⁸

After giving examples of the “flood of ‘fiduciary duty’ claims by Indian bands across a whole spectrum of possible complaints” brought since *Guerin*, Binnie J. said he would not comment on the correctness of these particular cases, but cautioned:

I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.⁹

Recognizing that the Crown, unlike private persons, has public law as well as private law duties, Binnie J. continued:

I do not suggest that the existence of a public law duty necessarily excludes the creation of a fiduciary relationship. The latter, however, depends on identification of a cognizable Indian interest, and the Crown’s undertaking of discretionary control in relation thereto in a way that invokes responsibility “in the nature of a private law duty...”¹⁰

However, the requisite “cognizable Indian interest” need not be a legal interest such as an interest in reserve land.¹¹ Referring to the

⁷ *Ibid.* at 286.

⁸ *Ibid.* at 286-87.

⁹ *Ibid.* at 287-88.

¹⁰ *Ibid.* at 283, quoting from Dickson J.’s judgment in *Guerin*, *supra* note 1 at 385.

¹¹ This is consistent with the law in relation to fiduciary obligations generally, where the interests protected are not limited to proprietary or other strictly legal interests: see e.g. *McInerney v. MacDonald*, [1992] 2 S.C.R. 138 (doctor’s duty to provide patient with copies of medical records); *Norberg v. Wynrib*, [1992] 2 S.C.R.

Supreme Court's decision in *Ross River Dena Council Band v. Canada*,¹² which, like *Wewaykum*, involved the Crown's fiduciary obligations in the context of reserve creation, Binnie J. stated:

All members of the Court accepted in *Ross River* that potential relief by way of fiduciary remedies is not limited to the s. 35 rights (*Sparrow*) or existing reserves (*Guerin*). The fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples.¹³

In *Wewaykum*, Binnie J. held that the Crown did owe fiduciary obligations to the two Indian bands in question relating to the creation of their reserves, even though the reserve lands were not, in his view, within their traditional territory, and even though the Crown owed no treaty obligations to them. He found no reason, however, to interfere with the trial judge's decision that, on the facts, these obligations had been met.

To this point it can be seen that, while the Aboriginal/Crown relationship is generally fiduciary, not all aspects of the relationship give rise to fiduciary obligations. Obligations of this sort arise in relation to cognizable Aboriginal interests (legal or otherwise, including social and economic interests) over which the Crown has assumed discretionary control. The nature and extent of these obligations depend on the circumstances.¹⁴ Additionally, where Aboriginal or treaty rights protected by section 35(1) of the *Constitution Act, 1982* are concerned, Parliament and the provincial legislatures also have to take into account the Crown's fiduciary obligations in the context of infringements of those rights.¹⁵ In its recent decisions in *Haida Nation v. British Columbia*

226 (doctor's duty to not to take advantage of doctor-patient relationship); *M (K) v. M (H)*, [1992] 3 S.C.R. 6 (parent's duty to a child). In *Frame v. Smith*, [1987] 2 S.C.R. 99 at 136, Wilson J. (dissenting in the result) stated that a duty arises in situations where a "fiduciary can unilaterally exercise... power or discretion so as to affect the beneficiary's *legal or practical interests*" [emphasis added]. This statement was approved by other members of the Supreme Court in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574. See also *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 [*Hodgkinson*].

¹² 2002 SCC 54, [2002] 2 S.C.R. 816 [*Ross River*].

¹³ *Wewaykum*, *supra* note 6 at 285.

¹⁴ See *Quebec (A.G.) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at 183.

¹⁵ Note that provincial infringement of Aboriginal and treaty rights is problematic for division-of-powers reasons, as these rights are within the core of federal jurisdiction over "Indians, and Lands reserved for the Indians" (*Constitution Act, 1867* (U.K.), 30 &

(*Minister of Forests*)¹⁶ and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*,¹⁷ the Supreme Court of Canada held that the Crown does not owe fiduciary obligations in the context of Aboriginal claims to rights that have not yet been established, but in those circumstances the honour of the Crown can give rise to a legally-enforceable duty to consult with the Aboriginal people in question and to accommodate their claims in appropriate circumstances.¹⁸

2. *Fiduciary Obligations and Respect for First Nation Autonomy*

Given that the Crown's fiduciary obligations arise in circumstances where the Crown has assumed discretionary control over Aboriginal peoples and their interests, one can expect a certain tension to exist between these obligations and the right of Aboriginal peoples to govern themselves. To the extent that Aboriginal groups exercise authority over their own affairs, the Crown's fiduciary obligations are likely to change, and possibly be reduced. This conclusion is supported not only by general principles of fiduciary law, but also by the leading cases of

31 Vict., c. 3, s. 91(24), reprinted in R.S.C. 1985, App. II, No. 5), and so are protected against provincial laws by the doctrine of interjurisdictional immunity: see *Delgamuukw*, *supra* note 4 at 1118-19 (compare *ibid.* at 1107 and *Côté*, *supra* note 4); *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915; *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, [2008] 1 C.N.L.R. 112 at paras. 1001-49 [*Tsilhqot'in Nation*]. See also Nigel Bankes, "Delgamuukw, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 U.B.C. L. Rev. 317; Kerry Wilkins, "Of Provinces and Section 35 Rights" (1999) 22 Dalhousie L.J. 185; Kerry Wilkins, "Negative Capability: Of Provinces and Lands Reserved for the Indians" (2002) 1 Indigenous L.J. 57; Kent McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask. L. Rev. 431 (also in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) 249 [McNeil, *Emerging Justice?*]; and chapters on interjurisdictional immunity by Dale Gibson, P. Mitch McAdam, Kent McNeil, and Albert C. Peeling in Frederica Wilson and Melanie Mallet, eds., *Métis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Toronto: Irwin Law, 2008).

¹⁶ 2004 SCC 73, [2004] 3 S.C.R. 511 [*Haida Nation*].

¹⁷ 2004 SCC 74, [2004] 3 S.C.R. 550.

¹⁸ See also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 [*Mikisew Cree*], involving the duty to consult in the context of treaty rights. For an excellent discussion, see Maria Morellato, "The Crown's Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights" (2008), online: National Centre for First Nations Governance website <<http://fngovernance.org/research>>.

*Guerin*¹⁹ and *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*.²⁰

In *Guerin*, the Crown was held to have fiduciary obligations in the context of surrender of reserve lands because those lands are inalienable other than by surrender to the Crown. Because the Crown has placed itself between First Nations and potential purchasers of their lands, it exercises discretionary control over disposition of those lands.²¹ This control, Dickson J. said, is the source of the Crown's fiduciary obligations in this context. The Crown also has an obligation, however, to respect the decision-making authority of First Nations. In *Guerin*, the Department of Indian Affairs entered into a lease of reserve lands for a golf course on terms significantly different from those agreed upon by the Musqueam Band. Dickson J. observed:

After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms. When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the Band to explain what had occurred and seek the Band's counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty.²²

In the context of surrender of reserve lands for a particular purpose, the role of the Crown as fiduciary is therefore to consult with the First Nation and obtain the best terms in accordance with that Nation's instructions. In other words, the Crown has an obligation to respect and abide by the decision-making authority of the First Nation.²³

The role of the Crown in this context was elaborated in *Blueberry River*. That case also involved a surrender of reserve lands, which were then transferred to the Director (as defined by the *Veterans' Land Act*),

¹⁹ *Supra* note 1.

²⁰ [1995] 4 S.C.R. 344 [*Blueberry River*].

²¹ *Guerin*, *supra* note 1 at 376, 383-84, where Dickson J. said the Crown undertook this responsibility when it issued the *Royal Proclamation of 1763*, George R., Proclamation, 7 October 1763 (3 Geo. III), reprinted R.S.C. 1985, App. II, No. 1, and continued it in relation to Indian reserve lands by provisions of the *Indian Act*, now R.S.C. 1985, c. I-5.

²² *Guerin*, *ibid.* at 388; see also *ibid.* per Wilson J. at 355.

²³ See William R. McMurtry and Alan Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: *Guerin* in Perspective" [1986] 3 C.N.L.R. 19.

and granted to veterans without reservation of the mineral rights, contrary to the Crown's usual practice. The Supreme Court held that failure to retain the mineral rights and to correct the error when it became known to the Department of Indian Affairs were breaches of the Crown's fiduciary obligations. Regarding the respective authority of First Nations and the Crown in relation to surrenders of reserve lands, McLachlin J. said:

My view is that the *Indian Act's* provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation.²⁴

After referring to a passage from *Guerin* where Dickson J. said the purpose of interposing the Crown between First Nations and potential purchasers was to prevent exploitation, McLachlin J. continued:

It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.²⁵

Gonthier J., delivering the principal judgment in *Blueberry River*, agreed that “the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured.”²⁶ But he attached this qualification:

I should also add that I would be reluctant to give effect to this surrender variation if I thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention.²⁷

It therefore appears from *Guerin* and *Blueberry River* that, where a First Nation and the Crown both have authority in relation to a matter that affects the First Nation's interests, the fiduciary obligations of the Crown relate mainly to the exercise of its own authority. The autonomy

²⁴ *Blueberry River*, *supra* note 20 at 370-71.

²⁵ *Ibid.* at 371.

²⁶ *Ibid.* at 358.

²⁷ *Ibid.* at 362.

of the First Nation must be respected as much as possible. In *Guerin*, it was in fact the Crown's failure to respect the Musqueam Band's decision-making authority that led to breach of the Crown's fiduciary obligations and liability. In *Blueberry River*, the Crown's pre-surrender role was generally limited to intervening to prevent exploitative bargains. Both cases involved the exercise of statutory powers under the *Indian Act* by First Nations and the Crown. The fiduciary principles applied by the Supreme Court do not, however, appear to depend upon this statutory context. As Dickson J. said in *Guerin*, "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."²⁸ One can therefore anticipate that, in the context of governmental authority exercised by Aboriginal peoples outside the *Indian Act*, courts will take an approach to Aboriginal autonomy and Crown obligations not unlike that taken in *Guerin* and *Blueberry River*. The courts will expect the Crown to respect Aboriginal autonomy, and will not impose fiduciary obligations on the Crown that are inconsistent with that autonomy except in situations where Crown intervention is necessary to prevent exploitation. For the Crown to intervene at all, however, it must have the authority to do so. In the context of surrenders of reserve lands, this authority is explicitly provided by the *Indian Act's* requirement that such surrenders be accepted by the Governor in Council to be effective.²⁹ Where surrenders of Aboriginal title lands are concerned, equivalent authority can be found in the *Royal Proclamation of 1763*, and in the inalienability of Aboriginal title other than by surrender to the Crown.³⁰ But in the absence of statutory or prerogative Crown authority in relation to the exercise of governmental authority by Aboriginal peoples in other contexts, the discretionary power giving rise to the Crown's fiduciary obligations probably does not exist.³¹

Let us now consider the exercise of governmental authority by Aboriginal peoples in a context outside the *Indian Act*, namely by virtue of their inherent right of self-government.

²⁸ *Guerin*, *supra* note 1 at 384.

²⁹ *Indian Act*, *supra* note 21, s. 39(1)(c).

³⁰ See Kent McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2002) 47 McGill L.J. 473.

³¹ Legislative authority is another matter, though we have seen that, since the enactment of s. 35(1) of the *Constitution Act, 1982*, Parliament and provincial legislatures have also been subject to fiduciary obligations in the context of infringements of Aboriginal and treaty rights; see text accompanying notes 2-4, *supra*, and cases cited therein.

3. *Fiduciary Obligations and the Inherent Right of Self-Government*

The Royal Commission on Aboriginal Peoples³² and most academic commentators³³ have expressed the view that the Aboriginal peoples have an inherent right of self-government that is constitutionally protected by section 35(1) of the *Constitution Act, 1982*. This right stems from the pre-existing sovereignty of the Aboriginal peoples,³⁴ and continues because it was not taken away by European assertions of sovereignty or any act of extinguishment.³⁵ The Supreme Court, however, has yet to decide that this right exists in any specific instance.³⁶

³² See Canada, Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993); *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996) [RCAP Report], Vol. 2, *Restructuring the Relationship*, Pt. 1, 202-13.

³³ See Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984); Michael Asch, "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity" (1992) 30 *Alta. L. Rev.* 465; Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 *Osgoode Hall L.J.* 681; Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 *Can. Bar Rev.* 261 [Slattery, "Question of Trust"]; Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 *Can. Bar Rev.* 196; John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 *U.B.C. L. Rev.* 1; John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 *Osgoode Hall L.J.* 537; Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Publishing, 1999); Dan Russell, *A People's Dream: Aboriginal Self-Government in Canada* (Vancouver: UBC Press, 2000); Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001); James (Sákéj) Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Carswell, 2007), especially at 490-96; Gordon Christie, "Aboriginal Nationhood and the Inherent Right to Self-Government" (2007), online: National Centre for First Nations Governance website <<http://fngovernance.org/research>>. I have reached the same conclusion in my own work: see especially "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998) 5 *Tulsa J. of Comp. & Int'l L.* 253; and "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 *Queen's L.J.* 95, both reprinted in McNeil, *Emerging Justice?*, *supra* note 15 at 58 and 184.

³⁴ McLachlin C.J.C. acknowledged this sovereignty in *Haida Nation*, *supra* note 16 at para. 20: "Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty."

³⁵ See *Campbell v. British Columbia (A.G.)*, 2000 BCSC 1123, [2000] 4 C.N.L.R. 1; and the works cited *supra* notes 31-32.

³⁶ See Kent McNeil, "Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence" in Hamar Foster, Heather Raven, and Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 129 [McNeil "Judicial Approaches"];

In *R. v. Pamajewon*, the Court “assume[d] without deciding that s. 35(1) includes self-government claims.”³⁷ In *Delgamuukw v. British Columbia*,³⁸ the Court declined to rule on the self-government claim of the Gitksan and Wet’suwet’en nations, but Lamer C.J.C. did say that Aboriginal nations have decision-making authority over their Aboriginal title lands. In *Campbell v. British Columbia (A.G.)*,³⁹ Williamson J. of the British Columbia Supreme Court decided that this authority is governmental in nature, and thus an aspect of the inherent right of self-government.⁴⁰ It is also significant that, in *Delgamuukw*, the Supreme Court sent the self-government claim back to trial, advising the plaintiffs to frame that aspect of their case more narrowly. If no inherent right of self-government exists as a matter of law, the Court could have decided the matter then and there, instead of inviting the plaintiffs to try again with a modified approach in a new trial that would inevitably be long and costly (the case has not, in fact, been retried).⁴¹ I therefore think it is safe to conclude that the Aboriginal peoples do have an inherent right to govern themselves that is protected by section 35(1).

It is my contention that the Crown has no prerogative authority to infringe section 35(1) rights in general, and self-government rights in particular, but needs clear and plain statutory authority to do so.⁴² This means that, in circumstances where an Aboriginal group is exercising an inherent right of self-government, the Crown will have no authority

Kent McNeil, “The Jurisdiction of Inherent Right Aboriginal Governments” (2007), online: National Centre for First Nations Governance website <<http://fngovernance.org/research>>.

³⁷ [1996] 2 S.C.R. 821 at para. 24.

³⁸ *Supra* note 4 at paras. 115, 170-71.

³⁹ *Supra* note 35, especially at paras. 114, 137-38. As the *Campbell* decision was not appealed, it remains the leading case on self-government in Canada.

⁴⁰ For more detailed discussion, see McNeil, “Judicial Approaches,” *supra* note 36 at 136-43.

⁴¹ The *Delgamuukw* trial took 374 days of court time; see *Delgamuukw*, *supra* note 4 at para. 5. See also Kerry Wilkins, “Conclusion: Judicial Aesthetics and Aboriginal Claims” in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing, 2004) 288 at 307, n. 19.

⁴² Respecting Aboriginal land rights, see Kent McNeil, “Aboriginal Title as a Constitutionally Protected Property Right” in McNeil, *Emerging Justice?*, *supra* note 15 at 292. On legislative infringement, see Kent McNeil, “Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government” (2003) 22 Windsor Y.B. Access Just. 329 [McNeil, “Challenging Legislative Infringements”]. It is fundamental to the rule of law that the Crown has no authority apart from statute to infringe legal rights; see *Entick v. Carrington* (1765), 19 St. Tr. 1029; *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

in relation to the exercise of that right in the absence of a statutory provision providing the Crown with such authority. Ever since its enactment in 1876, however, the *Indian Act* has provided the Crown in right of Canada with statutory authority to infringe the inherent Aboriginal right of self-government by imposition of the band council system of government on First Nations.⁴³ Imposition of this system has generally occurred without the consent of First Nations through the exercise of discretionary authority by the Governor in Council.⁴⁴ For example, in 1924 the Governor in Council imposed the band council system on the Six Nations in southern Ontario by an order-in-council made under the authority of the Act.⁴⁵ In *Davey v. Isaac*,⁴⁶ members of the Six Nations representing the hereditary chiefs challenged the validity of this order on the basis that the *Indian Act* did not apply to the Six Nations, as they did not constitute a “band” as defined in the Act. The Supreme Court of Canada held the Six Nations to be a “band” at the relevant time because they fitted at least one of the statutory definitions of that term, namely, “a body of Indians... for whose use and benefit in common, moneys are held by His Majesty.”⁴⁷ The Court therefore found the order-in-council to be valid. However, the issue of whether the Governor in Council had properly exercised its discretionary authority was not argued before the Supreme Court, nor was the issue raised of whether the Crown owed fiduciary obligations in this context.

Davey was decided before *Guerin*, at a time when it was generally thought that the Crown’s obligations towards Aboriginal peoples in the context of exercise of statutory authority were moral and political rather than legal.⁴⁸ *Guerin* altered the legal landscape in this regard. As we have seen, the Supreme Court decided that the Crown does owe legally-

⁴³ *Indian Act, 1876*, S.C. 1876, c. 18, ss. 62, 97; *Indian Advancement Act, 1884*, S.C. 1884, c. 28, s. 3. Equivalent discretionary authority is contained in the current *Indian Act*, *supra* note 20, ss. 4, 74.

⁴⁴ In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 [*Corbiere*] at 228, L’Heureux-Dubé J. observed that infringements of the right of self-government, if they occurred in the context of the band council electoral system, were due, not to the enactment of the *Indian Act* itself, but to the orders-in-council bringing First Nations within the Act’s electoral rules. See discussion in McNeil, “Challenging Legislative Infringements,” *supra* note 42, especially at 334-54.

⁴⁵ At the time, the *Indian Act*, R.S.C. 1906, c. 81, s. 93. This order was replaced by an equivalent order-in-council in 1951 made under the new Act: *Indian Act*, S.C. 1951, c. 29, s. 73. For discussion, see Darlene M. Johnston, “The Quest of the Six Nations Confederacy for Self-Determination” (1986) 44 U.T. Fac. L. Rev. 1.

⁴⁶ [1977] 2 S.C.R. 897 [*Davey*].

⁴⁷ *Indian Act*, S.C. 1951, c. 29, s. 2(1)(a).

⁴⁸ See Reynolds, *supra* note 1 at 9-17.

enforceable fiduciary obligations to Aboriginal peoples when it exercises discretionary authority that affects their interests. The question, then, is how the fiduciary doctrine articulated in *Guerin* applies in the context of imposing the band council system on First Nations.

In considering this question, it is important to be aware of the impact that government policies, especially the band council system, have had on the capacity of First Nations to govern themselves.⁴⁹ The reality is that this system has become the operative form of government in most First Nation communities.⁵⁰ As a result, the ability of many First Nations to exercise their inherent right of self-government has been seriously impaired. They have become dependent on the Canadian government as a result of the band council system and the control exercised by the Department of Indian Affairs. At the same time, however, many First Nations want to move away from that system and re-establish forms of government that are better suited to their cultures and traditions.⁵¹ This is the context in which the application of fiduciary principles needs to be assessed.

⁴⁹ See Frances Abele, "Like an Ill-Fitting Boot: Government, Governance and Management Systems in the Contemporary *Indian Act*" (2007); John Borrows, "Seven Generations, Seven Teachings: Ending the *Indian Act*" (2008); Ken Coates, "The *Indian Act* and the Future of Aboriginal Governance in Canada" (2008); Shin Imai, "The Structure of the *Indian Act*: Accountability in Governance" (2007); John Milloy, "*Indian Act* Colonialism: A Century of Dishonour, 1869-1969" (2008); all titles online: National Centre for First Nations Governance <<http://fngovernance.org/research>>.

⁵⁰ See *RCAP Report, supra* note 32, Vol. 1, *Looking Forward, Looking Back*, 273-319.

⁵¹ See *ibid.*, Vol. 2, *Restructuring the Relationship*, Pt. 1 at 137-39, and the National Centre for First Nations Governance website, online: <<http://fn governance .org>>. These aspirations are supported by emerging international law, which has begun to acknowledge that Indigenous peoples have a right of self-determination, entitling them at least to internal self-government within the nation-states that have engulfed them; see Erica-Irene Daes, "The Right of Indigenous Peoples to 'Self-Determination' in the Contemporary World Order" in Donald Clark and Robert G. Williamson, eds., *Self-Determination: International Perspectives* (New York: St. Martin's Press, 1996) 47; S. James Anaya, *Indigenous Peoples in International Law*, 2nd ed. (New York: Oxford University Press, 2004); Andrew Huff, "Indigenous Land Rights and the New Self-Determination" (2005) 16 *Colo. J. Int'l Env'tl. L. & Pol'y* 295. This right is supported by article 3 of the United Nations *Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly on September 13, 2007, Resolution 61/295, UN Doc A/RES/61/295. Although Canada voted against the Declaration along with Australia, New Zealand, and the United States, 144 countries voted in favour. Canada's opposition therefore does not diminish the value of the Declaration as an international instrument that sets norms and standards for the treatment of Indigenous peoples. See Claire Charters, "Indigenous Peoples and International Law and Policy" in Benjamin J.

I do not think the Canadian government can avoid responsibility for the dependency its own policies have created, especially when this dependency has arisen from the Crown's exercise of discretionary statutory power, specifically the imposition of a governmental system that has interfered with the inherent right of self-government of First Nations. Arguably, imposition of the band council system by the Governor in Council was a breach of the Crown's fiduciary obligations in most, if not all, instances.⁵² But we do not need to go back to the time of imposition to find legal liability, as the breach has been ongoing, and continues today. While assimilationist assumptions may have led the Canadian government to believe in the past that it was doing the right thing,⁵³ First Nation opposition to the 1969 Statement of the Government of Canada on Indian Policy – commonly known as the “White Paper” – put the government on notice that assimilation is not acceptable.⁵⁴ Since at least the 1970s, First Nations have been vocal in their demands for acknowledgement of their inherent right of self-government. This was apparent during the four constitutional conferences convened in the 1980s to clarify and define the Aboriginal rights that had been recognized and affirmed by section 35(1) of the *Constitution Act, 1982*. During those conferences, First Nations were adamant in their assertion that their inherent right of self-government must be constitutionally protected.⁵⁵ As the band council system is inconsistent with this inherent right, it should have been obvious that continued imposition of that system on First Nations that want to re-establish their own forms of government was an infringement of their right of self-government.⁵⁶ Consequently, the Canadian government could no longer rely on its own prejudicial assumptions and claim that

Richardson, Shin Imai, and Kent McNeil, eds., *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing, 2009) 161.

⁵² See McNeil, “Challenging Legislative Infringements,” *supra* note 42 at 339–43.

⁵³ See John L. Tobias, “Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy” in Ian A. L. Getty and Antoine S. Lussier, eds., *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: UBC Press, 1983) 39; and John S. Milloy, “The Early Indian Acts: Developmental Strategy and Constitutional Change” in Getty and Lussier, *ibid.* at 56.

⁵⁴ See Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968–1970* (Toronto: University of Toronto Press, 1981); Alan Pratt, “Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?” (1992) 2 Nat'l J. Const. L. 163 at 169–71.

⁵⁵ See Kent McNeil, “The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments” (1994) 7 Western Leg. Hist. 113 (also in McNeil, *Emerging Justice*, *supra* note 15 at 161).

⁵⁶ In addition to infringing the inherent right of self-government, the band council system fails to meet basic standards of political legitimacy: see the research papers cited *supra* note 49.

it was acting on what it thought were the best interests of First Nations in maintaining the band council system.⁵⁷ So even if *imposition* of that system did not breach the Crown's fiduciary obligations, *continuation* of it in face of First Nation opposition constituted a breach. This conclusion is consistent with *Guerin* and *Blueberry River*, where, as we have seen, the Supreme Court decided that the Crown has an obligation to respect First Nation autonomy and decision-making authority.

Enactment of section 35(1) in 1982 further weakened any defence the Canadian government might have had to allegations of breach of its fiduciary obligations in the context of imposition of the band council system. Prior to that time, Parliament had the power to give the Crown statutory authority to infringe Aboriginal rights, including the right of self-government, without having to justify its actions.⁵⁸ Since the enactment of section 35(1), this has no longer been possible. Any infringement of an existing Aboriginal right, whether by Parliament directly or by the Crown acting on statutory authority, has to be justified in accordance with the test established by the Supreme Court in *Sparrow*.⁵⁹ That test involves proof by the government of a valid legislative objective and of respect for the Crown's fiduciary obligations. Moreover, the justification requirement applies not only to post-section 35(1) infringements, but also to past infringements that have continued after the section came into force. Were this not so, there would be a patchwork of protected and unprotected Aboriginal rights (depending on whether they were infringed post- or pre-section 35(1)) – a result that the Supreme Court explicitly rejected in *Sparrow*.⁶⁰

Given that the inherent right of self-government is a section 35(1) Aboriginal right, any continuing infringement of that right by imposition of the band council system would have to be justified.⁶¹ Proof of justification by the Canadian government would need to relate

⁵⁷ See also *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Supply and Services Canada, 1983), also known as the Penner Report.

⁵⁸ See *R. v. Sikyee*, [1964] S.C.R. 642; *R. v. George*, [1966] S.C.R. 267; *Daniels v. White*, [1968] S.C.R. 517; *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.); *Davey*, *supra* note 46.

⁵⁹ *Supra* note 3. See also the cases cited *supra* note 4.

⁶⁰ *Supra* note 3 at 1091-93.

⁶¹ In *Corbiere*, *supra* note 44 at 225 (*per* McLachlin and Bastarache JJ.) and 281-82 (*per* L'Heureux-Dubé J.), the Supreme Court indicated that, in the absence of justifiable infringement, self-government rights that are protected by s. 35(1) of the *Constitution Act, 1982* would take precedence over the band council provisions in the *Indian Act*. For more detailed discussion, see McNeil, "Challenging Legislative Infringements," *supra* note 42 at 343-54.

to the time when the infringement is challenged by First Nations, not the time when infringement by the band council system first took place.⁶² Regarding the first branch of the *Sparrow* test, what current legislative objective would justify continuing imposition of that system on a First Nation that prefers to exercise its inherent right of self-government? Up to now, the kinds of legislative objectives the Supreme Court has accepted as valid in the context of section 35(1), such as conservation, have involved substantial and compelling interests of Canadian society generally.⁶³ I think the government would be hard pressed to come up with substantial and compelling interests that would justify the continued imposition of the band council system on a First Nation against its wishes, in circumstances where the First Nation had a viable alternative form of government more suited to its culture and traditions.⁶⁴ In this situation, one would expect the democratic values of Canada to support the right of self-government.⁶⁵

But even if the Canadian government were able to prove a substantial and compelling legislative objective for continued infringement of the inherent right of self-government, it would still have to meet the second branch of the *Sparrow* justification test, namely, respect for the Crown's fiduciary obligations. Among other things, this would require the government to prove that its legislative objective had been met with as little infringement of the right of self-government as possible, and that it had consulted with individual First Nations in regard to the infringement of their rights.⁶⁶ It seems doubtful that the government could ever meet the first of these requirements, as the band council system was designed, not to minimally impair, but to replace traditional forms of government. Moreover, the imposition of this system on individual First Nations generally took place without consultation. On the other hand, the requirements of minimal impairment and consultation only became constitutional when section 35(1) came into force in 1982. From then on, the Crown's fiduciary

⁶² In hunting and fishing cases involving section 35(1) that have gone to the Supreme Court, justification based on conservation evidently related to conservation needs at the time the infringement was challenged, not conservation needs at the time the infringing provisions were first imposed; see the cases cited *supra* notes 3-4.

⁶³ See the cases cited *supra* notes 3-4.

⁶⁴ Cultural preservation is a prominent theme in Supreme Court decisions involving s. 35(1) Aboriginal rights; see e.g. *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911; *R. v. Sappier*; *R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686.

⁶⁵ See *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, where democracy was identified as one of the fundamental principles in the Canadian Constitution.

⁶⁶ See *Sparrow*, *supra* note 3 at 1119; *Delgamuukw*, *supra* note 4 at 1112-13.

obligations, in particular the constitutional duty to consult, placed an obligation on the Canadian government to enter into negotiations with First Nations that want to replace the band council system with inherent right Aboriginal governments that are culturally and politically appropriate, and that meet their current aspirations and needs.⁶⁷

As discussed earlier, many First Nations have become dependent on the band council system. So although imposition of that system likely violated the Crown's fiduciary obligations to them, and could be challenged and probably found to be invalid (at least after the enactment of section 35(1)) for the reasons outlined above, many First Nations might not want to pursue that option. A declaration by a Canadian court that imposition of that system was unlawful would not repair the damage already done, and could cause political, economic and social turmoil in the community, if it meant that the band council had no legal authority. Fortunately, this is not the only remedy available to First Nations. Another option would be for them to prove that imposition of the band council system violated the Crown's fiduciary obligations, and ask for restitution, which is one remedy for breach of fiduciary obligations in equity generally.⁶⁸ Restitution can take the form of equitable compensation, the goal of which "is to repair and restore the person wronged to his or her position *status quo ante* the fiduciary's infringement that has caused the loss."⁶⁹ Taking a restitutionary approach in *Guerin*, the Supreme Court ordered the Crown to pay the Musqueam Band compensation of \$10 million, which was the amount they would have received if their reserve lands had been put to the most profitable future use (residential development), instead of being leased on unfavourable terms for a golf course.⁷⁰

Equitable compensation is not a particularly suitable remedy for breach of fiduciary obligations by the Crown's imposition of the band council system. What First Nations have lost as a result of this breach is not money as such, but the capacity to govern themselves on a continuing basis in accordance with their own cultures and traditions.

⁶⁷ See Michael Coyle, "Loyalty and Distinctiveness: A New Approach to the Crown's Fiduciary Duty Toward Aboriginal Peoples" (2003) 40 Alta. L. Rev. 841 especially at 857.

⁶⁸ See Peter Birks, *An Introduction to the Law of Restitution*, rev. ed. (Oxford: Clarendon Press, 1989); Peter D. Maddaugh and John D. McCamus, *The Law of Restitution*, looseleaf ed. (Aurora: Canada Law Book, 2004).

⁶⁹ Jeffrey B. Berryman and Leonard I. Rotman, "Remedies" in Mark R. Gillen and Faye Woodman, eds., *The Law of Trusts: A Contextual Approach*, 2nd ed. (Toronto: Emond Montgomery, 2008) 593 at 597; see also *Hodgkinson*, *supra* note 11 at 73.

⁷⁰ *Guerin*, *supra* note 1; see also *Whitefish Lake Band of Indians v. Canada (A.G.)*, 2007 ONCA 744, [2008] 1 C.N.L.R. 383.

In this context, restitution needs to be fashioned to restore this capacity, so that First Nations can not only choose their own forms of government, but also operate as autonomous and effective political communities, as they did before the imposition of the band council system.⁷¹ The specifics of this remedy would undoubtedly vary somewhat from one First Nation to another, depending on their individual circumstances and needs. At a minimum, however, the remedy would have to include the financial and other resources necessary for First Nations to develop their governing capacity, and to be able to provide services for their communities that are comparable to the level of government services available to other Canadians in the twenty-first century.⁷² Preferably, the details of the remedy would be the product of good-faith negotiations, consistent with the honour of the Crown.⁷³ If, however, the Canadian government did not negotiate in good faith to achieve this goal, First Nations could initiate legal action against the Crown in right of Canada for breach of its fiduciary obligations, and ask a court for appropriate restitution for the damage caused by the government's continuing infringement of the Aboriginal right of self-government and its failure to negotiate acceptable terms to restore their capacity to govern themselves.

4. Conclusion

Fiduciary obligations are not precluded by government-to-government relationships between the Aboriginal peoples and other governments in Canada.⁷⁴ As the Supreme Court has said on numerous occasions, fiduciary obligations typically arise where a person in a fiduciary relationship exercises discretionary power so as to affect the interests of

⁷¹ See Rotman, *supra* note 1 especially at 258-60.

⁷² As Canadian citizens, First Nation persons are entitled to comparable services. Moreover, empirical research in the United States has demonstrated that Indian nations that have effective, culturally-appropriate governments are more successful economically and more self-sufficient; see Stephen Cornell and Joseph P. Kalt, "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today" (1998) 22 *Am. Indian Culture & Research J.* 187; Harvard Project on American Indian Economic Development, *The State of the Native Nations: Conditions under U.S. Policies of Self-Determination* (New York: Oxford University Press, 2007). For further information on the Harvard Project's research and publications, see Harvard Kennedy School website, online: <http://www.hks.harvard.edu/hpaied/res_main.htm>.

⁷³ See *Haida Nation*, *supra* note 16; *Mikisew Cree*, *supra* note 18; *Tsilhqot'in Nation*, *supra* note 15 especially at paras. 1338-82.

⁷⁴ For works by other commentators that support this conclusion, see Rotman, *supra* note 1; McMurtry and Pratt, *supra* note 23; Henderson, *supra* note 33 especially at 495; Slattery, "Question of Trust," *supra* note 33; Pratt, *supra* note 54; Coyle, *supra* note 67.

a beneficiary. The relationship between the Crown and the Aboriginal peoples is fiduciary; it originated from the Crown's unilateral assertion of sovereignty, and hence the Crown's position of power, over the Aboriginal peoples. This position of power will persist for as long as the Crown maintains its sovereignty. In situations where the Crown exercises its power over cognizable Aboriginal interests, the fiduciary relationship gives rise to fiduciary obligations.

The Aboriginal peoples have a right to govern themselves, and this is a cognizable interest. The *Indian Act* conferred discretionary power on the Crown in relation to this interest, power that the Governor in Council exercised by imposing the band council system on First Nations. If this was not a breach of the Crown's fiduciary obligations at the time of the imposition, surely it became so after Aboriginal rights were recognized and affirmed by the *Constitution Act, 1982* and First Nations asserted their inherent right of self-government. Thereafter, the Crown's duty to respect Aboriginal autonomy, as posited by the Supreme Court in *Guerin* and *Blueberry River*, became a constitutional duty. Any unjustifiable infringement of it would result in Crown liability.

It is doubtful whether the Canadian government would be able to justify infringement of the Aboriginal right of self-government in situations where First Nations oppose the infringement and have viable systems of government of their own. As decided in *Guerin*, they are entitled to restitution for breaches of the Crown's fiduciary obligations. In the context of infringement of their right of self-government, restitution can best be achieved through good-faith negotiations, aimed at restoring and maintaining the capacity of First Nations to govern themselves in accordance with their own cultures and traditions. Where negotiations fail to achieve this objective, First Nations can seek restitution in Canadian courts. But whether restitution is pursued through negotiation or litigation, the Crown's fiduciary relationship with the Aboriginal peoples has an ongoing role to play in promoting the inherent right of self-government.