

The Honour of the Crown: Making Sense of Crown Liability Doctrine in  
Crown/Aboriginal Law in Canada

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By

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## ABSTRACT

*Simply put, Crown liability doctrine in Crown/Aboriginal Law in Canada is a mess. Demonstrably, there are fiduciary-based duties, fiduciary-based principles, an over-arching honour of the Crown principle, Crown honour-based duties, and a constitutional Crown/Aboriginal “reconciliation” imperative. How the various pieces are meant to fit together is atypically unclear. In this project, Ronald Dworkin’s rights thesis is invoked as a conceptual tool in an attempt to help bring some order to the disarray.*

*It is argued that the Supreme Court of Canada made a fundamental (Dworkinian) mistake in the manner in which they adopted fiduciary concepts into the core of Crown/Aboriginal Law; that this mistake has led to a dysfunctional doctrine; and that the Supreme Court has implicitly acknowledged their error and are now in the process of incrementally mending their materially flawed doctrine. Crown liability doctrine in Crown/Aboriginal Law in Canada is now centrally organized around the principle that the honour of the Crown must always be upheld in applicable government dealings with Aboriginal peoples. Enforceable Crown honour-based “off-shoot” duties operate to regulate the mischief of Crown dishonour in constitutional contexts. The Supreme Court has now stated that a (non-conventional and fundamentally unresolved) Crown/Aboriginal fiduciary obligation is one such “off-shoot” duty.*

*This emergent “essential legal framework” is meant to protect and facilitate the over-arching project of reconciling the pre-existence of Aboriginal societies with the de facto sovereignty of the Crown, which reconciliation project, it is argued here, is to be fundamentally undertaken by the executive and legislative branches of government working collaboratively with Aboriginal peoples. The judicial branch of government is then largely limited to the more modest task of regulating the mischief of constitutional Crown dishonour.*

*This project ultimately purports to theorize this relatively new Crown honour-based framework, and to conceptualize what residual role there is for fiduciary accountability to play in applicable Crown/Aboriginal contexts moving forward. It is concluded there is likely only a narrow jurisdiction remaining for fiduciary accountability in Crown/Aboriginal contexts, which jurisdiction appears destined to take the form of conventional fiduciary doctrine which, as will be demonstrated, has itself been fundamentally reconfigured in recent years.*

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## I. INTRODUCTION

*“There is a great need for a different kind of legal analysis related to Aboriginal issues which explicitly focuses on Crown obligations. The reciprocal relationship between Aboriginal rights and Crown obligations remains under-theorized and largely unrecognized. This needs to change...”*

- John Borrows<sup>1</sup>

By the time the *Haida Nation v. British Columbia (Minister of Forests)*<sup>2</sup> litigation came before the Supreme Court of Canada, our high Court was evidently of the view that the *sui generis* foundation they had first chosen for their Crown liability doctrine in “Crown/Aboriginal Law”<sup>3</sup> was materially unstable. Previously structured around a foundation of non-conventional fiduciary concepts, Crown/Aboriginal Law in Canada was fundamentally redesigned in *Haida Nation* around the principle that the honour of the Crown must always be upheld in applicable government dealings with Aboriginal peoples.

The Supreme Court stated that this central *legal* principle operates doctrinally to give rise to enforceable “off-shoot” Crown legal obligations. Three primary types of Crown obligation have been explicitly identified to date as flowing from the honour of the crown principle: (a) the duty to consult and, where indicated, accommodate applicable Aboriginal interests prior to acting in a manner adverse to those interests,<sup>4</sup> (b) the duty to bring a demonstrably purposive and diligent

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<sup>1</sup> “Let Obligations Be Done” in Hamar Foster, Jeremy Webber & Heather Raven, eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) at 204-205.

<sup>2</sup> [2004] 3 S.C.R. 511, 245 D.L.R. (4th) 33 [*Haida Nation* cited to S.C.R.].

<sup>3</sup> I use the phrase “Crown/Aboriginal Law” in this project to encapsulate all constitutional-based contexts in which relationships between a Crown entity (or entities) and an Aboriginal group are legally regulated in Canada.

<sup>4</sup> As will be addressed in greater detail in Chapter Two, this duty was recognized through a trilogy of decisions in 2004 and 2005; *Haida Nation*, *supra* note 2; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, [*Taku River* cited to S.C.R.]; and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 259 D.L.R. (4th) 610, [*Mikisew* cited to S.C.R.]. For general commentary on this duty, see Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich, 2009).

approach to the fulfillment of constitutional obligations owed applicable Aboriginal peoples,<sup>5</sup> and (c) the (residual and, as will be shown, fundamentally unresolved) fiduciary duty to act “with reference to the best interests of” a First Nation, Inuit, or Metis community in circumstances where the Crown has assumed a sufficient measure of discretion over cognizable legal interests of that community.<sup>6</sup> The first two developed at common law as direct progeny of the honour of the Crown principle; the third preceded development of the modern honour-based principle but was also vaguely reconceptualised in *Haida Nation*.

In this project, I seek to theorize the doctrinal fundamentals of this emergent legal framework, this new foundation for Crown/Aboriginal Law in Canada. I have chosen to employ Ronald Dworkin’s promontory “rights thesis” as my primary conceptual tool for this analysis (and a working summary of that thesis is set out at the end of this introductory chapter). Dworkin’s account of the operative dynamics of legal doctrine in common law systems is used here to contextualize the key structural components of Canadian Crown/Aboriginal Law. His influential thesis is widely cited and accepted as a comprehensive and helpful model for understanding how law, essentially, works. Notably, the Supreme Court of Canada, for their part, relied on Dworkin’s thesis in several cases in the 1980s where conceptualizing constitutional rights post-1982.<sup>7</sup>

Primarily conceived with individual rights as the focal point, Dworkin has made clear he intended his thesis to explain how both individual and *collective* rights are interpreted and enforced judicially,<sup>8</sup> thus rendering it appropriate for study in the context of Canadian

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<sup>5</sup> This duty was acknowledged and articulated in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, 355 D.L.R. (4th) 577 [*Manitoba Metis Federation* cited to D.L.R.].

<sup>6</sup> As articulated in *Haida Nation*, *supra* note 2 at para 18.

<sup>7</sup> See, e.g., *Attorney General of Quebec v. Grondin* [1983] 2 S.C.R. 364, 4 D.L.R. (4th) 605 [*Grondin* cited to D.L.R.]; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, [1986] S.C.J. No. 70 (Q.L.); and *R. v. Therens*, [1985] 1 S.C.R. 613, [1985] S.C.J. No. 30 (Q.L.). See, also, *Re Residential Tenancies Act*, [1981] 1 SCR 714, 123 D.L.R. (3d) 554 [cited to D.L.R.]; and *R. v. Paré*, [1987] 2 SCR 618, 45 D.L.R. (4th) 546.

<sup>8</sup> The rights thesis is largely constructed against a certain branch of political philosophy (American liberalism), but is intended to be transportable to other constitutional contexts; the application of the thesis simply takes a modified form under the arrangement of a different political theory. As he notes in Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977) at 91, the thesis is also meant to apply to those contexts where the prevailing constitutional theory “counts special groups like racial groups as having some corporate standing within the community [and] therefore speak of group rights.” He often refers to “group rights” synonymously with individual rights as both constituting the same type of individuated political aims the rights thesis promotes.

Crown/Aboriginal Law (*i.e.* where Aboriginal and treaty rights are generally conceived as being held collectively rather than by individual persons<sup>9</sup>).

I do, however, adopt Dworkin's rights thesis here mindful of some potential limitations regarding its use in this unique area of law. For instance, in conceptualizing the nature of law and the relationship between law and citizens generally, Dworkin's theory explicitly assumes that citizens in applicable liberal democracies (*i.e.* such as Canada) have effectively "consented" to being governed by the laws of their respective countries.<sup>10</sup> However, in the context of Aboriginal-related issues in Canada, there are real and live questions about (a) the legitimacy of Crown sovereignty over Aboriginal peoples,<sup>11</sup> and (b) the extent to which it may be said that Aboriginal peoples have effectively *consented* to existing power structures.<sup>12</sup> And, of course, a (very much incomplete) constitutional *reconciliation* process inches along.<sup>13</sup> Such general limitation, however, does not pose a problem regarding the use of Dworkin's thesis in the current project. Such fundamental constitutional questions are not taken up; rather, Dworkin's thesis is used here only for discreet doctrinal analysis (*i.e.* conceptualizing the doctrinal frameworks that the Supreme Court of Canada is choosing to develop and employ in this area to regulate Crown

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<sup>9</sup> Cf *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, 357 D.L.R. (4th) 236 at para 35: "despite the critical importance of the collective aspect of Aboriginal and treaty rights, rights may sometimes be assigned to or exercised by individual members of Aboriginal communities, and entitlements may sometimes be created in their favour. In a broad sense, it could be said that these rights might belong to them or that they have an individual aspect regardless of their collective nature." On collective rights, see, generally, Dwight G. Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Oxford: Hart Publishing, 2011).

<sup>10</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 104-105.

<sup>11</sup> The Supreme Court has acknowledged as much by explicitly conceding that the nature of Crown sovereignty over Aboriginal lands and peoples in Canada is merely "*de facto*" in nature: *Haida Nation*, *supra* note 2 at para 32.

<sup>12</sup> Walters has powerfully argued that Crown/Aboriginal Law in Canada may not be imbedded with the reciprocal relationship of respect between the Canadian state and Aboriginal peoples required for that system to be more than a mere exercise of force or power, indeed for it to be meaningfully "legal" in nature. See Mark D. Walters, "The Morality of Crown/Aboriginal Law" (2006) 31 *Queen's L.J.* 470. See, also, Jeremy Webber and Colin M. Macleod eds., *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2011).

<sup>13</sup> The Supreme Court often refers to an over-arching constitutional reconciliation project, specifically noting that the main goal of this area of law is the ultimate reconciliation of "the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 [*Delgamuukw* cited to D.L.R.] at para 186. For commentary on the nature of this reconciliation project, and the various, differing ways in which the Supreme Court has described it, see, *e.g.*, Dwight G. Newman, "Reconciliation: Legal Conception(s) and Faces of Justice" in John D. Whyte ed., *Moving Toward Justice: Legal Traditions and Aboriginal Justice*, (Saskatoon: Purich, 2008); Mark D. Walters, "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada" in Will Kymlicka and Bashir Bashir eds., *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008); and Sonia Lawrence and Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. B. Rev.* 252.

misconduct in applicable Aboriginal contexts, separate and apart from any question regarding its authority to do so).

Centrally, I advance the following contentions in this project:

- 1) The modern honour of the Crown “core precept” – effectively germinated in *Haida Nation* – is, in jurisprudential form, a Dworkinian “abstract principle” meaning that it exerts “gravitational force” in adjudicative analyses (*i.e.* by grounding or helping to ground applicable *obligations* and *rights*) but does not by itself dictate specific results, which is to say that, practically, it is not a cause of action *per se*;
- 2) Specific Crown obligations flowing from the honour of the Crown principle (*e.g.* the *Haida Nation* “duty to consult” and the *Manitoba Metis Federation* “duty to purposively and diligently discharge constitutional obligations”) are Dworkinian “concrete obligations” which operate, in *rule* form, to specify essential facts which, if established, mandate liability (*i.e.* in Crown dishonour), and which is to say they *are*, practically, causes of action *per se*;
- 3) On the basis of *early returns*,<sup>14</sup> it appears that *Haida Nation* may well be Crown/Aboriginal Law’s equivalent to *Donoghue v. Stevenson*<sup>15</sup> (which, of course, was the seminal Tort Law case). Both decisions, each exceedingly Dworkinian in nature, articulate an abstract principle intended to centrally organize an entire area of common law doctrine and to act as a fount of supporting concrete obligations; (a) in Tort Law, specific legal frameworks have gradually developed around concrete legal obligations (*i.e.* torts) that function to regulate against violations of the *neighbour principle* (the principle that we are to avoid injuring our neighbour), and (b) now in Crown/Aboriginal Law, specific legal frameworks are developing around concrete legal obligations (*i.e.* actionable Crown honour-based duties) that function to regulate against violations of the principle that the Crown is to avoid dishonouring Aboriginal and treaty rights holders;
- 4) This new “essential legal framework”<sup>16</sup> for Crown/Aboriginal Law is set against a backdrop of, among other things, the central constitutional objective of *reconciling* pre-

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<sup>14</sup> See, *e.g.*, *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, 326 D.L.R. (4th) 385 [*Little Salmon/Carmacks* cited to S.C.R.] and, principally, *Manitoba Metis Federation*, *supra* note 5.

<sup>15</sup> *Donoghue v. Stevenson*, [1932] All E.R. Rep 1, [1932] A.C. 562.

<sup>16</sup> *Little Salmon/Carmacks*, *supra* note 14 at para 69

existing Aboriginal societies with the assertion of Crown sovereignty. This oft-noted “reconciliation” mandate<sup>17</sup> takes the Dworkinian form of a (constitutional) “policy” objective (*i.e.* the central, implicit mandate in section 35 of the *Constitution Act, 1982*<sup>18</sup>). According to Dworkin’s account, policy objectives are (a) typically inapplicable to a judge’s primary task (*i.e.* enforcing *rights* in specific factual circumstances) and (b) liemore within the jurisdiction of legislators, whose primary task is to work in support of broader community goals and community welfare.

- 5) The Crown honour-based framework has eclipsed the doctrinal space previously occupied by the Supreme Court of Canada’s non-conventional fiduciary-based framework (*i.e.* its initial, now effectively discarded, central doctrinal construct), leaving only a vague, residual (off-shoot) specific fiduciary obligation, the doctrinal function and content of which are unclear;
- 6) The Supreme Court of Canada’s *sui generis* Crown/Aboriginal fiduciary doctrine took the form of a classic Dworkinian *mistake* and, in recent decisions, the Court is undertaking a delicate project of mending a materially flawed doctrine, and even reorganizing and reaffirming previous precedent under a new legal principle (*i.e.* that the honour of the Crown must always be upheld); and
- 7) Finally, in *Manitoba Metis Federation*, the significant, residual defects of the Supreme Court of Canada’s non-conventional Crown/Aboriginal fiduciary doctrine are brought into particularly stark relief. The Supreme Court has effectively cornered itself, and the following conclusions about a future, residual role for fiduciary accountability in Aboriginal contexts in Canada appear irresistible:
  - a. Despite the Supreme Court’s suggestion to the contrary in both *Haida Nation* and *Manitoba Metis Federation*, there is no meaningful, residual doctrinal role in Crown/Aboriginal Law for the Supreme Court’s (still non-conventional) off-shoot fiduciary duty, as conceived; and
  - b. There is only residual doctrinal space – regarding Crown fiduciary accountability in Crown/Aboriginal contexts – for the *independent* operation of *conventional*

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<sup>17</sup> See *supra* note 13.

<sup>18</sup> *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982 c 11.

fiduciary doctrine (which is to say that Crown honour accountability now, effectively, *covers the field* in Crown/Aboriginal Law).

In order to place my analysis into its proper historical and cross-cultural (constitutional) context, some initial background commentary is necessary. First, the Supreme Court of Canada has long-acknowledged a history of constitutional injustice regarding the treatment of Aboriginal peoples generally since European settlers first arrived in what is now Canada. An apt example is a passage from the Supreme Court's decision in *R. v. Sparrow*<sup>19</sup> where, using the language of "honour," it was stated that "there can be no doubt that over the years the rights of the Indians were often *honoured* in the breach" and that "we cannot recount with much pride the treatment accorded to the native people of this country."<sup>20</sup>

Prior to the Supreme Court of Canada's decision in 1973 in *Calder et al. v. Attorney-General of British Columbia*,<sup>21</sup> Aboriginal groups in Canada were not widely recognized as having independent, enforceable legal rights. The Crown in Canada, likewise, was generally not seen as owing enforceable legal *obligations* to Aboriginal groups and, therefore, there was no constitutional Crown liability doctrine to speak of in the Aboriginal context.<sup>22</sup> In *Calder*, however, the Supreme Court stated, in an explicit pronouncement of first instance, that Aboriginal peoples do possess independent legal rights.<sup>23</sup> That key finding set in motion events that ultimately led to the enactment of section 35 of our *Constitution Act, 1982* which "recognized and affirmed" the existing Aboriginal and treaty rights held by First Nation, Inuit, and Metis collectives in Canada.

As it is a doctrinal axiom that rights have corresponding obligations,<sup>24</sup> section 35 may be described as having enshrined constitutional Crown *obligations* owed to Aboriginal groups in

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<sup>19</sup> [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [*Sparrow* cited to S.C.R.].

<sup>20</sup> *Ibid* at 1103.

<sup>21</sup> [1973] S.C.R. 313, [1973] 4 W.W.R. 1.

<sup>22</sup> See, e.g., *St. Catharines Milling and Lumber Co. v. The Queen* (1887), [1887] S.C.J. No. 3 (Q.L.), [1887] 13 S.C.R. 577 at 649 [*St. Catharines Milling* cited to S.C.R.] (the Crown's legal obligation towards Aboriginal lands and peoples is described as "a sacred legal obligation, in the execution of which the state must be free from judicial control."); and *St. Ann's Island Shooting and Fishing Club Ltd. V. The King*, [1950] 2 D.L.R. 225, [1950] S.C.R. 211 at 219 (Aboriginal peoples are defined here as "wards of the State, whose care and welfare are a political trust [*i.e.* non-enforceable] of the highest obligation.").

<sup>23</sup> *Calder*, *supra* note 21.

<sup>24</sup> See, e.g., Joseph Raz, *Morality of Freedom* (Chicago: Clarendon Press, 1988) at 167.

Canada just as much as it enshrined Aboriginal and treaty *rights*. The attendant common-law Crown liability doctrine, however, was slow to develop after the repatriation of the constitution in 1982. A major reason for this was that there was substantial uncertainty as to the nature of the *rights* that were “recognized and affirmed” by section 35. The mechanism that was to provide the critical constitutional *fleshing out* of the nature of section 35 rights ultimately failed. That is, the oft-forgotten section 37 of the *Constitution Act, 1982* called for a series of constitutional conferences, to take place between 1982 and 1987, wherein section 35 rights were to be fundamentally defined (it was easy enough to understand what was meant by “treaty rights” cited in section 35, but “Aboriginal rights” was a new term and, essentially, a new and undefined concept). Unfortunately, the various parties involved in those conferences could not find common ground, the process fatally broke down, and no further constitutional guidance or clarification was presented.<sup>25</sup> As such, it fell to the judicial branch of government, most often the Supreme Court of Canada, to gradually develop legal frameworks for the definition and enforcement of Aboriginal and treaty rights, which they have done (and continue to do) through a series of key decisions.<sup>26</sup>

That all said, as the doctrinal nature of section 35-guaranteed “Aboriginal and treaty rights” has been gradually developed by the courts since 1982, the underlying doctrinal nature of corresponding Crown *obligations*, likewise, has gradually taken some form. This latter project began with the Supreme Court’s decision in *R. v. Guerin*<sup>27</sup> where a non-conventional form of Crown fiduciary accountability was first described in an Aboriginal context. Later decisions, prominently *Sparrow* and *Delgamuukw*, further developed a “general guiding principle” for

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<sup>25</sup> For commentary on aspects of this important period in Canadian history, see generally: James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: University of Saskatchewan Native Law Centre, 2006) [“*First Nations Jurisprudence*”] at 25-44. See, also, *Ochapowace Ski Resort Inc.*, *supra* note 25 at para 64 [*Ochapowace Ski Resort* cited to C.N.L.R.]:

The conferences ended in failure. The provinces were not prepared to endorse a broad undefined right as the First Ministers wanted a definition of self government and other aboriginal rights. Their view was that the rights box is presently empty, and enquired what was to be put into it? This became known as the “empty box” theory. The Indian representatives pushed for a “full box” theory, which is that the self government box already contains all necessary rights and only needs recognition.

For commentary on this “box” metaphor, see *infra* note 161.

<sup>26</sup> Including: *Simon v. The Queen*, [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390 [*Simon*]; *R. v. Sioui*, [1990] 1 S.C.R., 70 D.L.R. (4th) 427 1025; *Sparrow*, *supra* note 19; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 [*Van der Peet* cited to S.C.R.]; *Delgamuukw*, *supra* note 13; *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220, 255 D.L.R. (4th) 1; *R. v. Sappier*; *R. v. Gray*, [2006] 2 S.C.R. 686, 274 D.L.R. (4th) 75.

<sup>27</sup> *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [*Guerin* cited to D.L.R.].

Crown/Aboriginal Law mandating that the Crown was always to act in “a fiduciary capacity” in their relationships with Aboriginal and treaty-rights holders<sup>28</sup> (which, for the Crown in this context, came to effectively mean acting fairly and honourably in their dealings with Aboriginal peoples).<sup>29</sup> Specific fiduciary duties owed by the Crown to Aboriginal peoples were defined in context, and understood as flowing from this general guiding principle.

The doctrinal fundamentals of this non-conventional fiduciary-based construct (*i.e.* developed as the core construct for Crown/Aboriginal Law in Canada) slowly began to mutate into various, conflicting forms through a series of doctrinally inconsistent Supreme Court pronouncements in the 1990s and early 2000s.<sup>30</sup> Moreover, as conventional fiduciary doctrine operates predominantly (if not exclusively) to strictly prohibit conflicts of interest, its application in Crown/Aboriginal contexts had to be stretched well beyond its conventional boundaries (*i.e.* since the Crown would so often find itself in inherent conflicts of interest; its essential role typically involving the balancing and reconciling of interests).<sup>31</sup> It was often acknowledged (explicitly or implicitly) that this non-conventional form of Crown/Aboriginal fiduciary accountability would need to be able to “tolerate conflicts of interest”<sup>32</sup> (*i.e.* tolerate the very mischief that a conventional fiduciary obligation functions to prohibit).

In its decision in *Wewaykum Indian Band v. Canada*,<sup>33</sup> the Supreme Court effectively commenced a project of, as noted above, mending a materially-flawed doctrine. In *Wewaykum*, Justice Binnie was at pains to elucidate the doctrinal consequences of the fact that the Crown

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<sup>28</sup> *Sparrow*, *supra* note 19 at 1108: “In our opinion, *Guerin*, together with *R. v. Taylor and Williams* ... ground a general guiding principle for s.35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples.”

<sup>29</sup> See, *e.g.*, *Delgamuukw*, *supra* note 13 at para 190 per La Forest J. in the minority decision he wrote (“the Crown is subject to a fiduciary obligation to treat aboriginal peoples fairly”) and *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33 [*Mitchell* cited to S.C.R.] at para 9 (“an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as ‘fiduciary’”).

<sup>30</sup> See *infra* notes 395-406 and surrounding text.

<sup>31</sup> For instance, in a recent Supreme Court of Canada case where a group of elder care-home residents unsuccessfully claimed that the Alberta Crown was in breach of fiduciary accountability owed to them to act in their best interests, Chief Justice McLachlin noted as follows: “Compelling a fiduciary to put the interests of the beneficiary before their own is ... essential to the [fiduciary] relationship. Imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole...”: *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 at para 44 [*Elder Advocates* cited to S.C.R.].

<sup>32</sup> *Squamish Indian Band v. Canada* (2000), 2001 FCT 480, [2000] F.C.J. No. 1568 (Q.L.) (F.C.T.D.) at para 473 [*Squamish Indian Band*].

<sup>33</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 220 D.L.R. (4th) 1 [*Wewaykum* cited to S.C.R.].

“can be no ordinary fiduciary” in light of the “many hats” it typically wears.<sup>34</sup> He stressed that not all obligations owed in a fiduciary relationship are themselves fiduciary in nature.<sup>35</sup> However, in the absence of a *replacement principle* on which to found concrete obligations in Aboriginal contexts, he continued to define the nature of Crown/Aboriginal fiduciary accountability in that case in a distinctly non-conventional manner, indeed in effectively the same generalised manner it had been applied in previous decisions.<sup>36</sup>

In 2004, and prior to the release of the Supreme Court’s decision in *Haida Nation*, Professor Robert Flannigan (a leading commentator on conventional fiduciary theory) delivered a searing critique of the Supreme Court’s (mis) use of fiduciary doctrine in the Aboriginal context, arguing it was demonstrably, fundamentally based on a “conceptual error,” that the Court’s Crown/Aboriginal doctrine essentially involved “a fiduciary analysis in name only,” and that this non-conventional approach had the (presumably unintended) consequences of “contaminating” the conventional doctrine.<sup>37</sup>

In *Haida Nation*, Chief Justice McLachlin installed a replacement principle to constitute the core of Crown/Aboriginal Law – the legal principle that the honour of the Crown must always be upheld in dealings with the holders of Aboriginal and treaty rights – and she directed that applicable concrete Crown obligations are to be sourced directly to that principle, and not to an over-arching, non-conventional fiduciary principle. In so doing, she effectively discarded (or, to use the applicable Dworkinian term, “disqualified”) the non-conventional fiduciary-based principle that had come before it, though this fact was not acknowledged in her decision (nor has it been subsequently<sup>38</sup>).

Ultimately, then, the current project aims to bring badly-needed conceptual clarity to this important area of constitutional law, the fundamentals of which seem to prove perpetually “elusive” to lower court judges.<sup>39</sup> Whether the installation of the honour of the Crown principle

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<sup>34</sup> *Ibid* at para 96

<sup>35</sup> *Ibid* at paras 83 and 92.

<sup>36</sup> *Ibid* at paras 98-104.

<sup>37</sup> Robert Flannigan, “The Boundaries of Fiduciary Accountability” (2004) 83 Can. B. Rev. 35 at 63, 65, 67.

<sup>38</sup> See, however, Justice Deschamps’ note in her minority decision in *Little Salmon/Carmacks*, *supra* note 14 at para 105, that the honour of the Crown principle has “over time” been “substituted” in for the Crown’s fiduciary duty.

<sup>39</sup> For instance, in a post-*Haida Nation* decision, *Kwakiutl Nation v. Canada (Attorney General)* (2006), 152 A.C.W.S. (3d) 552 at para 26, 2006 BCSC 1368, Satanove J. of the British Columbia Supreme Court states as

and the jettisoning of non-conventional Crown/Aboriginal fiduciary doctrine will effectively advance or retard the over-arching Crown/Aboriginal “reconciliation” project is not the focus.<sup>40</sup> Rather, the central objective here is to conceptually unpack and clarify unclear (and demonstrably dysfunctional) doctrine. I would stress, however, that the honour of the Crown as an effectively original legal principle brings with it neither the doctrinal baggage nor restrictions that came with the imported fiduciary concepts<sup>41</sup> and, at least on that basis, there is reason for optimism.

It should also be noted that there is some potential disadvantage, if one takes the viewpoint of the class of potential Aboriginal litigants, in releasing *sui generis* fiduciary concepts from the core of Crown/Aboriginal Law. That is, remedies for breaches of fiduciary obligations are the most powerful known to law.<sup>42</sup> Without getting granular (as to do so would be beyond the scope of this project, which is essentially confined to applicable *liability* dynamics in Crown/Aboriginal Law), remedial precepts that attend a fiduciary breach, based in equity, are both restitutionary and punitive. A beneficiary need not prove damages (*i.e.* the applicable remedy can be gain-based as opposed to damages-based) and windfalls to a beneficiary are permissible because furtherance of the “overriding deterrence objective” takes priority.<sup>43</sup>

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follows: “It must be recognized that just as aboriginal rights are *sui generis*, aboriginal rights litigation is also unique. It involves hundreds of years of history and sometimes unconventional techniques of fact finding. It involves lofty, often elusive concepts of law such as the fiduciary duty and honour of the Crown.” (emphasis added). See, also, *Callihoo v Canada (Minister of Indian Affairs and Northern Development)*, 2006 ABQB 1, [2006] 6 W.W.R. 660 at para 77 where Hillier J. effectively laments and resists the honour of the Crown-based legal framework: “the Plaintiffs’ use of terminology such as “honour of the Crown” neither creates nor enhances an arguable case on this point. That doctrine, if it is one, cannot modify or reverse the rights freely exercised by — as distinct from denied to — band members under the *Indian Act*.”

<sup>40</sup> Note, however, that on this question, one leading commentator expressed initial skepticism; having remarked shortly after the *Haida Nation* decision was released that the honour of the Crown principle will constitute a less than “full surrogate” for a plenary fiduciary principle. See Gordon Christie, “Developing Case Law: The Future of Consultation and Accommodation” (2006) 39 U.B.C. L. Rev. 139 at (Q.L.) para 61. Christie appears to interpret *Haida Nation* as potentially mandating a ‘softening’ of the standard of Crown conduct mandated by the honour of the Crown principle as compared to that ostensibly flowing from a fiduciary principle.

<sup>41</sup> This fact was recently acknowledged by Deschamps J. in her minority opinion in *Little Salmon/Carmacks* at para 105: “This Court has, over time, substituted the principle of the honour of the Crown for a concept — the fiduciary duty — that, in addition to being limited to certain types of relations that did not always concern the constitutional rights of Aboriginal peoples, had paternalistic overtones.”

<sup>42</sup> See *infra* note 280 and surrounding text.

<sup>43</sup> *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, 167 D.L.R. (4th) 577 at para 30 [*Cadbury* cited to S.C.R.] citing *M. (K.) v M. (H.)*, [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289 *per* McLachlin J (as she then was).

To the extent it is appropriate to utilize these types of remedial dynamics in Crown/Aboriginal Law (and I would certainly posit that in many different scenarios it is<sup>44</sup>), such a construct could surely be developed, in *sui generis* fashion, without maintaining non-conventional fiduciary-based liability concepts within the core of Crown/Aboriginal Law. And in any event, it is of course doctrinally inappropriate to pervert doctrinal liability dynamics for the sole purpose of taking advantage of more generous remedial dynamics.

The current project is structured around two chapters. In Chapter Two, I undertake a substantial theoretical examination of the modern honour of the Crown principle (*i.e.* the prevailing foundation of Crown/Aboriginal Law in Canada). In Chapter Three, and against the backdrop of the conceptual parameters for Crown honour accountability first set out in Chapter Two, I investigate towards conceptual parameters for the *residual* role of fiduciary concepts in the regulation of applicable Crown/Aboriginal relationships.

In Chapter Two, more specifically, I begin by taking an inventory of the various (limited) instances where the honour of the Crown concept was utilized by judges prior to *Haida Nation*. As is demonstrated, it was primarily used historically as a principle of interpretation in both statute and treaty contexts; in both types of scenarios, it was employed to, essentially, protect against interpretations that would ignore the Crown.

In the second part of Chapter Two, I examine the *Haida Nation* litigation in significant detail in light of its transformative significance for Crown liability doctrine in Crown/Aboriginal Law. As will be shown, Chief Justice McLachlin's judgment in that case is exceedingly Dworkinian in nature; she searches the Crown/Aboriginal "novel" to date, locates a moral principle evidently underlying this complex area of constitutional law (*i.e.* the honour of the Crown principle which mandates, in accordance with her interpretation, that the Crown is legally bound to honourable dealings generally with Aboriginal and treaty rights-holders) and ultimately interprets that moral principle to be legal in nature, and to effectively be the fount of positive, enforceable Crown obligations in this context.

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<sup>44</sup> In *Guerin*, *supra* note 27 at 356-363, for instance, the Supreme Court was clearly of the view that the facts of the case compelled an equity-based remedy, with more flexibility than would have been possible without recourse to equitable or *sui generis* remedial dynamics.

I then go on to place the following, various components of the core legal framework articulated in *Haida Nation* into applicable Dworkinian context (some of which are noted above, where I set out the central contentions of this project):

- The *reconciliation* mandate is the central policy objective of section 35 of the *Constitution Act, 1982*, to be effected largely by the legislative branch of government;
- The *honour of the Crown* concept is the central, organizing “abstract principle” for Crown/Aboriginal Law which mandates against applicable Crown dishonour, and which (a) is to be enforced largely by the judicial branch of government, and (b) serves to protect and facilitate the (legislative) reconciliation mandate;
- Concrete Crown *obligations* are sourced from, and operate in support of, the honour of the Crown principle; and
- Enforceable *rights* to judicial relief flow to applicable Aboriginal communities when one of these Crown *obligations* is breached (which rights are of a different doctrinal varietal from the applicable, underlying section 35 rights<sup>45</sup>).

In the final part of Chapter Two, I provide an overview of the various ways in which the Supreme Court has further developed the doctrinal fundamentals of its new, Crown honour-based “essential legal framework”<sup>46</sup> *post Haida Nation*. The main theme in the subsequent jurisprudence is confirmation of Crown honour accountability as now constituting the doctrinal “core” or “anchor” of Crown/Aboriginal Law, having been effectively “substituted” in for the (non-conventional) Crown fiduciary accountability-based framework that came before it. The most significant and substantial commentary by the Supreme Court, *post Haida Nation*,

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<sup>45</sup> *Little Salmon/Carmacks*, *supra* note 14 at para 44:

The respondents’ submission, if I may put it broadly, is that because the duty to consult is “constitutional”, therefore there must be a reciprocal constitutional right of the First Nation to be consulted, and constitutional rights of Aboriginal peoples are not subject to abrogation or derogation except as can be justified under the high test set out in *Sparrow* ... The trouble with this argument is that the content of the duty to consult varies with the circumstances. In relation to what *Haida Nation* called a “spectrum” of consultation (para 43), it cannot be said that consultation at the lower end of the spectrum instead of at the higher end must be justified under the *Sparrow* doctrine. The minimal content of the consultation imposed in *Mikisew Cree* (para 64), for example, did not have to be “justified” as a limitation on what would otherwise be a right to “deep” consultation. The circumstances in *Mikisew Cree* never gave rise to anything more than minimal consultation. The concept of the duty to consult is a valuable adjunct to the honour of the Crown, but it plays a supporting role, and should not be viewed independently from its purpose.

*Cf Mikisew*, *supra* note 4 at para 57: “Treaty 8 ... gives rise to Mikisew procedural rights (*e.g.* consultation) as well as substantive rights (*e.g.* hunting, fishing and trapping rights).”

<sup>46</sup> *Little Salmon/Carmacks*, *supra* note 14 at para 69.

regarding the fundamentals of this new framework comes in their recent *Manitoba Metis Federation* decision. I will examine that decision in some detail, specifically conceptualizing the new Crown honour-based duty that the Supreme Court recognized and enforced therein (*i.e.* the Crown duty to bring a demonstrably purposive and diligent approach to the discharge of applicable constitutional obligations owed to Aboriginal peoples).

In Chapter Three, and in my attempt to conceptualize the doctrinal role that fiduciary doctrine has played in Crown/Aboriginal Law in Canada and the role we may expect it to play moving forward, I start with a detailed examination of conventional fiduciary doctrine, undertaken for the specific purpose of ultimately conceptualizing both (a) where the Supreme Court went wrong in its attempts to utilize fiduciary concepts as part of the core of Crown/Aboriginal Law, and (b) the residual doctrinal space for the regulation of fiduciary accountability in Crown/Aboriginal contexts post *Haida Nation*.<sup>47</sup>

Put plainly, the Supreme Court of Canada's non-conventional Crown/Aboriginal fiduciary doctrine developed in a conceptual vacuum. Inexplicably, no judicial authority was cited in either of the two seminal decisions (*i.e.* *Guerin* and *Sparrow*) in support of importing fiduciary concepts into the doctrinal core of Crown/Aboriginal Law.<sup>48</sup> Likewise, academic commentators in this area have largely avoided recourse to conventional fiduciary theory in their attempts to elucidate Crown/Aboriginal fiduciary doctrine,<sup>49</sup> even implicitly cautioning against such

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<sup>47</sup> The work of Professor Leonard Ian Rotman is particularly notable here, as he is seemingly the one theorist who has examined in substantial detail the conceptual nature of conventional fiduciary theory while commenting on the Supreme Court's novel approach to fiduciary doctrine in Crown/Aboriginal Law. See, *e.g.*, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996). Rotman's work in this area is examined in detail in Chapter Three.

<sup>48</sup> Rather, they cited only one academic article, specifically: Ernest J. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1. It has been argued elsewhere that Dickson J. actually misinterpreted Weinrib's article in *Guerin*: see Flannigan, "The Boundaries of Fiduciary Accountability," *supra* note 37 at 63. In *Guerin*, Dickson J. did cite two lower court decisions in support one discreet principle related to fiduciary doctrine, but none in support of its main doctrinal fundamentals as he interpreted them therein. See, *Guerin*, *supra* note 27 at 384-385.

<sup>49</sup> See, *e.g.*, the following instances of commentary from Crown/Aboriginal Law specialists on the nature of the Supreme Court's Crown/Aboriginal fiduciary doctrine: Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*, *supra* note 47; Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can B Rev 261; the various chapters in *In Whom We Trust: A Forum on Fiduciary Relationships* (Toronto: Irwin Law, 2002), particularly at 81-113 and 269-293; R.H. Bartlett, "The Fiduciary Obligation of the Crown to the Indians" (1989), 53 Sask. L. Rev. 301; W.R. McMurtry and A. Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution; *Guerin* in Perspective, (1986) 3 C.N.L.R. 19; James Reynolds, "The Spectre of Spectra: The Evolution of the Crown's Fiduciary Obligation to Aboriginal Peoples Since *Delgamuukw*" in Maria Morellato, QC, ed., *Crown/Aboriginal Law Since Delgamuukw* (Aurora: Canada Law Book, 2009); Kent McNeil, "The Crown's Fiduciary Obligations in the Era of Aboriginal Self-Government" (2009) 88 Can

endeavour. To this end, I note Professor Brian Slattery's caution that recourse to general fiduciary law principles is "not always helpful" in this context<sup>50</sup> and Professor James [Sakej] Youngblood Henderson's similar caution that Crown/Aboriginal fiduciary doctrine "should not be confused with common law doctrines of fiduciary duties."<sup>51</sup>

There are at least two possible reasons for the fact that both the Supreme Court and applicable commentators have avoided recourse to the conventional doctrinal fundamentals of fiduciary law when addressing Crown/Aboriginal fiduciary accountability. The first is that the fundamentals of fiduciary law were unresolved when the Supreme Court sought to import them into Crown/Aboriginal Law. This argument has been made elsewhere.<sup>52</sup> Certainly, there were some conflicting pronouncements at the highest levels in fiduciary law in Canada pre-*Guerin*, as will be demonstrated in Chapter Three. The second and arguably more significant reason is that our "constitutional morality" (a Dworkinian term elaborated upon below<sup>53</sup>) post-1982 was such that there was a generally-observed need for the development of a legal framework for Crown liability doctrine in Crown/Aboriginal Law that would strictly and bluntly restrain the Crown's discretionary powers in instances where Aboriginal or treaty rights infringements were threatened. Ostensibly, aspects of fiduciary theory fit the bill.

Regarding Slattery and Henderson's cautions against conventional fiduciary doctrinal analyses in the Crown/Aboriginal context (*i.e.* something I have chosen to do here), my contention is that they were likely predicated on what is now arguably an anachronistic concern. That is, prior to *Haida Nation*, Crown liability doctrine was lacking an explicit legal principle to ground the

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Bar Rev 1; and J. Timothy S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (Markham: LexisNexis Canada, 2008). Where these commentators make reference to conventional fiduciary doctrine in this context, it is notably perfunctory and disproportionately limited to references to the decisions of Justice La Forest (who, as is demonstrated in Chapter Three, see *infra* note 314 and surrounding text, effectively sought to fundamentally reconceive conventional fiduciary doctrine based on the non-conventional manner in which it was conceived in the Crown/Aboriginal context); such commentary typically (and mistakenly) assumes the fundamental content of a conventional fiduciary duty is a mandate to act in the best interest of another.

<sup>50</sup> Slattery, "First Nations and the Constitution: A Question of Trust," *ibid* at 275.

<sup>51</sup> James (Sa'ke'j) Youngblood Henderson, I.P.C., *Treaty Rights in the Constitution of Canada*, (Toronto: Thomson Carswell, 2007) at 897. See, also, James Sakej Youngblood Henderson, "Commentary" in *In Whom We Trust: A Forum on Fiduciary Relationships*, *supra* note 49 at 90: "The *sui generis* framework and the fiduciary obligations it imposes on the Crown are different from the common law standards of fiduciary obligations in public and private law. Little understanding of the Crown-Aboriginal relationship can be made by reference to standard legal books of trust or fiduciary relationship."

<sup>52</sup> See, *e.g.*, Mark L. Stevenson and Albert Peeling, "Probing the Parameters of Canada's Crown-Aboriginal Fiduciary Relationship" in *In Whom We Trust: A Forum on Fiduciary Relationships*, *supra* note 49 at 22.

<sup>53</sup> See *infra* note 99 and surrounding text.

requisite Crown obligations corresponding Aboriginal and treaty rights, bind the Crown to a high standard of moral dealing, and operate to generally conceptualize and organize doctrine in this area. And (again) it was primarily to this end, and to fill this gap, that the Supreme Court configured its non-conventional fiduciary-based construct. However, as has been shown, the Supreme Court has now instituted its (re-oriented) honour of the Crown principle in this “core” doctrinal position previously inhabited by their non-conventional fiduciary construct.

Moreover, in my analysis of the Supreme Court’s conventional fiduciary law, then, I specifically examine three incidents of the doctrine: (1) the *function* of fiduciary law; (2) the general *content* of fiduciary accountability (specifically, the nature of fiduciary *obligations* and fiduciary *breaches*); and (3) the specific trust-based *contexts* in which fiduciary accountability arises.

Generally speaking, in conventional fiduciary law, doctrinal frameworks develop in the context of each applicable relationship category at issue (*e.g.* agent-principal, director-shareholder, doctor-patient). However, the doctrinal *fundamentals* are static and not mutating; their *application* differs depending on context. Specifically, and although there are a host of rhetorical meanderings in the jurisprudence, the implicit *function* of conventional fiduciary law, as will be shown, is the protection of beneficiary interests in trust-like contexts against the singular mischief of self-interested conduct by their fiduciary.

Furthermore, the *content* of a conventional fiduciary obligation typically involves a strict and absolute prohibition against putting one’s own interests in conflict with those applicable, entrusted interests of a beneficiary. While the Supreme Court diverted its doctrine away from this strict prohibition where they, temporarily, adopted the non-conventional approach to fiduciary doctrine, developed in Crown/Aboriginal Law, they have now returned to, or are near a full return to, the strict prohibition against self-dealing as constituting the entirety of the *content* of fiduciary accountability.

Regarding the trust-like *contexts* that give rise to fiduciary accountability, the Supreme Court has recently adopted an essentialist test (*i.e.* one where essential pre-conditions are necessary for fiduciary accountability to arise). Effectively, fiduciary accountability in Canada now arises where one undertakes to act exclusively in regard to critical interests of another (*i.e.* a person or

class of persons), having assumed or been assigned a specific discretionary power in relation to the management of those interests such that there is attendant vulnerability in the arrangement.<sup>54</sup>

In order to understand the distinction between the conventional approach to fiduciary doctrine and the non-conventional approach incubated in *Guerin* and *Sparrow* (aspects of which, as noted, were then adopted as part of the conventional doctrine for a period of time), I devise some terminology for conceptual assistance, again using Dworkinian theory. When referring to the dynamics of this non-conventional approach, commentators often speak in terms of it having constituted an “expansive” approach to fiduciary doctrine; as having *expanded* the conventional doctrinal boundaries.<sup>55</sup> In my view, the fundamental distinction between the two approaches is actually not one of degree (*i.e.* of just how much the boundaries expand) but is, rather, one of jurisprudential form. That is, the conventional approach is a *rule-based* construct while the non-conventional approach is a *principle-based* construct. More specifically, the conventional approach is organized around a fiduciary obligation in rule form (*i.e.* a singular rule against self-interested conduct in applicable scenarios) and the non-conventional approach is organized around a fiduciary obligation in principle form (*i.e.* the principle that a “fiduciary” is to generally act honestly, fairly, and honourably in applicable scenarios, which principle can then give rise to a wide range of specific rule-based obligations, tailored to context and of potentially limitless form).

Prior to *Guerin*, conventional fiduciary doctrine was a rule-based construct.<sup>56</sup> Subsequent to *Guerin*, it became a demonstrably confused blend of the rule-based and principle-based constructs (*i.e.* of the conventional and the non-conventional approaches to fiduciary doctrine). Professor Leonard Rotman, whose doctoral thesis presented a comprehensive normative

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<sup>54</sup> The most recent articulation by the Supreme Court of the prevailing test is in *Elder Advocates*, *supra* note 31 at para 36.

<sup>55</sup> See *e.g.*, Flannigan, “The Boundaries of Fiduciary Accountability,” *supra* note 37 at 36: “The divergent judicial views [on the nature of fiduciary doctrine] move in both directions, potentially contracting or expanding the traditional boundaries.”

<sup>56</sup> See, generally, *Midcon Oil & Gas Ltd. v. New British Dominion Oil Co.*, [1958] S.C.R. 314, 12 D.L.R. (2d) 705 [*Midcon* cited to S.C.R.]; *Peso Silver Mines Ltd. v. Cropper*, [1966] S.C.R. 673, 58 D.L.R. (2d) 1 [*Peso Silver Mines* cited to S.C.R.]; *Hawrelak v. City of Edmonton*, [1976] 1 S.C.R. 387, 54 D.L.R. (3d) 45 [*Hawrelak*]. As noted in Robert Flannigan, “Fact-Based Fiduciary Accountability in Canada” 36 *Advocates Q.* 431 at 447: “*Guerin* is widely recognized as the decision that signaled the Canadian departure from conventional accountability, and the subsequent struggle to articulate boundaries.”

statement on Crown/Aboriginal fiduciary doctrine,<sup>57</sup> embraced the “wonderfully enigmatic” nature of fiduciary theory, and became a leading proponent of the full-dress adoption of a principle-based construct for conventional fiduciary law.<sup>58</sup> According to his account, conventional fiduciary theory is effectively capable of recognizing and maintaining a central, overarching fiduciary principle *and* applicable off-shoot fiduciary rules.<sup>59</sup>

However, and as will be shown, the Supreme Court seems to have given up on this “experiment,” this doctrinal journey into a new paradigm for fiduciary law. That is, again, the conventional rule-based construct has now been largely resurrected in Canada in a recent line of Supreme Court decisions.<sup>60</sup> And the effect of these decisions appears to be that the principle-based construct, which was a Canadian invention (subsequently rejected and explicitly maligned elsewhere as devoid of practical utility and doctrinally unsound<sup>61</sup>), has arguably been effectively released from the Canadian jurisprudence.

Materially for present purposes, the notion that it is a fiduciary obligation to act in the “best interests” of another (this is, of course, how the *content* of fiduciary accountability was, and still is, described in the Crown/Aboriginal cases) has now been rejected by the Supreme Court in, effectively, all but the Crown/Aboriginal context.<sup>62</sup> An undertaking to act in the “best interests” of another is now actually one of the three main *pre-conditions* in the Supreme Court’s current governing framework required for conventional fiduciary accountability *to arise*.<sup>63</sup>

Strangely, however, in the recent *Manitoba Metis Federation* case, the majority decision of the Supreme Court held that a Crown/Aboriginal fiduciary obligation could arise in either this

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<sup>57</sup> “Solemn Commitments: Fiduciary Obligations, Treaty Relationships and the Foundational Principles of Crown-Native Relations in Canada” (1998) S.J.D. Thesis, University of Toronto Faculty of Law. Also, he based this book off of his thesis: Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*, *supra* note 47.

<sup>58</sup> See, generally, Leonard I. Rotman, *Fiduciary Law* (Toronto: Thomson Carswell, 2005).

<sup>59</sup> See *infra* note 388 and surrounding text.

<sup>60</sup> See *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403, 2003 SCC 5 [*KLB* cited to S.C.R.]; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247 [*Galambos* cited to S.C.R.]; *Elder Advocates*, *supra* note 31.

<sup>61</sup> See *infra* notes 258 and 291 and the text surrounding each.

<sup>62</sup> See, e.g., *KLB*, *supra* note 59 at para 45-46 where an alleged fiduciary duty to act in the best interest of another was rejected as lacking practical utility, and as failing to provide a “workable (legal or justiciable) standard by which to regulate conduct,” and as mandating a doctrinally inappropriate type of result-based analysis. Also, the undertaking to act exclusively in one’s best interest is now a fundamental pre-condition to fiduciary accountability arising in Canada: see, e.g., *Elder Advocates*, *supra* note 31 at para 36; the implication being that such an undertaking is not *also* the consequent fiduciary obligation itself.

<sup>63</sup> See, e.g., *ibid.*

conventional manner – the first time that the Court directly applied conventional fiduciary doctrine *per se* in a Crown/Aboriginal context – *or* in accordance with the (still *sui generis*) test articulated in *Haida Nation* (*i.e.* that a Crown fiduciary obligation to act in the “best interests” of an Aboriginal community could arise in applicable scenarios).<sup>64</sup>

Here we start to see just how confused Crown/Aboriginal fiduciary jurisprudence remains. Its fundamentals are doctrinally unsound and incongruent. In one of the two ways in which fiduciary accountability may now arise in the Crown/Aboriginal context (*i.e.* the conventional *and* the non-conventional), a Crown undertaking to act in the “best interests” of an applicable Aboriginal community is a precondition to there being a fiduciary obligation owed; in the other, acting in the “best interests” of the Aboriginal community is the potential fiduciary obligation itself. These circular doctrinal dynamics are further detailed and unpackaged in Chapter Three.

As I do with my analysis of conventional fiduciary doctrine, I examine the Supreme Court’s non-conventional Crown/Aboriginal fiduciary doctrine by addressing its three primary incidents: (1) its function, (2) its content, and (3) the contexts in which it arises. Generally, I conclude that its *function* is entirely unclear, the honour of the Crown principle having usurped the doctrinal function it previously served (*i.e.* regulating the mischief of Crown dishonour in Aboriginal contexts). It is difficult to conceptualize, that is, a meaningful functional distinction between a duty to act honourably towards another and a duty to act with reference to another’s best interest; and Supreme Court clarification is required here.

In terms of the specific *content* of the non-conventional *Haida Nation*-framed Crown/Aboriginal fiduciary obligation, it is explicitly a positive obligation which, once triggered, mandates the Crown to act “with reference to the best interests” of an applicable Aboriginal community. I posit three possible ways in which to interpret this mandate, drawing from both conventional and non-conventional (*i.e.* Crown/Aboriginal) jurisprudence, and conclude ultimately that the Supreme Court likely intended this mandate to be read as a *rule* that the Crown must act *exclusively* in the best interests of an Aboriginal community (or communities) in applicable scenarios.

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<sup>64</sup> *Manitoba Metis Federation*, *supra* note 5 at paras 46-50.

As for the *contexts* in which this rule is intended to apply, I note that the current, applicable test is as follows: non-conventional Crown/Aboriginal fiduciary accountability will arise when the Crown assumes a sufficient amount of discretion over sufficiently-specific Aboriginal interests. The interest in question must be “cognizable” and the Crown’s assumption of discretion over that interest must be such that it “invokes responsibility in the nature of a private law duty.”<sup>65</sup> I examine the various components of this test in turn.

In the final part of Chapter Three: (a) I frame the Supreme Court’s (past and present) approach to fiduciary doctrine in the Crown/Aboriginal context as a classic Dworkinian *mistake*, both in its demonstrable misconception of conventional doctrine and in the way it arguably reinforces existing Crown/Aboriginal sovereignty imbalance, and (b) I articulate a conceptual synthesis of the narrow sphere of doctrinal space evidently remaining for the regulation of fiduciary accountability in Crown/Aboriginal contexts moving forward; that of a singular, conventional rule against a particularized type of mischief – self-interested conduct – unlikely to arise often (*e.g.* when a Crown agent translates his access to Aboriginal interests to personal gain).

Before moving on to Chapter Two, I conclude this introductory chapter by setting out, below, an extensive working summary of Dworkin’s rights thesis, components of which are then picked up in various places throughout my analysis.

#### *Working Summary of Dworkin’s Rights Thesis*

Ronald Dworkin’s “rights thesis” as initially set out in *Taking Rights Seriously*<sup>66</sup> and further developed in subsequent works, principally *Law’s Empire*,<sup>67</sup> espoused a fundamental paradigmatic shift, in relation to the manner in which we conceptualize the nature of the adjudicative task, away from one primarily focussed on *rule application* (the applicable legal positivism paradigm) towards one primarily focussed on *rights determination*. This central aspect of the rights thesis has had a profound and enduring influence on how contemporary jurisprudential theorists conceptualize adjudication.

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<sup>65</sup> *Wewaykum*, *supra* note 33 at para 85.

<sup>66</sup> Dworkin, *Taking Rights Seriously*, *supra* note 10.

<sup>67</sup> Ronald Dworkin, *Law’s Empire* (Cambridge, Mass.: Belknap Press, 1986).

More specifically, the rights thesis advocates abandoning the positivistic notion that what judges do in adjudication of hard cases (those where no clear, governing rule applies) is exercise discretion. As his alternative, Dworkin proposes that “even when no settled rule disposes of the case, one party may nevertheless have a right to win,” and that “[i]t remains the judge’s duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively.”<sup>68</sup> He conceptualizes rights determination in these types of “hard cases” as a process of creative (or constructive), but meaningfully constrained interpretation.

To explain his phenomenon of creative, constrained interpretation, Dworkin invents a hypothetical judge, Hercules, and endows him with “superhuman skill, learning, patience and acumen.”<sup>69</sup> He then constructs the notion of a legal “chain novel” of sorts that a judge is to pick up mid-novel and draft as his contribution (the adjudicative task) the next best chapter, “teasing out the various dimensions of value” in the earlier chapters of the novel.<sup>70</sup> The notion is that a “group of novelists” (judges) are all participants in this process, each vowing to write their chapter with complete deference to the key structural and thematic tenets of the novel to date. Dworkin insists that there both is and ought to be “articulate consistency” in the unfolding narrative (indeed, in the law itself).<sup>71</sup>

In relation to the facts of a particular case, the novelist (judge) is to consider all possible interpretations of what could count (in terms of enforcing or denying a claimed right) as the next best chapter in the novel. It is said that an “eligible interpretation” must “fit” with the earlier chapters (precedents), in the sense that they must count as continuing the novel and not “beginning anew.”<sup>72</sup> In order to conceptualize whether or not a given interpretation may be eligible, he “must take up some view about the novel in progress, some working theory about its characters, plot, genre, theme, and point”<sup>73</sup> (a general political theory in relation to the rights claimed, the institutional character of the political community in which these rights are enjoyed, and the prevailing morality of the community).

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<sup>68</sup> Dworkin, *Taking Rights Seriously*, *supra* note 10 at 81.

<sup>69</sup> *Ibid* at 105.

<sup>70</sup> Dworkin, *Law’s Empire*, *supra* note 66 at 228.

<sup>71</sup> Dworkin, *Taking Rights Seriously*, *supra* note 10 at 88.

<sup>72</sup> Dworkin, *Law’s Empire*, *supra* note 66 at 230.

<sup>73</sup> *Ibid*.

Where more than one “eligible interpretation” is available, the judge is to then have recourse to “substantive aesthetic judgments, about the importance or insight or realism or beauty of different ideas the novel might be taken to express.”<sup>74</sup> The superior interpretation among *eligibles* (i.e. the “right answer”) will be that which has the highest degree of “substantive appeal” not to the adjudicator but *to the novel as a whole*,<sup>75</sup> all things considered. Dworkin describes adjudication as a process of “hunting” for that “best interpretation.”<sup>76</sup> And ultimately, this interpretation will for Dworkin be the “right answer” in a particular case.<sup>77</sup> Indeed, conceptualized in this manner, there is for Dworkin one right answer to any given legal issue.

A key element of this phenomenon is that all the characters in the chain novel (or citizens in the community) have consented to be governed by the chapters of its authors (or judges), by the unfolding narrative of the applicable chain novel. For conceptual purposes, Dworkin analogizes legal adjudication to the resolving of disputes by a referee in a chess game:

The hard case puts, we might say, a question of political theory. It asks what it is fair to suppose that the players have done in consenting ... The concept of a game’s character is a conceptual device for framing that question. It is a contested concept that internalizes the general justification of the institution so as to make it available for discriminations within the institution itself. It supposes that a player consents not simply to a set of rules, but to an enterprise that may be said to have a character of its own; so that when the question is put – To what did he consent in consenting to that? – the answer may study the enterprise as a whole and not just the rules.<sup>78</sup>

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<sup>74</sup> Dworkin, *Law’s Empire*, *supra* note 66 at 231.

<sup>75</sup> See, e.g., *ibid.* at 126: “Hercules’ theory of adjudication at no point provides for any choice between his own political convictions and those he takes to be the political convictions of the community at large. On the contrary, his theory identifies a particular conception of community morality as decisive of legal issues...”

<sup>76</sup> *Law’s Empire*, *supra* note 66 at viii-ix.

<sup>77</sup> See, e.g., *ibid.* at 280.

<sup>78</sup> *Taking Rights Seriously*, *supra* note 10 at 104-105.

Dworkin concedes that this portrayal of the adjudicative process is a “fanciful reconstruction of a calculation that will never take place”<sup>79</sup> and that real judges are not Herculean. So what he presents is an ideal that adjudicators perpetually work towards, but never reach.

He notes that many previous chapters in the unfolding novel will not be valid or compelling; some will contradict others, and some will be outright mistakes. He says, for instance, that a judicial decision is a *mistake* if it “leaves unexplained some major structural aspect of the text, a subplot treated as having great dramatic importance or a dominant and repeated metaphor.”<sup>80</sup> And he states that mistakes are inherently “disqualified.”<sup>81</sup>

Moreover, Dworkin provides that the “gravitational force” of a precedent will vacillate with the moral convictions of the community,<sup>82</sup> that their force depends on their “sense of appropriateness” being sustained as part of the prevailing community morality. If this “sense of appropriateness” erodes significantly with respect to a given precedent, Dworkin notes that it will “no longer play much of a role in new cases.”<sup>83</sup>

Further, in order to meaningfully intersect Dworkin’s vision of the adjudicative function with the applicable fundamentals of Crown liability doctrine in Crown/Aboriginal Law, it is important to have a general familiarity with some of his specific terminology, namely the specific meaning of and distinction between: rights and obligations; abstract rights and concrete rights; rules and principles (or, put another way, rule and non-rule standards – both for Dworkin a meaningful part of *the law*); arguments of principle and arguments of policy (the latter for Dworkin typically inapplicable to a judge’s primary task, as being more within the jurisdiction of legislators); individuated and non-individuated political aims (or specific rights and community goals); gravitational force and enactment force (*i.e.* of precedent); and “popular morality” and “community morality.”

First, upon Hercules having arrived at his “right” answer, the practical result will involve the recognition of an individual or group *right* (typically belonging to the plaintiff), and the

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<sup>79</sup> *Ibid* at 104.

<sup>80</sup> *Law’s Empire*, *supra* note 66 at 230.

<sup>81</sup> *Ibid*.

<sup>82</sup> See, *e.g.*, *Taking Rights Seriously*, *supra* note 10 at 94.

<sup>83</sup> *Ibid* at 40.

enforcement of an applicable, corresponding *obligation* (typically owed by the defendant). The fundamental assertion of the rights thesis is that “judicial decisions enforce existing political rights.”<sup>84</sup>

Dworkin defines rights themselves as a type of political “trump”; stating that, generally, a right is held by a person or group if the “state of affairs” in which that right is enjoyed is “advanced” or “protected” by its recognition and enforcement (even if other political considerations are disserved), and likewise, if its non-enforcement would “retard” or “endanger” that same “state of affairs.”<sup>85</sup>

Differentiating further between classes of legal rights (and principles), Dworkin distinguishes abstract/background rights (and principles), on the one hand, from concrete/institutional rights (and principles) on the other. According to the rights thesis, judicial decisions enforce the latter which (essentially) arise as a result of the former. In making this further distinction, Dworkin notes that rights (and principles) have a key dimension of degree:

The most important of the distinctions ... is the distinction between two forms of political rights: background rights, which are rights that hold in an abstract way against decisions taken by the community or the society as a whole, and more specific institutional rights that hold against a decision made by a specific institution. Legal rights may then be identified as a distinct species of a political right, that is, an institutional right to the decision of a court in its adjudicative function.<sup>86</sup>

...

This is a distinction of degree ... an abstract right is a general political aim the statement of which does not indicate how that general aim is to be weighed or compromised in particular circumstances against other political aims. The grand rights of political rhetoric are in this way abstract. Politicians speak of a right to

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<sup>84</sup> *Ibid* at 87.

<sup>85</sup> *Ibid* at 91.

<sup>86</sup> *Ibid* at (Introduction), xii.

free speech or dignity or equality, with no suggestion that those rights are absolute, but with no attempt to suggest their impact on particular complex social situations. Concrete rights, on the other hand, are political aims that are more precisely defined ... Abstract rights ... provide arguments for concrete rights, but the claim of a concrete right is more definitive than any claim of abstract right that supports it.<sup>87</sup>

Furthermore, while his thesis is a stated attack upon legal positivism's "model of rules," Dworkin does not discard the concept of a "rule." He recognizes that the applicable legal novel to date will indeed include numerous rules (whether constitutional, legislative, or common law in nature) and that judges do legitimately create rules as part of their creative interpretation (and enforcement) of rights. However, for Dworkin (unlike for legal positivism), the novel in progress consists of much more than just rules, and it is overly simplistic or naïve, he argues, to suggest otherwise. For Dworkin, the novel (the available body of law) consists of *standards* of both a rule and a non-rule varietal. The non-rule standard is related to but distinct from the rule standard. Dworkin explains that a rule goes beyond the language of its reasons; that underlying particular rules is an un-stated "scheme of principles" (the non-rule standards) that justifies those rules, some written and some implicit. He says that judges do (and ought to) consider such *principles* as part of the governing law.

For Dworkin, there is a meaningful distinction between rules and principles. He distinguishes rules from principles primarily by notions of force, explaining that rules will typically have "enactment force," principles only "gravitational force."<sup>88</sup> He describes rules as legal propositions with a type of "all or nothing" dimension, and principles, in contrast, as having a dimension of weight. As this distinction is important to Dworkin's thesis, it is helpful to look closer at what he says here:

The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give.

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<sup>87</sup> *Ibid* at 93-94.

<sup>88</sup> See, e.g., *ibid* at 318.

Rules are applicable in all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.<sup>89</sup>

...

Principles have a dimension that rules do not – the dimension of weight or importance. When principles intersect (the policy of protecting automobile consumers intersecting with principles of freedom of contract, for example), one who must resolve the conflict has to take into account the relative weight of each.<sup>90</sup>

...

Words like ‘reasonable’, ‘negligent’, ‘unjust’, and ‘significant’ often ... makes the application of the rule which contains it depend to some extent upon principles or policies lying beyond the rule ...<sup>91</sup>

...

Only rules dictate results, come what may. When a contrary result has been reached, the rule has been abandoned or changed. Principles do not work that way; they incline a decision one way, though not conclusively, and they survive intact when they do not prevail.<sup>92</sup>

Another important distinction Dworkin draws is between arguments of principle and arguments of policy; he insists that common law decisions are to be founded upon the former.<sup>93</sup> He explains

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<sup>89</sup> *Ibid* at 24.

<sup>90</sup> *Ibid* at 26.

<sup>91</sup> *Ibid* at 28.

<sup>92</sup> *Ibid* at 35.

<sup>93</sup> Note that Dworkin’s Hercules does at times consider arguments of policy, but only in a limited manner, and only when interpreting legislative rules – see, *e.g.*, *Taking Rights Seriously*, *supra* note 10 at 111 (footnote 1): “When he interprets statutes he fixes to some statutory language, as we say, arguments of principle or policy that provide the best justification of that language in the light of the legislature’s responsibilities. His argument remains an argument of principle; he uses policy to determine what rights the legislature has already created. But when he ‘interprets’

that any applicable common law rule may be justified by various arguments of principle, written or unwritten, and that a future author (judge) is entitled to have (creative) recourse as a matter of law to any such arguments. He provides this distinction to differentiate the judicial function from the legislative function, explaining that both involve political decisions but that only the legislative function involves justifying those decisions according to arguments of policy. The difference between principle and policy, for Dworkin, is that principles are standards that describe rights, and policies are standards that describe goals. Rights, as noted above, are individuated political aims, while goals are non-individuated political aims.<sup>94</sup> The legislators then, our elected officials, are tasked primarily with making political decisions based on specific considerations of future community welfare. Judges, on the other hand, do not legislate in this sense; they do not make decisions meant to primarily serve community goals for the future, but rather to enforce existing political rights of a particular claimant against one particular set of facts.<sup>95</sup>

This is not to suggest that judges, in accordance with the rights thesis, are to be blind to the consequences of their decisions or to the community welfare generally. To the contrary, a judge is, when taking up his role in the “chain novel” process, to consider as one element of his task “what his successor will want or be able to add.”<sup>96</sup> He is not to be seen as writing a concluding verse, that is to say, but one of many, in an unfolding, interpretive narrative. The process involves fixing upon both the “forward looking” dimension of precedent, and the value of adjudicating towards “an *honourable* future.”<sup>97</sup>

Finally, Hercules does not make decisions based on any notion of majority rule or “popular morality,”<sup>98</sup> but rather makes decisions by taking up a theory of “community morality” or

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judicial enactments he will fix to the relevant language only arguments of principle, because the rights thesis argues that only such arguments acquit the responsibility of the ‘enacting’ court.”

<sup>94</sup> *Ibid* at 91.

<sup>95</sup> Dworkin emphasizes the importance of conceptualizing this distinction between policies and principles (and between the adjudicative and legislative roles) while conceding the distinction is not absolute or water-tight; stating at the outset that it can be “collapsed” but cautioning that “the distinction has uses which are lost if it is thus collapsed”: *Taking Rights Seriously*, *supra* note 10 at 22-23.

<sup>96</sup> *Law’s Empire*, *supra* note 6 at 229.

<sup>97</sup> *Ibid*.

<sup>98</sup> See, e.g., *ibid* at 126: “Hercules’ techniques may sometimes require a decision that opposes popular morality on some issue.”

“*constitutional morality*”<sup>99</sup> evident in the abstract rights and principles the community has committed itself to (themselves evident in constitutional, legislative, or common-law dictates) and then enforces or denies rights in accordance with that particular conception of the applicable governing morality.

To summarize, the rights thesis holds that judges decide “hard cases” by denying or enforcing (as legal rights) concrete political rights which typically flow from abstract political (and legal) rights and principles. They do so by essentially choosing the most applicable and morally compelling arguments of principle (which arguments typically underlie and justify the applicable authorities) and generate a creative interpretation of the claimed rights and corresponding obligations which counts as the next *best* chapter in the applicable legal “novel.” The task is not to decide which interpretation is the most compelling to them personally, but rather which is most compelling to the novel as a whole. In order to do so, they take up a general political theory (again, not their own) that best describes the institutional character of the novel and the community morality evident in the novel to date.

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<sup>99</sup> *Ibid* at 126.

## II. CROWN HONOUR ACCOUNTABILITY IN CANADIAN CROWN/ABORIGINAL LAW

“...to know of any injury and to redress it are inseparable in the royal breast ...”

- Lord Blackstone<sup>100</sup>

The intriguing notion that Crown dishonour in Aboriginal contexts in Canada may attract legal consequence was first indicated in early-days Supreme Court of Canada decisions,<sup>101</sup> though in a context where Aboriginal communities were generally seen as having no enforceable legal rights, constitutional or otherwise.<sup>102</sup> That notion was later acknowledged by the Supreme Court in the post-1982 *Sparrow* decision,<sup>103</sup> and then incrementally expanded and transformed by, principally, the *R. v. Badger*,<sup>104</sup> *R. v. Marshall*,<sup>105</sup> and *Haida Nation* courts. While under-theorized, it is now, as noted at the outset, explicitly the central organizing principle for Crown/Aboriginal Law in Canada.<sup>106</sup>

Anecdotally, one jurist appears uniquely responsible for the fact the honour of the Crown principle now occupies such a core doctrinal position. As Associate Chief Justice of the Ontario Court of Appeal, the late Bert James MacKinnon pronounced in *R. v. Taylor and Williams* that “the honour of the Crown is always involved” in the process of treaty interpretation in Canada.<sup>107</sup> This was an argument he, in his days as a practitioner, had advanced on behalf of his client Calvin George in litigation that saw the first twentieth century-invocation by the Supreme Court of Canada of the honour principle in an Aboriginal context (and the only such invocation prior to

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<sup>100</sup> William Blackstone, *Commentaries on the Laws of England; in Four Books*, Thomas Cooley, ed., (Chicago: Callaghan and Cockraft, 1871) Book 3, c.17 at paras 254-255 [*Blackstone Commentaries*], cited in Thomas Isaac, *Crown/Aboriginal Law: Commentary and Analysis*, (Saskatoon: Purich, 2012).

<sup>101</sup> *Province of Ontario v. Dominion of Canada and Province of Quebec; In re Indian Claims*, [1895] S.C.J. No. 96 (Q.L.), (1895) 25 S.C.R. 434 at 512 [cited to S.C.R.]; *R. v. George* (1966), 55 D.L.R. (2d) 386, [1966] S.C.R. 267 [*George* cited to S.C.R.].

<sup>102</sup> See, e.g., *supra* note 21 and surrounding text.

<sup>103</sup> *Supra* note 19 at 1108.

<sup>104</sup> [1996] 1 S.C.R. 771, [1996] 2 C.N.L.R. 77 [*Badger* cited to S.C.R.].

<sup>105</sup> (1999), 177 D.L.R. (4th) 513, [1999] 3 S.C.R. 456 [*Marshall No. 1* cited to S.C.R.].

<sup>106</sup> *Manitoba Metis Federation*, *supra* note 5.

<sup>107</sup> [1981] 3 C.N.L.R. 114, 34 O.R. (2d) 360 [*Taylor and Williams* cited to C.N.L.R.].

*Taylor and Williams*).<sup>108</sup> MacKinnon A.C.J.O's pronouncement in *Taylor and Williams* was then ultimately adopted in *Sparrow*.<sup>109</sup>

In *Haida Nation*, again, the honour of the Crown “precept” was elevated to the status of being the central organizing principle in this area.<sup>110</sup> Where honour may have been judicially invoked previously as explicit acknowledgment of non-binding political or moral-only obligations,<sup>111</sup> Crown dishonour in applicable Aboriginal contexts is now legally actionable in Canada (*i.e.* through enforcement of the specific off-shoot Crown duties flowing from the honour of the Crown principle). Chief Justice McLachlin's decision in *Haida Nation* also suggests that this new or reconfigured theory of Crown liability doctrine is intended to both reorient previous doctrine in the area<sup>112</sup> and spawn new doctrinal frameworks.

Unfortunately, however, substantial doctrinal uncertainty persists. For instance, some lower courts have noted the “elusive” nature of the new legal construct while others have entirely misconceived it.<sup>113</sup> This doctrinal opacity appears a manifestation of prevailing uncertainty as to the nature and scope of residual and parallel applicability of Crown/Aboriginal fiduciary doctrine. Furthermore, as one leading commentator recently put it in relation to the honour principle, “a complete understanding of this important legal principle ... is in its infancy.”<sup>114</sup>

Strangely, and with some notable exceptions,<sup>115</sup> there is also a dearth of commentary on this new theory, particularly as regards the post-*Haida Nation* doctrinal intersection between Crown honour accountability and Crown fiduciary accountability.

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<sup>108</sup> *George*, *supra* note 100 at 102.

<sup>109</sup> *Sparrow*, *supra* note 19 at 1108.

<sup>110</sup> *Haida Nation*, *supra* note 2 at para 16-20.

<sup>111</sup> *See, e.g., infra* note 126 and surrounding text.

<sup>112</sup> As but one example, in *Mitchell*, *supra* note 29 at para 9, the fundamental nature of Crown fiduciary accountability was referred to by McLachlin C.J. as “an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as ‘fiduciary’” (emphasis added). However, in *Haida Nation*, *supra* note 2 at para 32, where the Chief Justice referenced this passage from *Mitchell* when talking about Crown liability as being Crown honour-based, she left out the final five words of this passage (*i.e.* those underlined above).

<sup>113</sup> *Supra* note 39.

<sup>114</sup> Isaac, *Crown/Aboriginal Law*, *supra* note 99 at 312.

<sup>115</sup> *See, e.g.,* Brian Slattery, “Aboriginal Rights and the Honour of the Crown” (2005) 29 S.C.L.R. (2d) 433; Isaac, *Crown/Aboriginal Law*, *supra* note 99 at 312-326; and McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples*, *supra* note 49 at 67-146; and Henderson, *Treaty Rights in the Constitution of Canada*, *supra* note 51 at 887-944.

It is this prevailing doctrinal confusion in the lower courts and dearth of applicable academic commentary that inspires the current project. Doctrinal clarity in this area is both lacking and imperative. In the remainder of this chapter, I will attempt to develop a more fulsome conceptualization of both the historical pedigree of the honour principle and its contemporary doctrinal parameters, as discernible at this early stage in its development.

#### **a. The ‘Honour of the Crown’ as a Legal Principle**

Early commentary on the nature of the principle suggests it arose in Britain as a principal of equity in the context of an imperial constitution premised on plenary Crown immunity and largely unfettered Crown prerogatives. It appears the principle, where (seldom) invoked, protected against the Crown inadvertently and unduly exercising its prerogative powers to the detriment of private interests:

...the prerogative of the crown extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudice ... Whenever therefore it happens that, by misinformation, or inadvertence, the crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign ... yet the invasion, by informing the king of the true state of the matter in dispute: and, as it presumes that to know of any injury and to redress it are inseparable in the royal breast, it then issues as of course, in the king’s own name, his order to his judges to do justice to the party aggrieved.<sup>116</sup>

More recently, in two separate pieces,<sup>117</sup> David Arnot provides a colourful historical account of the practical application of the honour of the Crown principle during times of imperial kingship. On the seriousness with which Crown agents approached the honour mandate, he said this:

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<sup>116</sup> *Blackstone Commentaries*, *supra* note 99 at paras 254-255, cited in Isaac, *Crown/Aboriginal Law*, *supra* note 99 at 313 (footnote 55).

<sup>117</sup> David M. Arnot “The Honour of the Crown”, (1996), 60 *Sask. L. Rev.* 339; and David Arnot, “The Honour of First Nations – The Honour of the Crown: The Unique Relationship of First Nations with the Crown” in Jennifer Smith and D. Michael Jackson eds., *The Evolving Canadian Crown*, (Kingston: McGill-Queen’s University Press, 2012) [*The Unique Relationship*].

This convention [the honour of the Crown principle] has roots in pre-Norman England, a time when every yeoman swore personal allegiance to the king and anyone who was charged with speaking or acting on behalf of him bore an absolute personal responsibility to lend credit to the king's good name. Should he fail in this responsibility or cause embarrassment, he was required to answer personally to the king with his life and fortune.<sup>118</sup> (emphasis added)

This account betrays a normative ethic of behaviour observed by Crown agents, literally motivated by fear of death, that is unrealistic in a contemporary constitutional democracy like Canada, despite Arnot's contemporary plea that "[i]n every action and decision the women and men who represent the Crown in Canada should conduct themselves as if their personal honour and family names depended on it."<sup>119</sup> This is not to say that the honour of the Crown principle is necessarily inapposite for Canadian Crown/Aboriginal Law but rather to say that contextual historical analogy will be of relatively limited value moving forward. The development of the honour of the Crown doctrine in Canada is and will be a novel, contemporary project. That said, and as will become clear, the analysis is incomplete and impoverished without some recourse to the applicable historical jurisprudence, which now follows.

### **i. Prior to *Haida Nation***

Tracing the early common law evolution of the honour of the Crown principle is not a particularly arduous task; there are mere handfuls of notable cases prior to *Haida Nation*. That said, there is a discernible evolution, a worthwhile doctrinal story to be told.

A review of the jurisprudence reveals three doctrinal threads and I propose to deal with each in turn:

- 1) The earliest thread, centuries old, involves the invocation of the principle, typically in non-Aboriginal contexts, in scenarios involving contractual and statutory interpretation. It was invoked in such contexts as a shield against technical interpretations that would otherwise ignore the Crown;

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<sup>118</sup> Arnot, *The Unique Relationship*, *ibid* at 161.

<sup>119</sup> *Ibid* at 162.

- 2) The second thread, now over a century old and given its fullest expression in the *Badger* and *Marshall* courts, involves those cases where the honour of the Crown principle is used as a principle of treaty interpretation in Aboriginal contexts in Canada; and
- 3) The third, most recent thread, that with which the current project is primarily concerned, includes those cases where the honour principle is used to source, and to fundamentally inform the nature of positive, prescriptive (constitutional) legal obligations owed by Canadian Crown to Aboriginal peoples (*i.e.* in contrast to the mere proscriptive manner in which it is used in the first two threads). Obviously, we see the high-water mark in terms of Crown liability doctrine under this third thread in *Haida Nation* (the duty to consult and accommodate) and *Manitoba Metis Federation* (the duty to purposively and diligently fulfill constitutional obligations). That said, and as will be demonstrated below, there were seeds of this thread of jurisprudence in some pre-*Haida Nation* Decisions.

To the first thread, the honour of the Crown as a legal principle goes back at least to the seventeenth century English decisions rendered in *Earl of Rutland's Case*<sup>120</sup> and *The Case of the Churchwardens of St. Saviour in Southwark*.<sup>121</sup> In the latter, it was stated in context that if:

... two constructions may be made of the King's grant, then the rule is, when it may receive two constructions, and by force of one construction the grant may accordingly to the rule of law be adjudged good, and by another it shall be adjudged void: then for the King's honour and for the benefit of the subject, such construction shall be made, that the King's charter shall take effect, for it was not the King's intent to make a void grant...<sup>122</sup> (emphasis added)

While this early reference to the honour of the Crown principle does not set out a particularly robust legal proposition – *i.e.* Crown honour requires the avoidance of a technical interpretation that a Crown grant is not actually a Crown grant – there are signs in later jurisprudence under this thread of a general proposition to the effect that the honour of the Crown is to be generally upheld in applicable contractual and statutory interpretations. For instance, the Upper Canada Court of Appeal in their 1852 decision in *Doe d. Henderson v. Westover* states that applicable

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<sup>120</sup> (1608), 77 E.R. 555, 8 Co. Rep. 55a.

<sup>121</sup> (1613), 77 E.R. 1025, 10 Co. Rep. 66b a 67b [cited to E.R.].

<sup>122</sup> *Ibid* at 1027.

incidents of Crown instruments “shall always, for the honour of the Crown be allowed most strongly in favour of the grantee.”<sup>123</sup> In a more recent instance, and in an Aboriginal context, the Supreme Court of Canada used the honour of the Crown principle to deliver an equitable interpretation of a tax-related provision of the *Indian Act* that would otherwise have operated to effect an Indian Band being “disposed of ... [certain statutory] entitlements.”<sup>124</sup>

As a bit of an aside, it is noteworthy that in certain other instances, the honour of the Crown principle has at times been invoked not as a principle of law or equity but more as a judicial acknowledgement of perceived governance ethics. To this end, note that prior to the *Calder* decision in 1973 and the subsequent constitutionalization of Aboriginal and treaty rights in 1982, “rights” held by Aboriginal peoples were commonly regarded as being entirely “dependent on the good will of the sovereign.”<sup>125</sup> This notion of the “good will of the Sovereign” as something expected in a political context but non-enforceable, closely resembles the honour principle as articulated in such early invocations.

One such early invocation is found in the decision in *Ontario Mining Co. Ltd. v. Seybold*.<sup>126</sup> This case involved a dispute between two mining companies each of whom wanted to develop portions of surrendered reserve lands. At issue was the effect of the *Indian Act*-based surrender of the lands to Canada. It was held that the surrender implicated Ontario in subsequent ownership and administration dynamics. In his decision, Lord Davey of the Judicial Committee of the Privy Council observed that upon the surrender, Ontario “came at least under an honourable engagement” to set aside certain portions of the tract for the use and benefit of the Indians in question (*e.g.* for hunting and fishing) and that “they could not without plain disregard of justice take advantage of the surrender and refuse to perform the condition attached to it.”<sup>127</sup>

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<sup>123</sup> (1852), 1 E.&A. 465 (U.C.C.A.) at 468. See also *R. v. Belleau*, [1881] S.C.J. No. 28 (Q.L.), (1881), 7 S.C.R. 53 at 71, and *Windsor & Annapolis Railway v. R.*, (1885), 10 R.C.S. 335, [1885] 10 S.C.R. 335 at 371. These three cases are cited in Isaac, *Crown/Aboriginal Law*, *supra* note 99 at 312-314.

<sup>124</sup> *Mitchell v Peguis Indian Band* (1990), 71 D.L.R. (4th) 193, [1990] 2 S.C.R. 85 at 133.

<sup>125</sup> *St. Catherine's Milling*, *supra* note 23 at 54.

<sup>126</sup> [1903] A.C. 73, (1902) 72 L.J.P.C. 5 [*Seybold* cited to A.C.]. See also, *Province of Ontario v Dominion of Canada*, [1909] S.C.J. No. 28 (Q.L.), [1909] 42 S.C.R. 1 at paras 209-210 and 217-218.

<sup>127</sup> *Seybold* at 81 and 82.

The significance of this *dictum* from *Seybold* is that it is the first time in Canadian jurisprudence there is an instance of Crown *honour* described as sourcing something close to a positive Crown obligation in an Aboriginal context (non-legal though the obligation may have been).

Moving to the second doctrinal thread, the honour of the Crown has become an important principle of equity in the context of Aboriginal treaty interpretation in Canada. The first jurisprudential indication of an applicable honour mandate in the context of Crown/Aboriginal treaties is found in an 1895 dissenting decision by Gwynne J. (who, it seems, was not necessarily embraced by his colleagues for his progressive views on such matters<sup>128</sup>). In *Province of Ontario v. Dominion of Canada and Province of Quebec; In re Indian Claims* he states that:

...what is contended for and must not be lost sight of, is that the British sovereigns, ever since the acquisition of Canada, have been pleased to adopt the rule or practice of entering into agreements with the Indian nations or tribes in their province of Canada, for the cession or surrender by them of what such sovereigns have been pleased to designate the Indian title, by instruments similar to these now under consideration to which they have been pleased to give the designation of “treaties” with the Indians in possession of and claiming title to the lands expressed to be surrendered by the instruments, and further that the terms and conditions expressed in those instruments as to be performed by or on behalf of the Crown, have always been regarded as involving a trust graciously assumed by the Crown to the fulfilment of which the Indians the faith and honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown.<sup>129</sup> (emphasis added)

More than seventy years after this decision from Gwynne J. issued, the Supreme Court of Canada next invoked the honour of the Crown principle in one of the earliest instances of an Aboriginal litigant seeking judicial protection of treaty rights against the effects of Canadian domestic law. In *George*, Calvin George had been charged and later acquitted in the lower courts of acting in contravention of applicable provincial law by hunting off-season on his Band’s

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<sup>128</sup> In *ibid* at 82, Lord Davey referred to Gwynne J. as “that learned and lamented judge.”

<sup>129</sup> *Supra* note 100 at 511-12.

reserve lands. At issue was the effect of the Band's treaty hunting rights on the scope of application of the provincial law under which Mr. George was charged, and on the meaning of section 87 of the *Indian Act* of the day (section 88 today) which otherwise made Indians subject to provincial laws of general application. After citing the passage from *Churchwardens*, set out above, Cartwright J. (again in a dissenting judgment, as Mr. George was ultimately unsuccessful in his challenge) said:

We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the honour of the Sovereign may be upheld and Parliament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty.<sup>130</sup>

The use of the Honour of the Crown principle here (referenced as “honour of the Sovereign”) was in the context, again, of treaty and statutory interpretation and was invoked towards preventing certain treaty rights from being unilaterally delimited by the Crown.

Interestingly, when the matter in *George* first came before the High Court of Ontario, the Chief Justice of that Court invoked the concept of “a breach of our national honour” in the following statement:

I wish to make it quite clear that I am not called upon to decide, nor do I decide, whether the Parliament of Canada by legislation specifically applicable to Indians could take away their rights to hunt for food on the Kettle Point Reserve. There is much to support an argument that Parliament does not have such power. There may be cases where such legislation, properly framed, might be considered necessary in the public interest but a very strong case would have to be made out that would not be a breach of our national honour.<sup>131</sup> (emphasis added)

The Chief Justice here was arguably implicitly following something like the rationale in *Churchwardens* or *Westover*, but it is nonetheless an interesting early example of a collective

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<sup>130</sup> *George*, *supra* note 100 at 279.

<sup>131</sup> *Regina v. George*, [1964] 1 O.R. 24, 41 D.L.R. (2d) 31 at (O.H.C.J.) 37.

concept of honour in an Aboriginal context being invoked in broad terms and in the form of a general restraint on Parliamentary power.

Some fifteen years after *George*, and shortly before the coming into force of *The Constitution Act, 1982*, we see the honour principle's next rise, the seminal pronouncement by MacKinnon A.C.J.O. in *Taylor and Williams*, that "[i]n approaching the terms of a treaty ... the honour of the Crown is always involved and no appearance of sharp dealing should be sanctioned."<sup>132</sup>

This oft-cited passage, as noted above, was first adopted at the Supreme Court of Canada level in a non-treaty context (in *Sparrow*, as discussed in more detail below) and then grounded in *Badger* and *Marshall* as a key, accepted principle of treaty interpretation. The main applicable passage from *Badger* reads as follows:

..the honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of 'sharp dealing' will be sanctioned.<sup>133</sup>

The honour of the Crown principle was invoked in *Badger* (as animated by the directives in this passage) as one principle among many informing a larger process of interpreting the scope of a specific treaty right, namely whether a hunting right extended to include hunting on private lands. General Crown/Aboriginal Law jurisprudence was, at the time of *Badger*, marked by a growing judicial sensitivity to the need for a "generous" and "liberal" interpretation of Crown/Aboriginal treaties in Canada,<sup>134</sup> however doctrinally sourced, against the backdrop of growing recognition of historical injustice in Crown/Aboriginal relationships.<sup>135</sup>

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<sup>132</sup> *Taylor and Williams*, *supra* note 106 at 367.

<sup>133</sup> *Badger*, *supra* note 103 at para 41.

<sup>134</sup> See, e.g., *Nowegijick v The Queen* (1983), 144 D.L.R. (3d) 193, [1983] 1 S.C.R. 29 at 37: "...treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."

<sup>135</sup> See, e.g., *supra* note 134 and surrounding text.

A few years later, in *Marshall*, Justice Binnie appeared to further elevate the honour of the Crown principle to a more central, doctrinal role in treaty interpretation matters, referring to it repeatedly in his decision, and expressly applying it not only to interpret written provisions but to supply perceived deficiencies in the treaty at issue. At the outset of his decision he said:

I would allow this appeal because nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship, as best the content of those treaty promises can now be ascertained. In reaching this conclusion, I recognize that if the present dispute had arisen out of a modern commercial transaction between two parties of relatively equal bargaining power ... it would have to be concluded that the Mi'kmaq had inadequately protected their interests.<sup>136</sup>

Interestingly, where he reads “implied” rights into the applicable treaty following earlier Supreme Court precedent (namely *Simon*<sup>137</sup> and *R. v. Sundown*<sup>138</sup>), he interprets his mandate to do so, novelly, as flowing principally from the honour of the Crown,<sup>139</sup> which to some extent had the effect of re-orienting the doctrinal underpinnings of those previous decisions. As will be shown when I discuss *Haida Nation* in the next section, this was precisely the type of (doctrinal) reorientation effected there.

Strangely, however, and despite the doctrinal consistency between the *dicta* of Binnie J. in *Marshall* and the later judgment of McLachlin C.J. in *Haida Nation*, McLachlin J. (as she then was) wrote a dissenting decision in *Marshall* which conspicuously under-emphasized the relevance of the honour of the Crown principle in treaty interpretation, referring to it in a manner more resembling incantation than anything substantive. She disagreed that the honour of the Crown, or any other doctrinal mandate, gave rise to the implied treaty rights recognized by Binnie J., and as to the doctrinal nature of the honour principle, where she took occasion to articulate a lengthy set of treaty interpretation principles purporting to be comprehensive, she

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<sup>136</sup> *Marshall No. 1*, *supra* note 104 at para 4.

<sup>137</sup> *Supra* note 26.

<sup>138</sup> *R v. Sundown*, [1999] 1 S.C.R. 393, 170 D.L.R. (4th) 385.

<sup>139</sup> *Marshall No. 1*, *supra* note 104.

said only this “[i]n searching for the common intention of the parties, the integrity and honour of the Crown is presumed ...”<sup>140</sup>

If, as appears to be the case, an inclination against an expanded doctrinal scope for the honour principle underlay her decision in *Marshall*, her decisions in *Haida Nation* and *Manitoba Metis Federation* (the latter co-authored with Karakatsanis J.) betrays a marked change of heart, as I will illustrate below.

I move now to the final thread of pre-*Haida Nation* jurisprudence on the honour of the Crown principle. This third line of case law is distinct from the first two which saw the principle used in applicable processes of interpreting Crown grants, statutes, and treaties. Here, I track the initial development of the principle as it is ultimately interpreted in *Haida Nation*: as an independent, conceptual source of *positive* constitutional obligations owed by the Crown to Aboriginal peoples in Canada. The distinction to the first two threads of case law is drawn, partly for conceptual convenience, on the basis that the applicable Crown obligations sourced by the honour principle in those threads were in a form that may be described as both negative and largely technical in nature; *i.e.* obligations not to interpret instruments in a manner ignobling the Crown.

The watershed decision by the Supreme Court of Canada in *Sparrow* is the key decision in this third doctrinal thread. It was in this decision that the Supreme Court first confirmed that constitutional Aboriginal and treaty rights operate to constrain Crown power generally and may not be unjustifiably infringed by the Crown. And in so doing, as will be shown, they engaged the honour principle.

Prior to the *Sparrow* decision, the Supreme Court had determined, in *Guerin*, that in at least some contexts the Crown is *legally* obligated to act in accordance with a certain (quite undeveloped) high standard of conduct in its dealings with Aboriginal people. In *Guerin*, as I discuss in greater detail in the next chapter when I examine Crown/Aboriginal fiduciary accountability, the dispute involved the manner in which the Crown dealt with Musqueam reserve lands that had been surrendered in accordance with the *Indian Act* and for a defined

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<sup>140</sup> *Ibid* at para 78.

purpose. There, and from a doctrinal perspective, the Court inaugurated a *sui generis* fiduciary obligation owed the Musqueam<sup>141</sup> (making no reference to the honour of the Crown principle) but left unclear the scope of that obligation in terms of its future application in Crown/Aboriginal Law.

Then in *Sparrow*, another decision involving the Musqueam, the dispute centred on a claim that the federal Crown had unconstitutionally regulated the Musqueam's Aboriginal fishing rights. While the decision has vital and numerous implications for various doctrinal components of Crown/Aboriginal Law, I will only focus here on the way in which it interpreted the honour of the Crown principle.

It is axiomatic that wherever there are rights, there are corresponding obligations.<sup>142</sup> And in *Sparrow*, the Court was undertaking, as an endeavour of first instance, to conceptualize the doctrinal nature of Crown obligation that corresponds to the newly-constitutionalized Aboriginal and treaty rights. In a crucial passage from the perspective of doctrinal analysis in this area, and after generally acknowledging a history of Crown dishonour in Canada in respect of the treatment of Aboriginal peoples,<sup>143</sup> they said this:

In our opinion, *Guerin* [fiduciary obligations], together with *R. v. Taylor and Williams* [the honour of the Crown principle]... ground a general guiding principle for s.35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples.<sup>144</sup> (emphasis added)

Several observations may be drawn here. First, the Court twinned the honour principle with the fiduciary mandate to source and forge a central guiding principle purporting to restrain and govern Crown conduct in the context of Aboriginal and treaty rights. Second, the standard of conduct contemplated under this directing principle was for the Crown to generally act “in a fiduciary capacity” in its dealings with Aboriginal peoples. As made clear in the next chapter,

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<sup>141</sup> See *infra*, note 363 and surrounding text.

<sup>142</sup> See *supra* note 24.

<sup>143</sup> *Sparrow*, *supra* note 19 at 1103: “we start by looking at the background of s.35(1) ...there can be no doubt that over the years the rights of the Indians were often honoured in the breach...we cannot recount with much pride the treatment accorded to the native people of this country.” (citations omitted)

<sup>144</sup> *Sparrow*, *supra* note 19 at 1108.

what it means generally to act “in a fiduciary capacity” was (and, to substantial extent, still is) unresolved.

Regarding this second observation, the Court, later in the decision, speaks of the importance of “holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin*.”<sup>145</sup> Here, since a reference to *Guerin* is clearly a reference to the applicable fiduciary concept, the Court’s emerging theory in *Sparrow* as to the doctrinal foundation of Crown obligations in the s.35 context, and certainly that picked up on in later decisions<sup>146</sup> and in academic commentary,<sup>147</sup> is that there was observed to be a over-arching and generalized fiduciary obligation owed by the Crown to Aboriginal peoples which obligation mandated, as a minimum, the upholding of Crown honour (to some undeveloped “high standard”).

This conceptualization is consistent with another important passage in *Sparrow* where the Court states:

...we find that the words “recognition and affirmation” [from s.35(1)] incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power ... federal power must be reconciled with federal duty ...<sup>148</sup> (emphasis added)

As an aside, and as picked up below, my contention is that this and other applicable portions of the *Sparrow* decision have been meaningfully re-oriented; that *Haida Nation* suggests that

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<sup>145</sup> *Ibid* at 1109.

<sup>146</sup> See, e.g., *Delgamuukw*, *supra* note 13 at 162-168; *R. v. Gladstone*, (1996), 137 D.L.R. (4th) 648, [1996] 2 S.C.R. 723 at para 54 [*Gladstone* cited to S.C.R.]; *Haida Nation v British Columbia (Minister of Forests)*, [2002] 2 C.N.L.R. 121 at para 36, 99 B.C.L.R. (3d) 209 at 36 [*Haida Nation BCCA No. 1* cited to B.C.L.R.] (“the trust-like relationship and its concomitant fiduciary duty permeates the whole relationship between the Crown, in both of its sovereignties, federal and provincial, on the one hand, and Aboriginal peoples on the other.”)

<sup>147</sup> Rotman, for instance, interpreted *Sparrow* as grounding an entirely plenary type of obligation, that it applies to “virtually every aspect of relations between the Crown and aboriginal peoples.”: Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*, *supra* note 47 at 11.

<sup>148</sup> *Sparrow*, *supra* note 19 at 1109.

section 35(1) now incorporates the honour of the Crown principle, and not “the fiduciary relationship.”<sup>149</sup>

Moving on, one way to view the doctrinal outcome (and the jurisprudential wake) of *Sparrow* is that there emerged a competition of sorts between competing principles (*i.e.* as between fiduciary and honour-based accountability) and that while in *Sparrow* the Court explicitly married the two instead of choosing one over the other, they also appeared to stake out an early preference for the fiduciary notion as the emerging, doctrinal centrepiece of Crown liability in Crown/Aboriginal Law, describing it as essentially absorbing the honour principle.<sup>150</sup> That preference was effectively confirmed and adopted in subsequent decisions.<sup>151</sup> As will be developed in detail in the next section, however, they reverse course in *Haida Nation*.

Subsequent Supreme Court of Canada decisions under this thread interpret *Sparrow* as standing for the proposition that the Crown’s *sui generis* fiduciary obligation owed “at large”<sup>152</sup> to Aboriginal peoples in Canada was the over-arching, core principle in Crown/Aboriginal Law; the obligation to uphold Crown honour being an effective offshoot of that principle. In *R. v. Van der Peet*, for instance, Chief Justice Lamer explained that “[t]he Crown has a fiduciary obligation to Aboriginal peoples with the result that in dealings between the government and Aboriginals, the honour of the Crown is at stake.”<sup>153</sup> Likewise, in *Mitchell*, Chief Justice McLachlin spoke of “an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as ‘fiduciary’”<sup>154</sup> (emphasis added).

I move now to examine how the Supreme Court fundamentally re-oriented these doctrinal dynamics in *Haida Nation*.

## **ii. As Fundamentally Reoriented in *Haida Nation***

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<sup>149</sup> As one example, among many, of the Supreme Court reorienting its doctrine in this manner, see, *e.g.*, *supra* note 111.

<sup>150</sup> As discussed in the next chapter, a fiduciary obligation to act honourably towards another is non-conventional. *Cf.*, however, *Meinhard v Salmon* (1928), 164 N.E. 545, 249 N.Y. 458 at 465 (New York C.A.) where Cardozo J. describes fiduciary accountability as follows: “A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior.”

<sup>151</sup> See, *e.g.*, *Delgamuukw*, *supra* note 13 at para 162-168; and *Gladstone*, *supra* note 146 at para 54.

<sup>152</sup> *Guerin*, *supra* note 27 at 355 *per* Wilson J.

<sup>153</sup> *Van der Peet*, *supra* note 26 at para 24.

<sup>154</sup> *Supra* note 29 at para 9.

Chief Justice McLachlin's decision in *Haida Nation* is a seminal decision in Canadian Crown/Aboriginal Law, following in a thread of other transformative decisions such as *Calder*, *Guerin*, *Sparrow*, *Van der Peet*, and *Delgamuukw*. Installing the "duty to consult and accommodate" as a primary (dialogical<sup>155</sup>) Crown obligation – as the *Haida Nation* decision did together with *Taku River* and *Mikisew* – has entirely transformed the face of litigation in this area.<sup>156</sup>

Consultation and accommodation *obligations* are now recognized categories of specific Crown obligations in Aboriginal contexts in Canada. Conversely, *rights* to honourable consultation and (where applicable) accommodation are now explicit. And the foundational doctrinal principle is that applicable infringement of such rights will constitute actionable Crown dishonour. Doctrinal frameworks governing the discharge of Crown consultation and accommodation obligations have been substantially animated since *Haida Nation*.<sup>157</sup> However, development of the conceptual nature of their theoretical underpinnings is a project still in its early stages,<sup>158</sup> a fact that, as indicated, fuels the current project.

I move now to a detailed examination of the *Haida Nation* litigation, specifically focussed on the manner in which the three respective Courts sourced or denied the applicable consultation and accommodation-related legal obligations claimed. From a theoretical perspective, the decisions are each quite fascinating, and informative for this project generally. And an analysis of each

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<sup>155</sup> Henderson, "Dialogical Governance: A Mechanism of Constitutional Governance," (2009) 72(1) Sask. L. Rev. 29.

<sup>156</sup> On the duty to consult and accommodate generally, see: Newman, *The Duty to Consult*, *supra* note 4.

<sup>157</sup> See, generally, Newman, *The Duty to Consult*, *supra* note 4; Isaac, *Crown/Aboriginal Law*, *supra* note 99 at 302-382; and Maria Morellato, "The Crown's Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights," National Centre for First Nations Governance Research Paper (Feb. 2009). The Supreme Court of Canada decisions to meaningfully address Crown consultation and accommodation obligations *post Haida Nation* are: *Taku River*, *supra* note 4; *Mikisew*, *supra* note 4; *Little Salmon/Carmacks*, *supra* note 14; and *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 [*Carrier Sekani*].

<sup>158</sup> Isaac, *Crown/Aboriginal Law*, *supra* note 99 at 312: "a complete understanding of this important legal principle as it applies to s.35 and Aboriginal peoples is in its infancy." See, also, Newman, *The Duty to Consult*, *supra* note 4 at 15-23. Newman advances several different potential bases on which to conceptualize the duty to consult. Where he speaks to the honour of the Crown principle specifically, he says this:

One might suggest that the judges, in the duty to consult context, simply draw on a long-standing concept of the 'honour of the Crown,' but this does not displace the need to develop a broader theoretical account of the duty to consult in order to understand it. The early doctrinal foundations of the 'honour of the Crown' consist of a concept that gave rise to a principle of interpretation that Crown grants should be interpreted in a manner such that they were not void. Without further development of the concept this doctrine has no immediate application in the context of the duty to consult. (footnotes omitted)

will serve my subsequent project of articulating a Dworkinian conceptualization of the fundamentals of the honour of the Crown-based legal construct.

### *Haida Nation Litigation – Background*

For more than a hundred years, the Haida Nation (the “Haida”) have claimed title to the lands of Haida Gwaii and the surrounding waters, which claim has not been either adjudicated on its merits or reconciled through any completed process of negotiation with British Columbia or Canada. The Haida lived on these lands long prior to confederation, were never conquered or displaced (as expressly recognized by McLachlin C.J.<sup>159</sup>), and have never signed a treaty with the Crown.

In 1961, the British Columbia Ministry of Forests granted a permit to MacMillan Bloedel to harvest portions of Haida Gwaii. Over time the permit was replaced, and later transferred to Weyerhaeuser (in 2000). The latter transfer (as well as some of the preceding replacements) was made after and in the face of express objections advanced by the Haida.

The Haida brought a judicial-review petition seeking, among other claims for relief, a declaration that British Columbia stood in a fiduciary relationship with the Haida and was therefore obligated to consult regarding applicable Haida interests with an intention of seriously addressing those interests prior to making any decisions regarding the management of the timber resource on Haida Gwaii.

The Haida also argued that the honour of the Crown was “brought into question” by the provincial Crown’s failure to meaningfully consult in this instance. For its part, the provincial Crown emphasized the fact it had a responsibility to manage the timber resource for the welfare of all citizens of British Columbia, and that it should not be rendered impotent pending formal reconciliation of Aboriginal rights claims. It argued that no fiduciary obligation could arise in these types of scenarios absent proven Aboriginal rights.

The Haida Aboriginal title assertion is a claimed section 35 right, one that was essentially (assuming eventual formalization) recognized and affirmed by the supreme law of Canada, the

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<sup>159</sup> *Haida Nation*, *supra* note 2 at para 69.

*Constitution Act, 1982*, more than two decades ago. The chambers judge noted a “reasonable probability” that the Haida would eventually prove its claim at law.<sup>160</sup>

The *Haida Nation* litigation, therefore, tasked the chambers judge, and the appellate judges to follow with determining certain consultation and accommodation-related rights, an endeavour of first instance in the case of the Supreme Court of Canada, against a backdrop of claimed constitutional rights that arguably (though not inevitably) already existed but had yet to be formally accepted or defined.<sup>161</sup>

Of course, the legal duty to consult in these types of “pre-proof” scenarios was ultimately recognized by McLachlin C.J. Established was a type of interim framework<sup>162</sup> for applicable consultation and accommodation duties in the context of asserted but unproven Aboriginal rights. Though I will not be examining the nature of this specific framework in fulsome detail, mostly restricting my analysis in this chapter to the manner in which the honour of the Crown principle is interpreted in the decision, it is helpful to the analysis to consider at this point a brief summary.

### *The Crown Duty to Consult and Accommodate*

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<sup>160</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2001] 2 C.N.L.R. 83 at para 47, 2000 BCSC 1280 [*Haida Nation BCSC* cited to C.N.L.R.].

<sup>161</sup> A metaphor sometimes used to differentiate two different conceptual interpretations of this aspect of section 35 is that of an “empty box” (*i.e.* that section 35 rights are potential rights that would only come into being once formally recognized by the Crown) contrasted with that of a “full box” (*i.e.* section 35 rights already exist regardless of Crown formalities). Richard Daly, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005); Walkem, Ardith and Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Vancouver: Theytus, 2003). See, also, *Ochapowace Ski Resort*, *supra* note 27 at para 64. Obviously, this conceptual context is loaded from a jurisprudential standpoint: legal positivists whether, for example, J.L. Austin followers or H.L.A. Hart followers, may argue that, notwithstanding the “existing” language in section 35, such rights do not exist until specifically established and that section 35 was in essence only a promise or a guarantee that certain rights would be established in the future. It might be noted that this type of dichotomy – that as between finding and inventing law and rights – is one that Ronald Dworkin’s thesis expressly deplores as unhelpful to jurisprudential analysis: see, *e.g.*, Dworkin, *Law’s Empire*, *supra* note 66 at 228.

<sup>162</sup> This framework, of course, was later confirmed (as modified accordingly for context) in the context of treaties, both historical and modern. See *Mikisew*, *supra* note 4 (historical treaties) and *Little Salmon/Carmacks*, *supra* note 14 and *Quebec (Attorney General) v. Moses*, [2010] 1 S.C.R. 557, [2010] 1 R.C.S. 557 [*Moses* cited to S.C.R.] (modern treaties). In these contexts, the Crown consultation/accommodation framework is not properly conceptualized as an interim framework but rather one that independently regulates Crown conduct generally in the context of potential infringements to established (treaty) rights (*i.e.* as an independent form of regulation that governs in addition to, and as supplementary to, any specific treaty rights).

Generally, in the pre-proof claim context, before authorizing or undertaking conduct that may adversely affect interests of an Aboriginal community related to claimed section 35 rights, the Crown must honourably and meaningfully consult that community regarding such interests. The obligation arises when the Crown has knowledge of the rights claim and is contemplating action that may adversely affect it. The consultation is to take place as early as possible in the project's planning stages, and the extent of the obligation will be proportionate to (1) the strength of the case supporting the claimed rights and (2) the seriousness of the potentially adverse effect (McLachlin C.J. invoked the concept of a spectrum in this regard to be used in any such assessment).

It is to be anticipated that the consultation process may reveal a duty to accommodate. The substance of any accommodation will depend on the circumstances. The duty to accommodate is said to involve the amending of a planned Crown (or industry) initiative in accordance with a process of balancing interests and minimizing adverse impacts.<sup>163</sup> Subsequently, other forms of substantive accommodation such as applicable employment or business development opportunities or direct economic compensation will sometimes be appropriate.<sup>164</sup> The controlling question in all scenarios is: “what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake?”<sup>165</sup> The obligation, owed by both provincial and federal Crowns,<sup>166</sup> lies with the Crown alone; there is no independent duty on third parties, since the honour of the Crown may not itself

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<sup>163</sup> *Haida Nation*, *supra* note 2 at paras. 47, 49-50. The doctrinal nature of the specific “duty to accommodate” remains largely embryonic in these types of contexts. See, generally, Newman, *The Duty to Consult*, *supra* note 5 at 58.

<sup>164</sup> See, e.g., *ibid*; and *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)* 2005 BCCA 140, (2005), 37 B.C.L.R. (4th) 309 at paras 97 and 98. Also, note as an example of a government policy directive on this Crown obligation that the Government of Saskatchewan has stated that “financial compensation” is an appropriate form of Crown accommodation in instances where a “significant, unavoidable infringement on Treaty and Aboriginal rights” is contemplated: see Government of Saskatchewan, *First Nation and Metis Consultation Policy Framework* at 13, available online at:

<<http://www.gr.gov.sk.ca/Consultations/Consultation-Policy-Framework>>.

<sup>165</sup> *Haida Nation*, *supra* note 2 at para 45.

<sup>166</sup> *Haida Nation*, *supra* note 2 at para 59. Note that the British Columbia Court of Appeal recently held that municipalities effectively do not owe constitutional Crown obligations and, further, that applicable provincial governments (*i.e.* the Crown) are also not responsible if any of *their* municipalities act in a manner that infringes Aboriginal or treaty rights: *Neskonlith Indian Band v. Salmon Arm*, [2012] 4 C.N.L.R. 218, 2012 BCCA 379. This line of jurisprudence is very likely to evolve.

be delegated to non-Crown entities.<sup>167</sup> However, the Crown may delegate “procedural aspects” of consultation to a project proponent.<sup>168</sup>

The Aboriginal community in question must also consult in good faith, must not frustrate the Crown's efforts to consult, and will not generally hold a veto in relation to the uses to which contested lands may be put.<sup>169</sup>

Much more could be said about this framework and the manner in which it has been interpreted and applied in subsequent cases,<sup>170</sup> but the foregoing summary will suffice for the analysis to follow.

### *British Columbia Supreme Court*

The chambers judge in *Haida Nation* dismissed the judicial-review petition denying the assertion that the claimed legal consultation obligations exist at law in pre-proof claim scenarios. Engaging the paradigm of the *Sparrow* justification test (which, as indicated above, provides that infringements of Aboriginal rights may be justified in certain circumstances), Halfyard J. decided that since the claimed Haida right to Aboriginal title had not been conclusively determined, and since “the law does not presume the existence of Aboriginal rights,”<sup>171</sup> questions of infringement of such rights were speculative and, as a result, questions of applicable justification (and of the scope of the applicable fiduciary duty or any duty to consult) could not be framed or determined with any certainty.

Despite his acknowledgement that British Columbia owed a generic legal fiduciary obligation (in some form) to the Haida,<sup>172</sup> Halfyard J. drew a sharp distinction between the nature of moral and legal obligation, and ultimately held that British Columbia, in the circumstances of the case, had come under a moral but not a legal obligation to assess the strength of the Haida claim, and to

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<sup>167</sup> *Haida Nation*, *supra* note 2 at para 53.

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid* at para 48. Contrast this lack of a veto for Aboriginal peoples in the Canadian context with the notion of “free, prior and informed consent” that forms part of the United Nations’ *Declaration on the Rights of Indigenous Peoples*, available online at <[http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)>.

<sup>170</sup> For commentary on post-*Haida Nation* case law, see generally the sources cited at *supra* note 156.

<sup>171</sup> *Haida Nation BCSC*, *supra* note 159 at para 17.

<sup>172</sup> *Ibid* at para 23.

consult proportionately, prior to granting applicable regulatory approvals. He cited, as apparent authority for his distinction between moral and legal duties, the *dictum* of Lamer C.J. from *Delgamuukw* that the Crown likely has a “moral, if not a legal, duty” to negotiate Aboriginal land claims in good faith.<sup>173</sup>

In support of his finding that British Columbia owed a duty (though moral only) to consult the Haida, he noted the relative strength of the Haida claim to Aboriginal title, the “reasonable probability” that the claim would eventually be successful, and the fact that the claim therefore goes “far beyond” mere assertion.<sup>174</sup> He also cited portions of applicable governmental (British Columbia) consultation policies, which mandated some measure of consultation of Aboriginal interests in pre-proof claim situations, and noted it was “arguable that the Crown ... failed to comply with its own guidelines, in refusing to consult with the Haida.”<sup>175</sup>

It is unclear what purpose he intended his articulation of the existing moral duties to serve, in light of his ultimate finding that such duties are not enforceable at law. The answer to this question may have something to do with his treatment of the honour of the Crown principle, to which end he states that:

... although I have expressed the opinion that the Crown has a moral duty to consult with the Haida concerning the Minister's decision to replace T.F.L. 39, I am not satisfied that the honour of the Crown has been diminished by the past failure to fulfill such moral duty. But I think the honour of the Crown will be called into question if this failure continues.<sup>176</sup> (emphasis added)

He appears to have been (awkwardly) suggesting that moral transgressions of the kind addressed are relevant for they may in a future instance reach some threshold level of degree so as to somehow, in combination with the application of the honour of the Crown principle, morph into a type of legally-enforceable moral transgression.

### British Columbia Court of Appeal

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<sup>173</sup> *Ibid* at para 61.

<sup>174</sup> *Ibid* at at para 50.

<sup>175</sup> *Ibid* at para 58.

<sup>176</sup> *Ibid* at para 64.

On appeal, Justice Lambert reversed the decision of Halfyard J. and held that there is a *legal* duty to consult Aboriginal interests in the pre-proof claim context. Like Halfyard J., Lambert J.A. recognized the existence of an at-large fiduciary relationship as between the federal and provincial Crowns, on the one hand, and all Aboriginal peoples in Canada on the other. He described it as a trust-like relationship, sourcing back to the *Royal Proclamation, 1763*,<sup>177</sup> that “is now usually expressed” in Canadian courts as fiduciary in nature.<sup>178</sup> He held that the duty to consult flows from this fiduciary relationship and is itself fiduciary in nature.<sup>179</sup>

He looked at the authorities in relation, principally, to the nature of the fiduciary relationship and then determined that the legal duty to consult is justified by the fact that it would offend “the general guiding principle” set out in *Sparrow* to deny the legal consultation duty in these circumstances. Specifically, he said this:

The trust-like relationship is now usually expressed as a fiduciary duty owed by both the federal and Provincial Crown to the aboriginal people. Whenever that fiduciary duty arises, and to the extent of its operation, it is a duty of utmost good faith. ... So the trust-like relationship and its concomitant fiduciary duty permeates the whole relationship between the Crown, in both of its sovereignties, federal and provincial, on the one hand, and the aboriginal peoples on the other. One manifestation of the fiduciary duty of the Crown to the aboriginal peoples is that it grounds a general guiding principle for s. 35(1) of the *Constitution Act, 1982*. ... It would be contrary to that guiding principle to interpret s. 35(1) ... as if it required that before an aboriginal right could be recognized and affirmed, it first had to be made the subject matter of legal proceedings; then proved to the satisfaction of a judge of competent jurisdiction; and finally made the subject of a declaratory or other order of the court. That is not what s. 35(1) says and it would

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<sup>177</sup> R.S.C. 1985, App. II, No.1.

<sup>178</sup> *Haida Nation BCCA*, *supra* note 145 at para 34.

<sup>179</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2002 BCCA 462, 216 D.L.R. (4th) 1 at para 63 [*Haida BCCA No. 2*].

be contrary to the guiding principles of s. 35(1), as set out in *R. v. Sparrow*, to give it that interpretation.<sup>180</sup>

Lambert J.A. also commented on the finding of the chambers judge that there were only moral duties owed in this instance. He disputed both the reasoning that Lamer C.J.'s *dictum* from *Delgamuukw* supported such a finding, as well as the "relevance" in any event of the concept of a moral duty to these proceedings.<sup>181</sup>

Lambert J.A. did not specifically engage the honour of the Crown principle.

### Supreme Court of Canada

Chief Justice McLachlin upheld Lambert J.A.'s ruling that there is a legal duty to consult in pre-proof claim scenarios. However, she described the applicable founding doctrine in a manner significantly distinct from his *dicta*. Following intervening precedent,<sup>182</sup> she adopted a position contrary to both the chambers judge and Lambert J.A. on the issue of whether a fiduciary duty is owed at large by the Crown to all Aboriginal peoples in Canada, stating that this duty only arises in relation to "sufficiently specific" interests, and does not exist at large.<sup>183</sup>

McLachlin C.J. held that both the legal duty to consult and the legal duty to accommodate (assuming the latter is revealed through appropriate consultation) exist as progeny of the "core precept" that the honour of the Crown is always at stake in its dealings with Aboriginal peoples. Further, she sourced this underlying precept in two observable ways: (1) as a practical result of the assertion of sovereignty by the British Crown over the Haida lands<sup>184</sup> and (2) as a corollary of section 35 of the *Constitution Act, 1982*.<sup>185</sup>

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<sup>180</sup> *Haida Nation BCCA No. 1*, *supra* note 145 at paras 34-37.

<sup>181</sup> *Ibid* at para 23.

<sup>182</sup> The Supreme Court of Canada's decision in *Wewaykum*, *supra* note 34, was released after the British Columbia Court of Appeal issued its decision in *Haida Nation BCCA*, *supra* note 145.

<sup>183</sup> *Haida Nation*, *supra* note 2 at para 18.

<sup>184</sup> *Ibid* at para 32.

<sup>185</sup> *Ibid* at para 20.

She explained that section 35 constitutes a “promise of rights recognition,” describing Aboriginal rights as “potential rights,”<sup>186</sup> and stating that during the (long) ongoing processes of negotiation, rights determination, and reconciliation, the Crown must honourably respect the interests that inhere in such potential rights.<sup>187</sup>

Of particular relevance to the current project, she described the doctrinal intersection between Crown honour accountability and fiduciary accountability (and the emergent centrality of the honour principle) as follows:

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples ... It is not a mere incantation, but rather a core precept that finds its application in concrete practices. ... The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty ... As explained in [*Wewaykum*], at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:

... “fiduciary duty” as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship .... overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best

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<sup>186</sup> On this notion of section 35 constituting only a “promise” of rights to come, as opposed to recognition of rights that already exist, see *supra* note 25.

<sup>187</sup> *Haida Nation*, *supra* note 2 at paras 20 and 67.

interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.<sup>188</sup>

As noted above, McLachlin C.J. describes the nexus between Crown honour and fiduciary accountability in a manner that fundamentally reverses earlier doctrine. Recall that she herself in *Mitchell* referred to the Crown honour mandate as “a duty characterized as fiduciary,”<sup>189</sup> and recall, further, that Lamer C.J. in *Van der Peet* likewise stated that “[t]he Crown has a fiduciary obligation to Aboriginal peoples with the result that in dealings between the government and Aboriginals, the honour of the Crown is at stake.”<sup>190</sup> Here, however, McLachlin C.J. states that (in applicable circumstances) “the honour of the Crown gives rise to a fiduciary duty.”<sup>191</sup>

Furthermore, though she reconceptualises the honour of the Crown principle as the broader or over-arching source of obligation – the fiduciary duty an off-shoot of this broader constitutional source – she does so (unfortunately) without acknowledging that fundamental doctrinal reorientation was at play, and that structural conceptual components of previous doctrine were effectively discarded.

On the general content of the honour of the Crown principle, and in contrast to any applicable “off-shoot” fiduciary obligation which she describes as involving a mandate to act “with reference to the best interests” of a given Aboriginal community,<sup>192</sup> McLachlin C.J. explains that:

[p]ending 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. Balance and compromise will then be necessary.<sup>193</sup>

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<sup>188</sup> *Ibid* at para 18.

<sup>189</sup> *Mitchell*, *supra* note 29 at para 9.

<sup>190</sup> *Van der Peet*, *supra* note 26 at para 24.

<sup>191</sup> *Haida Nation*, *supra* note 2 at para 18.

<sup>192</sup> *Ibid* at para 18.

<sup>193</sup> *Ibid* at para 45.

As will become clear in the next chapter when I examine the general nature of fiduciary obligation, notions of balancing the interests of one's beneficiary against those of others and having discretion to compromise a beneficiary's interests, run counter to the core of conventional fiduciary doctrine which singularly purports to guard against precisely such behaviour.

I will now change course and intersect Dworkin's rights thesis with *Haida Nation*'s honour of the Crown construct so as to provide added clarity as to the doctrinal nature of this construct and its potential as the central doctrinal framework for Crown/Aboriginal Law.

### **1. A Dworkinian Conceptualization**

We know that in *Haida Nation*, the Haida argued that the Crown owes a specific legal obligation to meaningfully consult regarding Haida interests. We know McLachlin C.J. ultimately recognized this Crown obligation, which she sourced to the honour of the Crown. We know that for Dworkin a legal obligation corresponds with some legal right. So, as a starting point, note that what the Haida were claiming (and indeed what was enforced) was *a right* to be honourably consulted prior to the granting of any such permits (even though enforcement of that right constituted a disservice to the political rights of others – Weyerhaeuser for instance).

This right to consultation is meaningfully distinct from the Haida's asserted *right* to constitutional Aboriginal title; while the latter (the asserted section 35 right to Aboriginal title) is clearly relevant to the interpretation and enforcement of the former (the right to be honourably consulted), it was not in any way itself enforced in this case. The asserted section 35 right to Aboriginal title, is simply one part of the novel in progress; a dominant structural component of the applicable theoretical, constitutional story, but indeed only one component among many.

The affirmed Haida *right* to be honourably consulted by the provincial Crown in these circumstances is, in accordance with Dworkin's account, a type of "political trump"; a concrete, institutional legal right, substantially defined so as to be capable of adjudication (*i.e.* as an independent cause of action), the enforcement of which enhances and protects the overall "state of affairs" in which it is enjoyed. The applicable "state of affairs" in *Haida Nation* – *i.e.* the theoretical constitutional story as a whole evincing our "constitutional morality" (a conception of

which theory, mirroring the dictates of Dworkin’s rights thesis, was taken up by and articulated by McLachlin C.J.) – included, among others, the following aspects: the *Constitution Act, 1982* recognizes and affirms certain Aboriginal rights (in section 35); identification and definition of many such rights has yet to occur (partly due to the failure of the constitutional mechanism, section 37, for defining those rights<sup>194</sup>) and is an ongoing, organic process;<sup>195</sup> the Haida have a “reasonable probability” of making out such a right but have not yet done so, and; a denial of the claimed legal duty to consult in these circumstances could have the effect of significantly robbing the “potential” section 35 right of much of its intended benefit prior to its even being established.

Moreover, this right (to be honourably consulted) therefore *exists* for the reason that its denial would “retard” or “endanger” the context in which the potential section 35 right is anticipated.

Let us now apply Dworkinian theory to specific instances of how the three respective judges reasoned in the *Haida Nation* litigation. Recall that the chambers judge drew a distinction between moral and legal obligation and ultimately held that the Crown owed only a moral duty to the Haida. Here, Dworkinian theory may lead us to conclude that Halfyard J. erred in his reliance upon a false distinction, and that he ought to have enforced the obligation he recognized as existing. Recall that for Dworkin, a fundamental dimension of adjudication is the (legal) animation of aspects of “community morality” (*i.e.* those that have a demonstrably sufficient “fit” with applicable aspects of the “novel to date”).<sup>196</sup>

Lambert J.A., for the Court of Appeal, ruled in a manner much more consistent with Dworkin’s rights thesis. He looked at the applicable authorities, noted the indication, from *Guerin* and *Sparrow*, of an abstract principle (itself a manifestation of the fiduciary nature of the relationship at large between the Crown and all Aboriginal peoples in Canada), said to be a “general guiding

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<sup>194</sup> See *supra* note 25.

<sup>195</sup> On Aboriginal rights as themselves “organic” in nature, see Brian Slattery, “The Generative Structure of Aboriginal Rights” (2007) 38 Sup. Ct. L. Rev. 595. In this article, Professor Slattery describes a “new constitutional paradigm” that conceptualizes “generic” Aboriginal rights that have the ability to renew themselves, to grow and change over time (*i.e.* in contrast to the old paradigm – one, he argues, that is in the process of being discarded by the Supreme Court of Canada – where Aboriginal rights were seen as merely “historical” in nature). See also: Brian Slattery, “Aboriginal Rights and the Honour of the Crown,” *supra* note 114 at 436 where he talks about *Haida Nation* and *Taku River* effectively confirming this paradigm for Crown/Aboriginal Law (*i.e.* where section 35 itself constitutes a “generative constitutional order”).

<sup>196</sup> See *supra* notes 74, 81, and 98, and the text surrounding each.

principle” for section 35 of the *Constitution Act, 1982*, and then interpreted the claimed right (*i.e.* to honourable consultation) in accordance with the *spirit* of that principle, the applicable, community morality.

McLachlin C.J., however, was faced with the fact that after Lambert J.A.’s decision issued, the Supreme Court of Canada, in *Wewaykum*, ruled conclusively on the issue of whether or not a fiduciary relationship exists at large as between the Crown and all Aboriginal peoples. Where Binnie J. expressly noted in that decision that the at-large fiduciary relationship does not exist, this had the effect of undercutting the finding to the contrary by Lambert J.A. Recall that the “general guiding principle” relied upon by Lambert J.A. was held to be a specific manifestation of the fiduciary relationship which now, in light of *Wewaykum*, could no longer be assumed to exist (*i.e.* at large).

However, McLachlin C.J. was evidently of a similar mind to Lambert J.A. in relation to the content and implications of the applicable Dworkinian “community morality,” since after her review of the authorities (indeed, as noted above, after taking up a general theory in relation to the applicable “constitutional morality”), she focused upon an additional *abstract principle*, that the Crown must always act honourably in its dealings with Aboriginal peoples (which principle, perplexingly and as noted above, was initially used to co-source the “general guiding principle” articulated in *Sparrow*), and interpreted this principle as determinative and as the foundation of the claimed, *concrete right* of the Haida to be consulted and to have its interests accommodated in relation to ongoing forestry on Haida Gwaii. Indeed, this decision was, in accordance with the Dworkinian account presented, in the form of the next (best) chapter for the novel in progress, all things considered.

What then of the legal *rule* that was established by McLachlin C.J. in this case?

Recall that for Dworkin, rules are a type of “all or nothing” proposition that dictate specific results: “if the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not...”. Principles, on the other hand, take a different form and “incline a decision one way, though not conclusively, and they survive intact when they do not prevail.”

The principle, therefore, that the Crown must always act honourably in its dealings with Aboriginal peoples is clearly a Dworkinian abstract principle.

The Dworkinian *rule* espoused in *Haida Nation* was simply that if the Crown has knowledge of an asserted Aboriginal right and it is contemplating conduct that may impact that right, it *must* honourably consult the community asserting the right in accordance with the legal framework set out in the case. This is an “all or nothing” proposition that dictates specific results, and it therefore carries “enactment force.” Underlying this rule then, as expressly referred to in the rule itself by the word “honourably”<sup>197</sup> is this *principle* that the honour of the Crown is always at stake. The principle does not dictate specific results, but rather, as McLachlin C.J. explains in *Haida Nation*, “finds its application in concrete practices.”<sup>198</sup> Further, this principle then must only exert a type of “gravitational force” (*i.e.* on future judges) in accordance with the rights thesis, which notion (again) is consistent with McLachlin C.J.’s *dictum* in *Haida Nation*.

Surely, however, something more doctrinally profound was generated here inherent in the nature of McLachlin C.J.’s “core precept”. One certainly senses that she gave it an interpretation that transformed its nature and function.<sup>199</sup> In accordance with Dworkin’s account, however, we may conclude that McLachlin C.J. simply altered (probably dramatically) the degree of “gravitational force” that this principle is to have on any future author of the unfolding chain novel, even though in light of its form this degree could not reach that of enactment force since it does not by itself dictate specific results. She also, of course, reconceptualised its ultimate source; where it was previously held that the honour of the Crown principle flowed from the fact that Crown/Aboriginal relationships were deemed to be fiduciary relationships, McLachlin C.J. reasoned in *Haida Nation* that it actually flows principally from section 35 itself and from the reality of *de facto* Crown sovereignty over Aboriginal peoples and lands.<sup>200</sup>

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<sup>197</sup> Recall also that McLachlin C.J. stated in *Haida Nation*, *supra* note 2 at para 45, that the “controlling question” for the Crown when consulting with Aboriginal peoples about potential impact to their rights is “what is required to uphold the honour of the Crown?”

<sup>198</sup> *Haida Nation*, *supra* note 2 at para 16.

<sup>199</sup> See, *e.g.*, McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples*, *supra* note 49 at 57: “Early in the post-1982 period the Supreme Court made extensive use of the fiduciary concept in aid of the reconciliation imperative. Latterly it has concentrated on the idea of the honour of the Crown as a more comprehensive principle on which to found conclusions...”

<sup>200</sup> *Haida Nation*, *supra* note 2 at paras 20 and 32.

Furthermore, the *Haida Nation* decision makes it much more likely that the honour of the Crown will be addressed by future judges; that unlike other principles, this one *must* now always be *considered* as part of any legal adjudication in Canada involving at least those instances where there is an allegation of an infringement of an Aboriginal or treaty right (since Crown honour is “always” at stake in such dealings).<sup>201</sup>

Moreover, in the specific scenario where a judge is addressing the issue of whether or not an instance of consultation and accommodation is legally sufficient (*i.e.* honourable), when he or she is interpreting, that is, the claim of a particularized concrete consultation right, the honour of the Crown principle is indeed *part of* the applicable rule.

From a doctrinal perspective, and as noted at the outset, organizing an entire area of law around an abstract principle is not novel. For conceptual assistance, one may contrast the honour of the Crown principle to the *neighbour principle* that similarly founds and organizes tort law. The neighbour principle, grounded as part of the applicable “community morality” in *Donoghue v. Stevenson*,<sup>202</sup> that mandates *we must not injure our neighbour* (contrast with the principle that the Crown must always act honourably in its dealings with Aboriginal people) was, in nature, a Dworkinian abstract principle both before and after *Donoghue v. Stevenson*.

In *Haida Nation* then, it may be observed that there was (arguably) no legal doctrine available (particularly since Justice Binnie, in *Wewaykum*, had jettisoned the notion of an applicable at-large fiduciary relationship between the Crown and all Aboriginal peoples) to govern the claimed consultation rights at issue since no (established) constitutional rights were explicit. So indeed, *Hercules* had no choice (in terms of recognizing the claimed concrete consultation rights) but to locate an applicable abstract principle within the “constitutional morality” from which to source the claimed rights. This is, in effect, a Dworkinian conceptualization of the adjudication endeavour in *Haida Nation* in terms of the specific development of the honour of the Crown principle.

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<sup>201</sup> Note that in *Manitoba Metis Federation*, *supra* note 5, which is discussed in greater detail in the next subsection, the Supreme Court recognized the honour of the Crown principle as triggering in a (constitutional) context where no section 35 rights were at issue, on the basis that the “reconciliation project” was itself at issue in light of the fact that the case involved issues related to the assertion of Crown sovereignty in southern Manitoba, and the manner in which the Crown sought to “reconcile” that assertion with interests of applicable Metis people living in the region at that time.

<sup>202</sup> *Supra* note 15.

Finally, it is important for present purposes to situate the ubiquitous “reconciliation” mandate within my (Dworkinian) account presented.<sup>203</sup> In *Haida Nation*, the Chief Justice explained that the reconciliation “of the pre-existence of aboriginal societies with the sovereignty of the Crown” is an over-arching “goal” that section 35 “demands”<sup>204</sup> (and, of course, she made the important concession in this case that Crown sovereignty over Aboriginal lands and peoples is “*de facto*” only at present, meaning it is something less than fully legitimate at law<sup>205</sup>). What then are we to make of the Dworkinian form of this over-arching reconciliation goal?

Recall that Dworkin distinguishes *principles* from *policies*, explaining that (a) judges principally deal in the former in enforcing (“individuated”) *rights*, while (b) legislators principally deal in the latter in promoting (“non-individuated”) community *goals*. He further suggests that “arguments of *policy*” (*i.e.* as opposed to “arguments of *principle*”) are typically inapplicable to a judge’s primary task in recognizing and enforcing (or not) a particularized right being alleged.<sup>206</sup>

Ultimately, then, the “reconciliation” mandate, described in *Haida Nation* as a “goal”, takes the form of a Dworkinian non-individuated Canadian, constitutional policy objective; that is, the Supreme Court clearly understands this reconciliation mandate to be the central policy dictate implicit in section 35 of the *Constitution Act, 1982*. In *Haida Nation*, McLachlin C.J. goes to some length to distinguish the reconciliation mandate from the honour of the Crown principle and its off-shoot duties. She states that Crown/Aboriginal reconciliation is neither “a final legal remedy in the usual sense” nor a “distant legalistic goal.”<sup>207</sup> Rather, she describes it as an ongoing constitutional process that is best achieved outside the courtroom (*e.g.* through “negotiations”).<sup>208</sup> And she conceptualizes the mandate of Crown honour (*i.e.* enforceable judicially) as serving a protective and facilitative role in relation to the (policy-oriented) reconciliation goal, stating that legally binding the Crown to honourable conduct in particular scenarios regarding alleged (and individuated) rights and obligations both (a) helps move us

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<sup>203</sup> *Haida Nation*, *supra* note 2 at para 14.

<sup>204</sup> *Ibid* at para 14, 35, and 38.

<sup>205</sup> *Ibid* at para 32.

<sup>206</sup> This conceptual framework of Dworkin’s differentiating principles from policies has been explicitly adopted for contextual use by the Supreme Court in more than one instance: see, *e.g.*, *Grondin*, *supra* note 7 at 375, and in *Re Residential Tenancies Act*, *supra* note 7 at 736.

<sup>207</sup> *Haida Nation*, *supra* note 2 at para 32 and 33

<sup>208</sup> *Ibid* at para 38.

“further down the path of reconciliation”<sup>209</sup> and (b) is effectively required as part of the community and constitutional morality acknowledged in *Haida Nation*; that is, that honourable conduct is “required if we are to achieve” the strived-for Crown/Aboriginal constitutional reconciliation.<sup>210</sup>

### iii. As Further Developed *Post Haida Nation*

In the wake of *Haida Nation*’s transformation of the fundamentals of Crown/Aboriginal Law, detailed in the preceding section, lower courts have been at substantial pains to properly conceptualize the prevailing doctrinal construct.<sup>211</sup> In their defence, and as I contend centrally in this project, the Supreme Court’s transformation of its doctrine is not yet complete; they are incrementally mending a materially flawed (and dysfunctional) doctrine whose fundamentals are presently incongruent, and are working to re-orient years of jurisprudence under a new construct. They are doing so without (yet) having explicitly acknowledged either the mistake they made in importing fiduciary concepts into the core of Crown/Aboriginal Law or the fundamental doctrinal reversal that *Haida Nation* effected;<sup>212</sup> they have not yet jettisoned those concepts entirely, leaving significant doctrinal uncertainty and overlap. It is indeed difficult to conceptualize a meaningful distinction between a duty to act honourably towards another and a duty to act with some reference to another’s best interest; and hence confusion in the lower courts.

That all said, there have been some notable developments specifically regarding the doctrinal fundamentals of the Supreme Court’s modern honour of the Crown principle. The majority of the jurisprudence in Crown/Aboriginal Law since *Haida Nation* has been centrally focussed on the honour of the Crown’s (off-shoot) duty to consult and accommodate. The legal framework governing that important duty, and how it applies in both treaty and non-treaty contexts, has been

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<sup>209</sup> *Ibid* at paras 45 and 49.

<sup>210</sup> *Ibid* at para 17.

<sup>211</sup> See *supra* note 39.

<sup>212</sup> See, e.g., *supra* notes 188 and 189 and the text surrounding each. The closest they have come was in the comment of Deschamps J. in her minority decision in *Little Salmon/Carmacks*, *supra* note 14 at para 105 where she noted with implicit approval the fact that Crown honour accountability had been, in applicable recent decisions, “substituted” in for Crown fiduciary accountability.

animated substantially.<sup>213</sup> As already indicated, this specific Crown obligation has been, by far, the most litigated in Crown/Aboriginal Law in recent years.

Comparatively little guidance or clarification, however, has been provided in applicable decisions in terms of the fundamental nature of the honour of the Crown principle itself (and its conceptual nexus with Crown fiduciary obligations). The most significant addition to the law in this latter regard came in the Supreme Court of Canada's recent decision in *Manitoba Metis Federation*.<sup>214</sup> In that decision, the Supreme Court recognized what is effectively the second explicit progeny of the honour of the Crown principle, the duty to purposively and diligently fulfill applicable constitutional obligations. The nature of that specific duty, as developed in that case, is discussed shortly. First, I will comment on some of the general clarifications that the Supreme Court has made *post Haida Nation* regarding its modern honour of the Crown principle.

One of the major themes emanating from the post-*Haida Nation* decisions in this area is the confirmation of the doctrinal centrality of the honour of the Crown principle in Crown/Aboriginal Law, and the doctrinal usurpation by that principle of the jurisdiction previously taken up by the Supreme Court's generalized fiduciary principle. In *Little Salmon/Carmacks*, for instance, Justice Binnie describes the new doctrinal construct (*i.e.* the honour of the Crown and its applicable off-shoot Crown obligations) as, effectively, the "essential legal framework" for Crown liability doctrine in Crown/Aboriginal Law. He confirms, consistent with the Dworkinian account presented above, that within this framework, the honour of the Crown concept itself operates doctrinally as a "principle" (indeed a "constitutional principle"), further describing it, conceptually, as an "important anchor" for this area of the law.<sup>215</sup>

Interestingly, in a minority decision in *Little Salmon/Carmacks*, Deschamps J. described the honour of the Crown principle in particularly lofty terms as one of five core principles underlying constitutionalism generally in Canada. Specifically, she stated as follows:

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<sup>213</sup> See, *e.g.*, the sources cited in *supra* note 156.

<sup>214</sup> *Supra* note 5.

<sup>215</sup> *Little Salmon/Carmacks*, *supra* note 14 at para 42.

In Reference re Secession of Quebec ... this Court identified four principles that underlie the whole of our constitution and of its evolution: (1) constitutionalism and the rule of law; (2) democracy; (3) respect for minority rights; and (4) federalism. These four organizing principles are interwoven in three basic compacts: (1) one between the Crown and individuals with respect to the individual's fundamental rights and freedoms; (2) one between the non-Aboriginal population and Aboriginal peoples with respect to Aboriginal rights and treaties with Aboriginal peoples; and (3) a "federal compact" between the provinces. The compact that is of particular interest in the instant case is the second one, which, as we will see, actually incorporates a fifth principle underlying our Constitution: the honour of the Crown.<sup>216</sup>

Notably, Deschamps J. also acknowledged that the honour of the Crown principle has effectively replaced the Supreme Court's previous fiduciary-based doctrinal construct. This is the first instance of the Supreme Court explicitly conceding the doctrinal transformation that has been effected. In doing so, Deschamps J. implicitly endorses this transformation on the basis that the previous construct was both paternalistic and doctrinally limited:

This Court has, over time, substituted the principle of the honour of the Crown for a concept — the fiduciary duty — that, in addition to being limited to certain types of relations that did not always concern the constitutional rights of Aboriginal peoples, had paternalistic overtones ...<sup>217</sup>

Additionally, and still speaking in relation to the centrality of the honour of the Crown principle, several other Supreme Court decisions since *Haida Nation* provide statements confirming the transformed and honour-based construct as the new doctrinal core of Crown/Aboriginal Law, each in slightly differing but effectively similar doctrinal conceptualizations.<sup>218</sup>

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<sup>216</sup> *Ibid* at para 97.

<sup>217</sup> *Ibid* at para 105.

<sup>218</sup> See, e.g., *Taku River*, *supra* note 4 at paras 24-25 (*per* McLachlin C.J.):

The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the Constitution Act, 1982, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in

Another notable doctrinal clarification regarding the honour of the Crown principle provided by the Supreme Court, in its majority decision in *Manitoba Metis Federation*, is that the honour of the Crown principle is not, by itself, an independent cause of action.<sup>219</sup> This is a logical conclusion of my conceptualization, above, of the honour of the Crown “precept” as a Dworkinian “abstract principle.” Recall that Dworkinian abstract principles do not dictate results; rather they incline decisions one way or another and can give rise to concrete obligations. Concrete obligations, for their part, do dictate results and may constitute independent causes of action.

Comparatively, the *neighbour principle* (again, an abstract Dworkinian principle) in Tort Law is not by itself an independent cause of action; rather it gives rise to specific “torts” such as the tort of negligence (of which there are also sub-varietals), the tort of nuisance, or the tort of trespass (just to name a few); these types of specific torts are Dworkinian concrete obligations and independent causes of action.

Moreover, some other notable findings made by the Supreme Court relating to the nature of the honour of the Crown principle *post Haida Nation* include: (a) that it sources back to the *Royal*

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accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown’s honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1). ... The obligation to consult does not arise only upon proof of an Aboriginal claim, in order to justify infringement. That understanding of consultation would deny the significance of the historical roots of the honour of the Crown, and deprive it of its role in the reconciliation process.;

*Mikisew*, *supra* note 4 at para 51 (*per* Binnie J.):

The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court as a treaty obligation as far back as 1895, four years before Treaty 8 was concluded: *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at pp. 511-12 *per* Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown’s policy as far back as the Royal Proclamation of 1763 ... The honour of the Crown exists as a source of obligation independently of treaties as well, of course.;

*Moses*, *supra* note 161 at para 116 (*per* LeBel and Deschamps JJ, dissenting):

the honour of the Crown infuses both the making of treaties and, ultimately, the interpretation of treaties by the courts ... The honour of the Crown requires it, in the treaty-making process, to try to reconcile Aboriginal rights and interests with those of the public more generally, because the Crown must be mindful of Aboriginal interests but must also consider the public interest. Modern agreements thus reflect a mixture of rights, obligations, payments and concessions that have already been carefully balanced. (footnotes omitted)

<sup>219</sup> *Manitoba Metis Federation*, *supra* note 5 at para 73.

*Proclamation (1763)*<sup>220</sup>; (b) that it applies in the context of modern treaties as well as historical treaties (operating both in an interpretive role<sup>221</sup> and in the context of supplying deficiencies to a written modern treaty<sup>222</sup>); that it may not be contracted out of<sup>223</sup>; that it will at times compel a relaxing of procedural defences that may otherwise be available to litigants;<sup>224</sup> that specific Aboriginal-held rights that correspond the duties flowing from the honour of the Crown principle (e.g. the right to be consulted, where applicable) are likely not themselves section 35 Aboriginal or treaty rights but rather play “a supporting role”;<sup>225</sup> and that despite the various rhetorical pronouncements in multiple Supreme Court decisions that the honour of the Crown is “always at stake” when Crown representatives are dealing with Aboriginal peoples, it is only actually engaged in the context of constitutional-related matters.<sup>226</sup>

Finally, regarding the doctrinal *function* of the honour of the Crown principle, the Supreme Court recently stated in its majority decision in *Manitoba Metis Federation* that “the ultimate purpose of the honour of the Crown [principle] is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty.”<sup>227</sup> (emphasis added) Note that this conceptualization of the doctrinal intersection between the honour of the Crown principle and the oft-referenced reconciliation mandate is, to some extent, at odds with the Dworkinian account presented in the previous section. That is, the reconciliation mandate fits best, in the Dworkinian account, conceptualized as the fundamental *purpose* of section 35 (as has been explicitly noted by the Supreme Court elsewhere<sup>228</sup>) and not, that is, a purpose of the honour of the Crown principle itself. As indicated above, the reconciliation mandate, in Dworkinian form, is more of a *policy*-oriented objective (or community goal) and, therefore, falls more into the jurisdiction of the

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<sup>220</sup> *Mikisew*, *supra* note 4 at para 50.

<sup>221</sup> *Moses*, *supra* note 161 at para 118.

<sup>222</sup> *Little Salmon/Carmacks*, *supra* note 14.

<sup>223</sup> *Ibid.*

<sup>224</sup> See, e.g., *Manitoba Metis Federation*, *supra* note 5 at paras 136-144.

<sup>225</sup> See *supra* note 14 at para 14.

<sup>226</sup> *Manitoba Metis Federation*, *supra* note 5 at para 66.

<sup>227</sup> *Ibid* at para 66.

<sup>228</sup> See, e.g., *Taku River*, *supra* note 4 at para 24: “Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims ... The Crown’s honour ... must be given full effect in order to promote the process of reconciliation mandated by s.35(1)”; *Haida Nation*, *supra* note 2 at para 45: “consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation.”

legislative branch of government, and not the judicial branch. The reconciliation mandate, of course, is always set in the background of Aboriginal-related constitutional jurisprudence but is not, in accordance with the account presented in this project, specifically enforced judicially. In contrast, the honour of the Crown principle *is* enforced judicially (*i.e.* through the actionable duties that are seen as flowing from it) and it functions not grandly to effect the reconciliation mandate but rather somewhat more modestly to specifically regulate Crown conduct (again, judicially) in those instances where the reconciliation mandate is being carried out (*i.e.* by other branches of government), and thus it plays a supporting role (*i.e.* to both facilitate and protect the reconciliation project).

*Manitoba Metis Federation's Duty to Purposively and Diligently Fulfill Applicable Constitutional Obligations*

*Manitoba Metis Federation* was the first case *post Haida Nation* where the Supreme Court meaningfully addressed the fundamental, conceptual nexus between Crown honour accountability and Crown fiduciary accountability in Aboriginal contexts. It was also the first instance *post Haida Nation* where the Supreme Court used the honour of the Crown principle to recognize a specific type of enforceable Crown honour; that is, a specific concrete obligation owed by the Crown to Aboriginal peoples. This concrete obligation – a duty to honourably (*i.e.* purposively and diligently) discharge constitutional obligations – is the second main Crown-honour varietal that has been effectively incubated as such by the Supreme Court (*Haida Nation*'s duty to consult and accommodate being the first).

This case dealt with allegations of Crown misconduct in relation to the carrying out of statutory obligations undertaken by the Crown in the *Manitoba Act* (which is a constitutional document; it is identified as part of the “Constitution of Canada” in section 52 of the *Constitution Act, 1982* and appended as a separate schedule thereto). In the complex circumstances in which the Manitoba region was ultimately settled as part of Canada, Metis peoples of the region (specifically a group of French-speaking Roman Catholic Metis; the dominant demographic group in the region) had agreed to become part of Canada after a series of discussions with the Crown. As part of those discussions, the Crown undertook a number of specific commitments, which commitments were ultimately formalized as part of the *Manitoba Act*. Among those

commitments was an agreement by the federal government to grant 1.4 million acres of land to applicable Metis children, thus giving them “a head start” in the context of what promised to be a dramatic influx of non-Aboriginal settlers looking to acquire land. The central issue in the case was whether the Crown was liable for misconduct based on the manner in which it discharged this commitment (among other problems, the administration of the land grants to Metis children was slow and ineffectual).<sup>229</sup> And the main two potential bases of Crown liability considered by the Supreme Court were (1) a breach of Crown honour accountability, and (2) a breach of Crown fiduciary accountability.

Ultimately, the Court issued a declaration that the Crown had failed to act diligently in the context of administering the land grants that were to go to Metis children, thus effectively constituting Crown dishonour. The case had been largely framed and argued in the lower courts as an alleged breach of Crown fiduciary accountability. However, the Supreme Court determined that fiduciary obligations did not arise in the circumstances of this case. They held that that the claimed declaratory relief could be granted on the basis of a demonstrable breach of an enforceable concrete obligation flowing from the honour of the Crown principle. The concrete obligation recognized in the majority decision as having been breached here by the Crown was articulated as a duty to purposively and diligently discharge constitutional obligations that are owed specifically to Aboriginal peoples.

I comment more in Chapter Three on the specifics regarding the manner in which the Supreme Court disposed of the claim in Crown fiduciary accountability. For present purposes, it is sufficient to note that (1) the claim to the effect that the Crown had breached the *Haida Nation*-framed “off-shoot” fiduciary obligation was denied on the basis that there was no evidence that the Metis had a constitutionally-protected, proprietary land interest over which the Crown had assumed discretion, and that it therefore did not meet the applicable test set out in the *Wewaykum* and *Haida Nation* decisions<sup>230</sup>, and (2) where the Court, also, applied conventional fiduciary

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<sup>229</sup> The Metis had also claimed Crown liability based on an alleged failure to honourably discharge another of their obligations in the *Manitoba Act*, namely the commitment by the federal government to formally recognize existing Metis landholdings in the region (some held by Metis, others by non-Metis). The Supreme Court rejected this claim on the basis that that Crown commitment was “not a promise made specifically to an Aboriginal group, but rather a benefit made generally available to all settlers, Metis and non-Metis alike. The honour of the Crown is not engaged whenever an Aboriginal person accesses a benefit.”: *Manitoba Metis Federation*, *supra* note 5 at para 95.

<sup>230</sup> *Ibid* at paras 51-59.

doctrine to the circumstances of the case, they explained that conventional fiduciary accountability does not arise here because there was no evidence that the Crown had undertaken to act *exclusively* in the interest of the Metis, which is a precondition for the grounding of fiduciary accountability in the conventional context.<sup>231</sup> Again, these dynamics are dealt with in greater detail in the next chapter.

The claim in Crown honour, for its part, was successful despite the fact that no Aboriginal or treaty rights were explicitly at issue (though the majority decision did analogize the right at issue to a treaty right<sup>232</sup>). Recall that in *Haida Nation*, the honour of the Crown principle was defined in part as a corollary to the constitutionalization of Aboriginal and treaty rights in section 35 of the Constitution Act, 1982.<sup>233</sup> However, there were here, in a Dworkinian sense, constitutional *rights* at issue; though not articulated as such, what was effectively enforced in this decision was the Metis right to honourable Crown conduct in the discharge of the statutory (indeed constitutional) obligation.

In the majority decision, the facts of the case were found to engage the honour of the Crown principle because although no section 35 rights were at issue, the explicit obligation owed in this case (*i.e.* to administer land grants to Metis children) was constitutional and owed exclusively to a Metis collective, and therefore, materially, was linked to the broader Crown/Aboriginal, constitutional reconciliation mandate.<sup>234</sup> Specifically, the majority stated that the *Constitution Act, 1982*, generally, “is at the root of the honour of the Crown, and an explicit obligation to an Aboriginal group placed therein engages the honour of the Crown at its core.”<sup>235</sup>

Where commenting on the specific off-shoot obligation recognized in this case as flowing from the honour of the Crown principle (*i.e.* the duty to purposively and diligently fulfill constitutional obligations), the majority stated that this duty “varies with the situation in which it is engaged” and that “what constitutes honourable conduct” in any given situation, will also vary depending on context.<sup>236</sup> It was stated that the key question, in circumstances where this duty is engaged, is

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<sup>231</sup> *Ibid* at paras 60-63.

<sup>232</sup> *Ibid* at para 92.

<sup>233</sup> *Haida Nation*, *supra* note 2 at para 20.

<sup>234</sup> *Manitoba Metis Federation*, *supra* note 5 at paras 68-72.

<sup>235</sup> *Ibid* at para 70.

<sup>236</sup> *Ibid* at para 74.

whether or not the Crown acted “with diligence to pursue the fulfillment of the purposes of the obligation” and “in a way that would achieve its objectives.”<sup>237</sup>

Returning, then, for a moment to Dworkin’s rights thesis, this discreet type of enforceable Crown honour (*i.e.* a duty to purposively and diligently discharge constitutional obligations) was recognized and articulated by the Supreme Court in *Manitoba Metis Federation* in the form of a Dworkinian concrete obligation which, recall, is an explicit mandate in rule form. Such obligations specify essential facts which, if established, mandate liability. Here, the specific *rule* established is this: if the Crown owes a constitutional obligation exclusively to an Aboriginal community, it must bring a demonstrably purposive and diligent approach to the undertaking.

Furthermore, while this Crown honour-based duty takes Dworkinian rule form, there are outstanding questions regarding its scope. For instance, the Court will need to clarify what types of constitutional obligations trigger the duty. As just one example, it is conceivable that Crown obligations undertaken in historical treaties (and perhaps also in modern treaties<sup>238</sup>) may suffice. Moreover, as is the case with any newly-minted obligation in common law (a newly-acknowledged tort, for instance), we can assume the content of this duty will be fleshed out through future decisions, and that the outstanding questions will be answered.

It should be noted that Justice Rothstein wrote a dissent in *Manitoba Metis Federation* that was particularly critical of the majority decision. He described the majority’s incubation of the novel Crown honour-based duty here as constituting a dramatic change in the law not justifiable in these circumstances on the basis that the case had not been framed nor argued in the context of that specific duty, and thus that the fundamentals of the duty had not been effectively vetted through the conventional litigation process.<sup>239</sup> Rothstein J. was also critical of the merits of the duty itself. He was particularly concerned with the lack of a “clear framework” for determining the specific types of constitutional obligations that would trigger the duty. And he cautioned that

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<sup>237</sup> *Ibid* at paras 83 and 97.

<sup>238</sup> Though the Supreme Court has made comments of late to the effect that they intend to treat modern treaties differently than historical treaties; that there will be less need in the context of modern treaties to resort to Crown honour accountability, and that the courts ought to “strive to respect [the] handiwork” of modern treaty parties who are more likely to have been “adequately resourced and professionally represented”: see *Little Salmon/Carmacks*, *supra* note 14 at para 54.

<sup>239</sup> *Manitoba Metis Federation*, *supra* note 5 at para 204.

recognition of this duty brought with it the “potential to expand Crown liability in unpredictable ways.”<sup>240</sup>

For present purposes, the manner in which Rothstein J. conceptualized this new duty in contrast to Crown fiduciary accountability was particularly interesting. He was of the opinion that denial of Crown fiduciary accountability in these specific circumstances ought to have ended the matter. He warned that recognizing the type of Crown honour-based duty that the majority decision articulated “risks making claims under the honour of the Crown into ‘fiduciary duty-light.’”<sup>241</sup> He referred to it as a “watered down cause of action [that] would permit a claimant who is unable to prove a specific Aboriginal interest to ground a fiduciary duty, to still be able to seek relief so long as the promise was made to an Aboriginal group.”<sup>242</sup> And, finally, he stated that the new duty has “a broader scope of application and a lower threshold for breach” than would an applicable Crown fiduciary obligation, and he noted that the new duty constitutes a “significant expansion of Crown liability.”<sup>243</sup>

Rothstein J.’s reasoning here suggests he either was mis-conceptualizing the fundamentals of the new “essential legal framework” for Crown/Aboriginal Law set out in *Haida Nation*, or resisting them. That is, the framework set out in *Haida Nation* is clear that Crown honour-based duties are triggered in applicable circumstances where facts do not give rise to Crown fiduciary accountability. For instance, in *Haida Nation*, Crown fiduciary accountability was denied on the basis that the Aboriginal interest was “insufficiently specific” (*i.e.* since the Aboriginal right in question was asserted but not yet established or codified). Yet, a Crown honour-based obligation (the duty to consult) was recognized and enforced. In essence, a range of obligations that take a type of ‘fiduciary duty light’ form was precisely what was contemplated in *Haida Nation*.

Furthermore, it is unclear what Rothstein J. meant when he stated that this duty brings with it a “lower threshold for breach” than do Crown/Aboriginal fiduciary duties. That is, the content of a Crown/Aboriginal fiduciary duty, *post Haida Nation* and once triggered, is a mandate to act “with reference to the best interest” of an applicable Aboriginal group. Exactly how that mandate

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<sup>240</sup> *Ibid* at para 161.

<sup>241</sup> *Ibid* at para 208.

<sup>242</sup> *Ibid* at para 208.

<sup>243</sup> *Ibid* at para 208.

is intended to differ from the fundamental Crown honour mandate (*i.e.* to act honourably in dealings with an Aboriginal group) is unresolved, as will be demonstrated in the next chapter.

My contention is that Rothstein J.'s evident confusion or resistance here in relation to the fundamentals of the emergent honour of the Crown framework is a direct manifestation of the fact that the Supreme Court has not (yet) explicitly acknowledged that its non-conventional approach to fiduciary accountability in Crown/Aboriginal contexts was, in effect, fundamentally adjusted in *Haida Nation*, if not entirely jettisoned. That is, and as I will now begin to demonstrate as I move to the next chapter, Crown honour accountability – put plainly – now does what Crown fiduciary accountability used to do, and there is no apparent residual role for a *non-conventional* type of Crown/Aboriginal fiduciary obligation (*i.e.* of the kind articulated in *Haida Nation*), despite the insistence to the contrary in both *Haida Nation* and *Manitoba Metis Federation*.

### III. CROWN FIDUCIARY ACCOUNTABILITY IN CANADIAN CROWN/ABORIGINAL LAW

*“[T]he fiduciary jurisdiction has been hijacked to provide the conceptual foundation for the positive regulation of aboriginal/Crown relations...The main concern with that usage of fiduciary accountability...is that it will contaminate the general [fiduciary law] jurisprudence...The Supreme Court appears to have a distinct agenda in this context. It intends to control more than opportunism [the mischief predominantly controlled by fiduciary law], it intends to control the discretion of the Crown generally.”*

- Professor Robert Flannigan<sup>244</sup>

From my conceptualization of the doctrinal fundamentals of the honour of the Crown principle, I turn now to an examination of fiduciary doctrine, the role it has played in Crown/Aboriginal contexts to date, and the role it may be expected to play moving forward. As noted above, McLachlin C.J. described applicable fiduciary obligations in *Haida Nation* as “off-shoot” obligations that will arise in limited instances (*i.e.* off-shoots of the honour of the Crown principle); namely, where the Crown has assumed substantial discretionary control over “sufficiently specific” Aboriginal interests. This conception of fiduciary obligations represents a marked departure from earlier Crown/Aboriginal jurisprudence that, as will be shown, was organized around a generalized and over-arching type of fiduciary obligation. This generalized fiduciary obligation was articulated in *Sparrow* as a fiduciary-based “guiding principle” that required generally of the Crown honest, fair, and honourable dealing in matters involving Aboriginal or treaty rights.<sup>245</sup>

At least prior to *Haida Nation*, this principle occupied a core doctrinal position in Canadian Crown/Aboriginal Law; it was from this principle that other specific (fiduciary) duties were seen to flow.<sup>246</sup> The doctrinal re-ordering that took place in *Haida Nation*, detailed in the preceding chapter, effectively saw the Supreme Court jettison the notion of a generalized fiduciary

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<sup>244</sup> Flannigan, “The Boundaries of Fiduciary Accountability,” *supra* note 37 at 65-67.

<sup>245</sup> *Sparrow*, *supra* note 19 at 1109. See, also, *Mitchell*, *supra* note 29 at para 9.

<sup>246</sup> See, *e.g.*, *infra* note 388 and surrounding text.

principle and replace it with the honour of the Crown principle. Consequently, a fiduciary precept (or ethic) is no longer the doctrinal fount of obligations in Crown/Aboriginal Law, but rather is one such (quite undeveloped) concrete obligation.

Given this fundamental re-ordering, and mindful of the fact that a substantial body of jurisprudence developed around the now-discarded fiduciary-based construct,<sup>247</sup> this chapter examines the residual, much-narrowed jurisdiction of fiduciary doctrine in Crown/Aboriginal contexts in Canada.

To conceptualize fiduciary doctrine generally and the specific manner in which it has been deployed in Crown/Aboriginal contexts, initial questions one may pose are:

- What does it mean in Canada to say that an *obligation* is fiduciary in nature?
- What does it mean in Canada to say that a *relationship* is fiduciary in nature?

One would expect answers to these fundamental questions to be readily available in the applicable jurisprudence. Unfortunately, in both (a) *Guerin, Sparrow, and Delgamuukw* (i.e. the three cases that principally incubated the Supreme Court's Crown/Aboriginal fiduciary doctrine), and (b) much of the academic commentary on the nature of Crown/Aboriginal fiduciary doctrine,<sup>248</sup> these questions are dealt with in an oddly perfunctory manner. This dearth of doctrinal analysis on fundamental principles is striking. As I will show, the treatment of fiduciary doctrine in *Guerin, Sparrow, and Delgamuukw* is novel and, quite literally, unprecedented; judicial precedent was not cited in support of the adoption of fiduciary doctrine in any of these cases.<sup>249</sup>

Consequently, in this chapter I look to first principles – to conventional fiduciary law jurisprudence – in order to better conceptualize the nature of fiduciary accountability and the role it may (or may not) be equipped to play in Crown/Aboriginal contexts moving forward. In the first part of this chapter, I examine conventional fiduciary law. It will be observed that the

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<sup>247</sup> See, generally, McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples*, *supra* note 49.

<sup>248</sup> See sources cited in *supra* note 49.

<sup>249</sup> In *Guerin*, Dickson J. did cite two lower court decisions in support one discreet principle related to fiduciary doctrine, but none in support of its main doctrinal fundamentals as he interpreted them therein. See, *Guerin*, *supra* note 27 at 384-385.

Supreme Court of Canada's general fiduciary jurisprudence has itself, at least since *Guerin* (not coincidentally), been marked by quite extraordinary doctrinal opacity. As noted in a leading decision, fiduciary doctrine was once described as "one of the most ill-defined, if not altogether misleading" areas of Canadian law.<sup>250</sup> While this certainly complicates the task of cogently conceptualizing a residual jurisdiction of fiduciary accountability in Canadian Crown/Aboriginal Law post-*Haida Nation*, a substantial measure of doctrinal clarity has emerged through a recent line of Supreme Court decisions<sup>251</sup> and this clarity provides some initial clues, and initial guidance, regarding future doctrinal development in Crown/Aboriginal contexts.

In the second part of this chapter, I take a closer look at the Supreme Court of Canada's non-conventional Crown/Aboriginal fiduciary doctrine. I track the key pronouncements beginning with *Guerin* and *Sparrow*, and then contrast that thread of decisions with the more recent, transforming *dicta* in *Wewaykum* and *Haida Nation*. It is noted that the Supreme Court appears to be seeking in these later decisions to begin aligning the fundamentals of its non-conventional Crown/Aboriginal fiduciary doctrine (which it had initially described as "*sui generis*" in nature<sup>252</sup>) with the core fundamentals of conventional fiduciary doctrine (itself a bit of a work in progress, as will be demonstrated); though full alignment of the conventional and (Crown/Aboriginal) non-conventional is still a ways off. These applicable fundamentals are addressed in some detail.

I also return here to Dworkin's rights thesis to conceptualize the Supreme Court's Crown/Aboriginal non-conventional fiduciary doctrine – both *pre* and *post Haida Nation* – for what it seems to clearly be: a mistake. Despite the praise that has been heaped upon the *Guerin* decision,<sup>253</sup> I contend that from a doctrinal perspective, the approach to fiduciary accountability

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<sup>250</sup> This comment was made by Justice La Forest J. in *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14, [1989] 2 S.C.R. 574 [*Lac Minerals* cited to S.C.R.] at 644, where, citing Professor Paul Finn, he stated that there are "few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship...the principle on which the obligation is based is unclear... [it is] one of the most ill-defined, if not altogether misleading terms in our law."

<sup>251</sup> *KLB*, *supra* note 59; *Galambos v. Perez*, *supra* note 59; *Elder Advocates*, *supra* note 31.

<sup>252</sup> *Guerin*, *supra* note 27 at 387.

<sup>253</sup> See, e.g., James I. Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* (Saskatoon: Purich, 2005) at preface p. x. It is noted there that *Guerin* has "been ranked as the tenth most important decision of the Supreme Court of Canada in the twentieth century and among the top thirty significant legal events." Note also Justice Binnie's articulation of *Guerin*'s significance in *Wewaykum*, *supra* note 33 at para 74: "The enduring contribution of *Guerin* was to recognize that the concept of political trust did not exhaust the potential legal character of the multitude of relationships between the Crown and aboriginal people."

employed in that decision as well as the distinct approach used in *Sparrow* each took the form of a Dworkinian *mistake*, a mistake which then (a) pervaded (or, in Flannigan’s words from the epigraph to this chapter, “contaminated”) other areas of general fiduciary law, and (b) created substantial doctrinal confusion and dysfunction in Crown liability doctrine in Crown/Aboriginal Law in Canada. It is suggested that one of the key dynamics in the seminal *Haida Nation* decision is a mending of a materially-flawed doctrine; substantial doctrinal repair was effected in that decision but much work remains.

In the final part of this chapter, I articulate a conceptual synthesis of the narrow sphere of doctrinal space evidently remaining for the regulation of fiduciary accountability in Crown/Aboriginal contexts moving forward.

### a. Conventional Fiduciary Doctrine

I now step away from the Crown/Aboriginal context, temporarily, to examine the conventional law of fiduciary accountability. Conventional fiduciary doctrine has been described as, for instance, “messy”<sup>254</sup> and “unusually vexing.”<sup>255</sup> For its part, the Supreme Court of Canada’s fiduciary doctrine has been described (at least since *Guerin*<sup>256</sup>) as a “profoundly confused jurisprudence”<sup>257</sup> and as following a theoretical approach consistent with “analytical nihilism,” devoid of practical utility.<sup>258</sup> An extensive review of the Supreme Court of Canada

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<sup>254</sup> D. Gordon Smith, “The Critical Resource Theory of Fiduciary Duty,” 55 Vand. L. Rev. 1399 at 1400.

<sup>255</sup> Paul B. Miller, “A Theory of Fiduciary Liability,” 56(2) (2011) McGill L.J. 235 at (Q.L.) para 1.

<sup>256</sup> As noted in Robert Flannigan, “Fact-Based Fiduciary Accountability in Canada,” *supra* note 55 at 447: “*Guerin* is widely recognized as the decision that signaled the Canadian departure from conventional accountability, and the subsequent struggle to articulate boundaries.”

<sup>257</sup> Rotman, *Fiduciary Law*, *supra* note 57 at 20.

<sup>258</sup> Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties*, (Oxford: Hart Publishing, 2010) at 28 (“analytical nihilism”) and 26-28:

...the description ‘fiduciary’ must be limited to duties that are peculiar to fiduciaries because unless the expression is so limited it is lacking in practical utility ...[it is] extremely difficult to identify what generic function might be served by fiduciary duties as a class, which thereby deprives the fiduciary concept of analytical, and therefore predictive, utility ... such an approach denudes the fiduciary concept of any analytically valuable meaning. (footnotes omitted)

See, also, D.A. De Mott, “Fiduciary Obligation Under Intellectual Siege: Contemporary Challenges to the Duty to be Loyal,” (1992) 30 Osgoode Hall J.J. 471 at 497, cited in Rotman, *Fiduciary Law*, *supra* note 57 at 38: [i]f fiduciary norms are overextended, that vitiates their force and their undergirding of commitments to act loyally, leaving a residue of empty, albeit emphatic, rhetoric.”

jurisprudence<sup>259</sup> and of leading academic commentary<sup>260</sup> reveals that both (a) the fundamental components of conventional fiduciary doctrine in Canada became substantially obscured *post-Guerin*, (b) remained unresolved for decades (and still are, to some extent), and (c) was substantially reconceptualised (and repaired) in a quite recent line of Supreme Court decisions.<sup>261</sup>

There are a host of competing theories among commentators (and Supreme Court justices) on what fiduciary law is, and ought to be, all about. Overviewing the broad selection of theories and pronouncements, fiduciary law in Canada may be understood, at a high level of abstraction, as a competition between two distinct schools of thought.

On the one hand, there are those who see the fiduciary concept as involving a singular *prohibition* against self-interested conduct – or the appearance of such – in applicable trust-based relationships<sup>262</sup> (note that *fiducia* means “an entrusting” in Latin<sup>263</sup>). On the other hand are those

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<sup>259</sup> *Midcon*, *supra* note 55; *Peso Silver Mines*, *supra* note 55; *Hawrelak*, *supra* note 55; *Can. Aero v. O’Malley* [1974] S.C.R. 592, 40 D.L.R. (3d) 371 [*Can. Aero* cited to S.C.R.]; *Frame v. Smith*, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81 [*Frame* cited to S.C.R.]; *Lac Minerals*, *supra* note 250; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, 85 D.L.R. (4th) 129 [*Canson* cited to S.C.R.]; *Norberg v. Wynrib*, [1992] 2 S.C.R. 224, [1992] 6 W.W.R. 673 [*Norberg* cited to S.C.R.]; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, 93 D.L.R. (4th) 415 [*McInerney* cited to S.C.R.]; *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 [1992] S.C.J. No. 85 (Q.L.) [*M.(K.) v. M.(H.)* cited to S.C.R.]; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, [1994] S.C.J. No. 84 (Q.L.) [*Hodgkinson* cited to Q.L.]; *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214; *Cadbury*, *supra* note 43; *KLB*, *supra* note 59; *Strother v. 3464920 Canada Inc.*, [2007] 2 S.C.R. 177, 2007 SCC 24 [*Strother* cited to S.C.R.]; *Galambos*, *supra* note 59; *Elder Advocates*, *supra* note 31.

<sup>260</sup> In this project, and mindful of the morass of commentary that exists, effectively a competition of sorts, as to the nature of fiduciary accountability and the lack of consensus on various applicable doctrinal fundamentals, I have, for the purposes of this project, focussed primarily on certain instances of theoretical work undertaken by leading theorists in recent years, most particularly: Rotman, *Fiduciary Law*, *supra* note 57; Conaglen, *Fiduciary Loyalty*, *supra* note 258; Tamar Frankel, *Fiduciary Law*, (Oxford: Oxford University Press, 2011), and the work of Flannigan which is set out in a series of articles including but not limited to: Robert Flannigan, “The Fiduciary Obligation” *Oxford J. Legal Studies* (1989) 9 (3): 285-322; Robert Flannigan “The Boundaries of Fiduciary Accountability,” *supra* note 37; Robert Flannigan, “Access or Expectation: The Test for Fiduciary Accountability” 89(1) *Can. B. Rev.* 1 (2010); and Robert Flannigan, “The Core Nature of Fiduciary Accountability” [2009] *N.Z. L. Rev.* 375. Also, key additional commentary on the nature of conventional fiduciary doctrine that has at various times been resorted to by the Supreme Court of Canada (some of which I make limited reference to in this project), include: Ernest J. Weinrib, “The Fiduciary Obligation” (1975) 25 *U.T.L.J.* 1.; Paul Finn, *Fiduciary Obligations* (Sydney: Law Book Company, 1977); J.C. Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1981). See, also, Peter Birks, “The Content of the Fiduciary Obligation” (2000) 34:1 *Isr. L.R.* 3; Deborah A. DeMott, “Beyond Metaphor: An Analysis of Fiduciary Obligation,” 1988 *Duke L.J.* 879; Smith, “The Critical Resource Theory of Fiduciary Duty,” *supra* note 254; and Miller, “A Theory of Fiduciary Liability,” *supra* note 255.

<sup>261</sup> *KLB*, *supra* note 59; *Galambos*, *supra* note 59; *Elder Advocates*, *supra* note 31.

<sup>262</sup> Flannigan is a leading proponent of this approach. See, e.g., Flannigan, “The Boundaries of Fiduciary Accountability,” *supra* note 37. See, also, Conaglen, *Fiduciary Loyalty*, *supra* note 258. Generally, and as indicated below, this conceptualization of the focus of fiduciary law is ubiquitous (whether envisioned as central to fiduciary doctrine or as constituting the full scope of the content of fiduciary accountability) in the applicable commentary and jurisprudence. In early Supreme Court of Canada decisions to address the nature of fiduciary accountability, it is

who conceptualize the fiduciary concept as more centrally structured around a (general) *principle* operating to source a range of tailored (specific) fiduciary obligations in the distinctive contexts of applicable trust-based relationships.<sup>264</sup> Proponents of this latter approach would generally require of fiduciaries not the mere avoidance of self-interested conduct but exemplary moral conduct generally in the managing of interests under their trust and care.<sup>265</sup>

I contend that the distinction between these two approaches is not so much one of degree, as it is sometimes described,<sup>266</sup> but more one of fundamental jurisprudential form.<sup>267</sup> The first school of thought is organized around a fiduciary *rule*: those in trust-based relationships shall not act or appear to act in self-interest regarding the incidents of a trust reposed. The second school of thought is organized around a fiduciary *principle*: those in trust-based relationships are to act honestly and with high honour and integrity in relation to the trust interests reposed.

Recall from the summary of Dworkin's rights thesis, above, that *rules* operate in all-or-nothing fashion (*i.e.* if the facts a rule stipulates are present, liability necessarily follows) whereas principles operate in a distinctly different jurisprudential manner. They incline a decision one way or another but do not by their form dictate specific results; rather, principles (at times in

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described explicitly as a "rule." See, *e.g.*, *Midcon*, *supra* note 55 at 326 ("Equity, in applying the rule as one of fundamental public policy does so ruthlessly to prevent its corrosion by particular exceptions; by an absolute interdiction it puts temptation beyond reach of the fiduciary by appropriating its fruits.").

<sup>263</sup> *Black's Law Dictionary*, 8<sup>th</sup> ed., Bryan A. Garner ed., (St. Paul, MN: Thomson, 2004) at 658.

<sup>264</sup> Rotman is a leading academic proponent of this approach: see, *e.g.*, *Fiduciary Law*, *supra* note 57 generally, and at 295 ("The fiduciary concept is premised upon principles rather than rules so that it may retain the flexibility to respond to the myriad situations in which it may be applied, but can still provide sufficient guidelines for its informed application to specific scenarios." Note also that while Frankel generally conceives of the content of fiduciary accountability as centrally concerned with self-interested conduct, she sees merit in a blending, to some extent, of the principle-based and rule-based approaches, reasoning that although "[f]uzzy rules, expressed as standards and principles, may raise issues concerning 'the rule of law,'... the very risk that fuzzy rules pose for fiduciaries could act as a deterrent to violating the law": see Frankel, *Fiduciary Law*, *supra* note 260 at 105. La Forest J. was the leading judicial proponent of this approach in Canada, as noted below.

<sup>265</sup> See, *e.g.*, Rotman, *Fiduciary Law*, *supra* note 57 at 18: "Fiduciary duties ... require that fiduciaries act with honesty, selflessness, integrity, fidelity and in the utmost good faith (*uberrima fides*) in the interests of their beneficiaries." Conaglen, *Fiduciary Loyalty*, *supra* note 258 at 110 describes this approach as one which appeals generally to "the higher moral order of equitable principles."

<sup>266</sup> See, *e.g.*, Flannigan, "The Boundaries of Fiduciary Accountability," *supra* note 37 at 36: "The divergent judicial views move in both directions, potentially contracting or expanding the traditional boundaries."

<sup>267</sup> Frankel has used similar language. See Frankel, *Fiduciary Law*, *supra* note 260 at 104: "Fiduciary duties, like other legal duties, can be designed and expressed by standards and principles, or by specific rules, or by both."

combination with other principles) give rise to specific rights and obligations (and rules) in different contexts.<sup>268</sup>

Throughout the remainder of this chapter, where I make reference to these two schools of thought, I distinguish them for convenience as, respectively, a *rule-based* conception of fiduciary accountability and a *principle-based* conception of fiduciary accountability.

There is some debate as to whether fiduciary accountability, historically, was more of a rule-based or a principle-based doctrinal concept.<sup>269</sup> Flannigan points to a number of eighteenth century precedents to argue that “from the beginning of its recorded history,” it was essentially a legal construct consistent with the rule-based conception, a fully independent doctrine that operated solely to control the self-regarding impulse of actors in trust-based relationships and which operated in parallel to other legal duties (*e.g.* other trust law obligations in the classic trust context).<sup>270</sup> Professor Matthew Conaglen, alternatively, disputes the certainty of Flannigan’s position and argues that much is lost in translation in some of the earliest applicable judgements and that “the historical evidence cannot be said to be completely compelling one way or the other.”<sup>271</sup>

Rotman, for his part, describes fiduciary doctrine historically (and normatively in contemporary context) in a manner more consistent with the principle-based conception, suggesting it was always less concerned with the prohibition of a singular type of behaviour than with the protection of important societal relationships generally and with controlling the general manner in which those in positions of trust acted in relation to applicable entrusted interests. Rotman argues that fiduciary accountability in its historical and contemporary essence includes not only a strict prohibition against opportunism but a broader, prescriptive mandate requiring fiduciaries to

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<sup>268</sup> *Supra* note 91 and surrounding text.

<sup>269</sup> See, *e.g.*, Conaglen, *Fiduciary Loyalty*, *supra* note 258 at 11-31; Rotman, *Fiduciary Law*, *supra* note 57 at 153-237; Frankel, *Fiduciary Law*, *supra* note 260 at 79-101; and J. Getzler, “Rumford Market and the Genesis of Fiduciary Obligations” in Andrew Burrows and Lord Rodger of Earlsferry, eds., *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: Oxford University Press, 2006).

<sup>270</sup> See Robert Flannigan, “Book Review: A Romantic Conception of Fiduciary Obligation” 84 *Can. B. Rev.* 391 at 396.

<sup>271</sup> Conaglen, *Fiduciary Loyalty*, *supra* note 258 at 18

“act with honesty, selflessness, integrity, fidelity and in the utmost good faith (*uberrima fides*) in the interests of their beneficiaries.”<sup>272</sup>

In contrast to (and indeed in explicit opposition to)<sup>273</sup> Rotman’s thesis, however, and despite debate on the nature of historical precedent, Conaglen and Flannigan (and other leading commentators)<sup>274</sup> generally agree that as the jurisprudence evolved throughout the commonwealth, fiduciary law become (if it was not already) predominantly concerned with strictly (if not exclusively) prohibiting self-interested behaviour in trust and trust-like contexts. The jurisprudence is not uniform but this general conceptualization of its central theme is ubiquitous.

At a high level, it can be said that the core, basic construct of fiduciary doctrine, on which there is relatively broad consensus among theorists, is essentially as follows. Where a beneficiary in a trust or trust-like relationship is able to establish that his or her alleged “fiduciary” acted or appeared to act, without consent,<sup>275</sup> in a self-regarding manner regarding trust interests reposed,<sup>276</sup> strict liability follows<sup>277</sup> and extraordinary remedial flexibility attends.<sup>278</sup> The

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<sup>272</sup> Rotman, *Fiduciary Law*, *supra* note 58 at 18.

<sup>273</sup> See, e.g., Conaglen’s rejection of Rotman’s proposed approach in Conaglen, *Fiduciary Loyalty*, *supra* note 258 at 106-113. Flannigan, for his part, has also explicitly rejected Rotman’s approach: see, e.g., Flannigan, “A Romantic Conception of Fiduciary Obligation,” *supra* note 270.

<sup>274</sup> See, as but two fairly randomly-plucked examples, Joshua Getzler, “Duty of Care” in Peter Birks and Arianna Pretto eds., *Breach of Trust* (Oxford: Hart Publishing, 2002).at 41, cited in Frankel, *Fiduciary Law*, *supra* note 260 at 4: “A fiduciary obligation is a legal requirement that a person in a fiduciary position should promote exclusively the beneficiary’s interests, and refrain from allowing any self-interest or rival interests to touch or affect his or her conduct...”; and Weinrib, “The Fiduciary Obligation,” *supra* note 48 at 1: “the propositions that a fiduciary must not allow his duty to conflict with his interest and must not make a profit from his position reverberate through the judgments, dislodging or reallocating improperly acquired gains.”

<sup>275</sup> Consent is a full defence to an allegation of breach. See, e.g., *Midcon*, *supra* note 55 at 327; *Peso Silver Mines*, *supra* note 55 at 680; *Can. Aero*, *supra* note 259 at 607; *Hodgkinson*, *supra* note 259 at para 88.

<sup>276</sup> The impermissible self-interested behavior must “result from the use, in any manner or degree by the fiduciary, of the property, interest or influence of the beneficiary”: *Midcon*, *supra* note 55 at 341 (per Rand J. in his dissenting opinion).

<sup>277</sup> The strict character of fiduciary accountability, see, e.g., *Hodgkinson*, *supra* note 259 at 87 (a “type of behaviour that calls for strict legal censure.”); *Can. Aero*, *supra* note 259 at 608 (“pervasiveness of a strict ethic”); and *Midcon*, *supra* note 55 at 341 per Rand J. in his dissenting opinion (“Equity, in applying the rule as one of fundamental public policy does so ruthlessly to prevent its corrosion by particular exceptions; by an absolute interdiction it puts temptation beyond reach of the fiduciary by appropriating its fruits.”)

<sup>278</sup> See, e.g., *Canson*, *supra* note 258 at 588:

the flexible remedies of equity, such as constructive trust, account, tracing and equitable compensation, must continue to be available and to be moulded to meet the requirements of fairness and justice in specific situations. Equitable remedies ... should not be confined within the strictures of previous situations. Where new remedies are required, equity will recognize them”);

*Strother*, *supra* note 259, generally.

beneficiary need not have suffered any harm and the alleged fiduciary need not have acted dishonestly or with ill intent.<sup>279</sup> While an extensive review of the different types of remedies available for a fiduciary breach is beyond the scope of this project,<sup>280</sup> the governing remedial precepts are both restitutionary and punitive, and are generally seen as more generous to claimants than those that attend any other area of law.<sup>281</sup> A beneficiary need not prove damages (*i.e.* the applicable remedy can be gain-based as opposed to damages-based<sup>282</sup>) and windfalls to a beneficiary are permissible<sup>283</sup> because furtherance of the “overriding deterrence objective”<sup>284</sup> takes priority. Wherever a fiduciary has derived profit in a position of conflict or has diverted profit to a third party in a position of conflict – again even where a beneficiary does not suffer loss – strict “disgorgement” in favour of the beneficiary is the order.<sup>285</sup>

The long-accepted policy rationales for the strictness, or “bluntness”, of fiduciary regulation is that fiduciary breaches in trust-based relationships may be uniquely tempting for fiduciaries, difficult to prove and to regulate, and uniquely easy to conceal,<sup>286</sup> and therefore draconian, strict

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<sup>279</sup> See, *e.g.*, *Midcon*, *supra* note 55 where Rand J., at 337 in his dissenting decision, noted that profit by a fiduciary “is not permitted in any case, however honest the circumstances,” citing Lord Eldon in *Ex Parte James* (1803), 8 Ves. 337 at 345, 32 E.R. 385 at 388; and at 338, citing Lord Russell from the decision of Supreme Court of Alberta, Appellate Division, in the same case, (1957), 21 W.W.R. 229, 8 D.L.R. (“liability arises from the mere fact of profit.”); *Peso Silver Mines*, *supra* note 55 at 680, citing *Regal (Hastings), Ltd. v. Gulliver et al.*, [1942] 1 All E. R. 378 (“The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.”).

<sup>280</sup> On remedies for breaches of fiduciary obligations, see, generally, Mark Vincent Ellis, *Fiduciary Duties in Canada*, v.2 (Toronto: Thomson Reuters, 2004) at 20-1.

<sup>281</sup> See, *e.g.*, *Norberg*, *supra* note 259 at 295 per McLachlin J., as she then was, writing a minority decision (“a generous restorative remedial approach” which does not “countenance deductions for market fluctuation or failure of the beneficiary to mitigate or take appropriate care, as would the law of tort or contract.”)

<sup>282</sup> See, *e.g.*, *Can. Aero*, *supra* note 259 at 612, 622-623:

[it is] no answer to the breach of fiduciary duty that no loss was caused ... or that any profit was of a kind (the beneficiary) could not have obtained ... nor is it a condition of recovery of damages that [the beneficiary] establish what its profit would have been or what it has lost ... [i]t is entitled to compel the faithless fiduciaries to answer for their default according to their gain.

See, also, *Midcon*, *supra* note 55 at 338 (per Rand J. in his dissenting opinion).

<sup>283</sup> See, *e.g.*, *Strother*, *supra* note 259 at para 77 (“The prophylactic purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary.”)

<sup>284</sup> *Cadbury*, *supra* note 43 at para 30.

<sup>285</sup> See, *e.g.*, *Can. Aero*, *supra* note 259 and *Strother*, *supra* note 259, generally.

<sup>286</sup> See, *e.g.*, *Midcon*, *supra* note 55 at 337 where Rand J. in his dissenting opinion cites Lord Eldon from *Ex Parte James* (1803), 8 Ves. 337 at 345, 32 E.R. 385 at 388 (“no court is equal to the examination and ascertainment of the truth in much the greater number of cases.”); *Canson*, *supra* note 259 at 544 (per McLachlin J. (as she then was):

...because the fiduciary has superior information concerning his or her acts, it will be difficult to detect and prove breach of these wide obligations; and because the fiduciary has control based on the notion of implicit trust, there is a substantial potential for gain through such wrongdoing. This may justify more stringent remedies...;

and *Frame*, *supra* note 259 at 137 per Wilson J. in her oft-cited dissenting judgment (“the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power”).

*deterrence* is compelled.<sup>287</sup> It is also often suggested that the strict prohibition was in part born of a societal desire to deal harshly with faithless conduct generally in relationships that society places a particular value on nurturing and protecting.<sup>288</sup>

While this brief summary of conventional fiduciary doctrine may seem clear enough, it will soon become apparent as I move to an examination of the Supreme Court of Canada jurisprudence that (a) it is imbued with several analytical landmines that have led to doctrinal uncertainty (the prime example being the “notoriously intractable” problem of identifying a test for the types of societal interactions that attract fiduciary accountability), and (b) the Supreme Court, while not disputing a strict prohibition against opportunism as a central feature of fiduciary law (and, to be clear, only one Supreme Court of Canada decision outside the Crown/Aboriginal context has ever enforced any other type of fiduciary breach<sup>289</sup>), began in *Can. Aero* and *Guerin* to describe its doctrine in much broader terms, terms capable of wildly varying interpretations; the latter being a fact the jurisprudence has generally borne out.

Ultimately, the Supreme Court’s contemporary fiduciary doctrine reads as a distinctly confused blend of the rule-based and principle-based approaches articulated above. Interestingly, at a point where the Supreme Court’s doctrine was particularly unsettled, the sitting Chief Justice of the British Columbia Court of Appeal delivered a biting indictment of the failure of the Supreme Court to “make the law as clear as it should be.”<sup>290</sup> In the following, lengthy passage from *Critchley*, McEachern C.J.B.C. refers pejoratively to the Supreme Court’s effective shift to a *principle-based* approach as an “experiment,” pleads with them to revert back to a *rule-based* approach, and notes the fact that the Supreme Court’s doctrine has been literally mocked elsewhere:

Until recently, [fiduciary doctrine] was used for the purpose of requiring disloyal agents to disgorge secret or unlawful profits. Quite recently, fiduciary law has been extended to cover a myriad of circumstances ... In a speech delivered in

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<sup>287</sup> The notion that fiduciary accountability is fundamentally designed to serve as a *deterrent* against applicable types of behaviour is ubiquitous in the jurisprudence.

<sup>288</sup> See, e.g., *Hodgkinson*, *supra* note 259 at para 48 (“The desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout fiduciary law.”). See, also, Rotman, *Fiduciary Law*, *supra* note 57 at 259-260.

<sup>289</sup> Flannigan made this point in “The Boundaries of Fiduciary Accountability,” *supra* note 37 at 65.

<sup>290</sup> *C.A. v. Critchley*, [1998] B.C.J. No. 2587 (Q.L.), 166 D.L.R. (4<sup>th</sup>) 475 at para 79 [*Critchley* cited to D.L.R.].

1988 to a Canadian-Australian legal-judicial exchange in Canberra, Mason C.J.A. commented humorously, but with considerable accuracy, that: ‘All Canada is divided into three parts: those who owe fiduciary duties, those to whom fiduciary duties are owed, and judges who keep creating new fiduciary duties!’

Our Supreme Court of Canada has led the way in the common law world in extending fiduciary responsibilities ... but it has not provided as much guidance as it usually does in emerging areas of law ... lawyers and citizens alike are often unable to know whether a given situation is governed by the usual laws of contract, negligence or other torts, or by fiduciary obligations whose limits are difficult to discern ... it is time, in my view, for the law to be made more certain and less subjective. Certainly I regard it as part of this Court’s responsibility to urge the Supreme Court of Canada to clarify the law ... Guerin is obviously a case that should be confined to its particular facts and we should not be timid ... I conclude that it would be a principled approach to confine recovery ... to cases of the kind where ... the defendant personally takes advantage of a relationship of trust or confidence for his or her direct or indirect personal advantage ... In effect, this redirects fiduciary law back towards where it was before this experiment began ...<sup>291</sup> (emphasis added)

Moreover, it was for similarly-framed reasons that the New South Wales Court of Appeal stated that “Canadian authorities on equity must be treated with considerable caution.”<sup>292</sup>

Against this overall backdrop, I move now to a closer examination of the jurisprudence. The following analysis of general fiduciary law in the Supreme Court of Canada is set at a relatively high level of abstraction and organized under three incidents of fiduciary doctrine: (1) the *function* of fiduciary law; (2) the general *content* of fiduciary accountability (specifically, the nature of fiduciary *obligations* and fiduciary *breaches*); and (3) the specific trust-based *contexts* in which fiduciary accountability arises.

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<sup>291</sup> *Ibid* at paras 74-75, 84-85.

<sup>292</sup> *Harris v. Digital Pulse Pty Ltd* [2003] N.W.S.C.A. 10 at 32, (2003) 56 N.S.W.L.R. 298, cited in Conaglen, *Fiduciary Loyalty*, *supra* note 258 at 25.

### Function of Convention Fiduciary Law

The core function of fiduciary doctrine in Canada is difficult to isolate; the Supreme Court of Canada “has refused to tie its hands”<sup>293</sup> in terms of (explicitly) committing to a discernible mandate. It has been stated that the judicial disarray generally in this area (both in Canada and to the extent it exists in jurisprudence elsewhere) is primarily a result of a lack of clarity on the applicable doctrinal *function*.<sup>294</sup> As such, that is my starting point.

There are various instances in the jurisprudence where the Supreme Court has sought to articulate a general function (or functions) of fiduciary law. But instead of consensus, there are various incompatible or overlapping pronouncements. Evident in the case law are (at least) five main types of doctrinal function that have in various decisions been described as fundamentally driving fiduciary law:

- To regulate against self-interested behaviour (or opportunism) by trustees or by those acting in trustee-like roles;<sup>295</sup>
- To promote the due performance of applicable non-fiduciary duties by trustees or by those acting in trustee-like roles;<sup>296</sup>
- To maintain the integrity of social and economic relationships that society places particular value on;<sup>297</sup>
- To promote norms of exemplary behaviour in trust-based relationships;<sup>298</sup> and

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<sup>293</sup> *Lac Minerals*, *supra* note 250 at 296.

<sup>294</sup> See, e.g., Flannigan “The Boundaries of Fiduciary Accountability,” *supra* note 37 at 36.

<sup>295</sup> This is the narrowest articulation of function. Implicitly this is the central doctrinal function, though typically when the Supreme Court explicitly articulates a function for fiduciary accountability, it does so in broader terms.

<sup>296</sup> See, e.g., *Hodgkinson*, *supra* note 259 at 82 (“used as a means of putting pressure on solicitors [and others] in the performance of their special skills”) and at \* (La Forest J. adopted Frankel’s conceptualization here stating that “the law aims at deterring fiduciaries from misappropriating the powers vested in them solely for the purpose of enabling them to perform their functions.”); *Elders Advocates*, *supra* note 31 at para 43 (McLachlin C.J. adopted Finn’s theory here in describing the function thus: “the fiduciary principle’s function is ... to secure the paramountcy of one side’s interests ... this is achieved through a regime designed to secure loyal service of those interests”); *Strother*, *supra* note 259 at para 83 (“the prophylactic purpose of the ... remedy”).

<sup>297</sup> See, e.g., *Hodgkinson*, *supra* note 259 at paras 48 and 93 (“The desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout fiduciary law ... the law is able to monitor a given relationship society views as socially useful while avoiding the necessity of formal regulation that may tend to hamper its social utility”); *Galambos*, *supra* note 59 at para 70 (“The underlying purpose of fiduciary law may be seen as protecting and reinforcing ‘the integrity of social institutions and enterprises’, recognizing that ‘not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules’” – footnotes omitted).

- To generally monitor or supervise the manner in which a trustee (or person in a trustee-like capacity) exercises his or her discretion regarding applicable interests entrusted to them.<sup>299</sup>

As may be expected, proponents of a rule-based conception of fiduciary doctrine tend to argue that the courts should explicitly recognize a narrow function for fiduciary law. Flannigan, for instance, posits that the singular function of fiduciary law is and has always been the control of opportunism.<sup>300</sup> He argues that all of the other various ways in which the Supreme Court has sought to articulate the doctrinal function (or purpose) are each open to misinterpretation, and that only by instituting a narrow function for the doctrine can we be sure that it remains focused on the singular mischief it seeks to control (*i.e.* opportunism).

Rotman, on the other hand, sees fiduciary doctrine serving a much broader function. He sees the doctrine as having much in the way of untapped potential,<sup>301</sup> and he interprets the overall jurisprudence (historical and contemporary) as ultimately standing for the proposition that the primary function of fiduciary doctrine is to protect the types of relationships that make society a better place. Specifically, Rotman states that:

The interest and concern that the fiduciary concept has generated may be traced to the important purpose that it is designed to fulfill. ‘Fiduciary’ is one of the means by which law transmits its ethical resolve to the spectrum of human interaction ... its purpose is to preserve important social and economic interactions. In particular, it is impressed with the difficult task of maintaining the integrity of socially and economically valuable, or necessary, relationships of high trust and confidence that facilitate and flow from human interdependency ... the fiduciary

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<sup>298</sup> See, *e.g.*, *Can. Aero*, *supra* note 259 at 306 (“to compel obedience ... to norms of exemplary behaviour...”).

<sup>299</sup> See, *e.g.*, *Guerin*, *supra* note 27 at 385 (“Equity will then “supervise the relationship”); *Hodgkinson*, *supra* note 259 para 27 (“monitors the abuse of a loyalty reposed”) and at \* (“the enforcement of fiduciary duties in policing the advisory aspect of solicitor-client relationships”).

<sup>300</sup> See, *e.g.*, Flannigan “The Boundaries of Fiduciary Accountability,” *supra* note 37 at 35.

<sup>301</sup> In L.I. Rotman, “Fiduciary Doctrine: A Concept in Need of Understanding,” (1996) 34 *Alta. L. Rev.* 821 at 852, Rotman refers to the fiduciary concept as “a vibrant and exciting facet of law whose potential is only beginning to be tapped.”

concept exists to foster human advancement through the specialization of knowledge and tasks which leads to enhanced fiscal and information wealth.<sup>302</sup>

The simple take away from this brief section is that the range of conduct that fiduciary law purports to regulate may well differ depending on what is seen as the doctrine's central function. And the Supreme Court could add much clarity to their doctrine by arriving at a consensus on function.

### Content of Conventional Fiduciary Accountability

I will now consider the substantive nature of a fiduciary obligation (and a fiduciary breach). Fundamentally, and as noted above, fiduciary accountability is said to involve a strict obligation placed upon actors in applicable trust-based relationships to avoid both (a) self-interested behaviour, and (b) the appearance of self-interested behaviour. This is the most common conception of fiduciary accountability.

In one of the early Supreme Court of Canada decisions addressing fiduciary doctrine, Rand J, in a dissenting judgment, stated that the general nature of fiduciary accountability “has been laid down consistently for several centuries”<sup>303</sup> and may be generally understood as follows:

The loyalty of a fiduciary ... means that he must divest himself of all thought of personal interest or advantage that impinges adversely on the interest of the beneficiary or that result from the use, in any manner or degree by the fiduciary, of the property, interest or influence of the beneficiary ... The fiduciary relation is that of trust in one who is to act in relation to the beneficial interest of another. It creates a standard of loyalty that calls for ... the exclusion of all personal advantage and the total avoidance of any personal involvement in the interests being served or protected...<sup>304</sup>

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<sup>302</sup> Rotman, *Fiduciary Law*, *supra* note 57 at 2 and 259.

<sup>303</sup> *Midcon*, *supra* note 55 at 336 (per Rand J. in his dissenting opinion).

<sup>304</sup> *Ibid* at 335 and 342 (per Rand J. in his dissenting opinion). See, also, *KLB*, *supra* note 59 at para 48 (“The traditional focus of breach of fiduciary duty is breach of trust, with the attendant emphasis on disloyalty and promotion of one’s own or others’ interests at the expense of the beneficiary’s interests.”); *Hodgkinson*, *supra* note 259 at 96-97 where McLachlin J. (as she then was) and Sopinka J. state in their dissenting judgment as follows:

The content of fiduciary accountability is often described as a prohibition against both *profit* and *conflict* (conflict of interest or conflict of duty) in the carrying out of one's trust-based undertakings.<sup>305</sup> Indeed, profit and conflict have often been posited as the *only* two legitimate forms of fiduciary breach.<sup>306</sup> Furthermore, fiduciary obligations are often described as proscriptive (or negative) in form as opposed to prescriptive (or positive).<sup>307</sup> That is, a fiduciary obligation "tells the fiduciary what he must *not* do. It does not tell him what he ought to do."<sup>308</sup> (emphasis added)

The content of fiduciary accountability, understood as such, fits nicely into a rule-based doctrinal construct (*i.e.* if a fiduciary actor self-deals, or appears to self-deal, in the circumstances of their trust-based undertakings, she or he commits a fiduciary breach and liability necessarily follows – in accordance with the bluntness of the classic, strict rule). However, the Supreme Court of Canada has often described the content of fiduciary accountability in much broader terms; terms consistent with it being conceptualized more as a principle-based construct.

The first signs of the Supreme Court embracing a principle-based approach appear in the 1974 decision of *Can. Aero*, where Laskin J. states that fiduciary accountability "in its generality

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Fiduciary duties find their origin in the classic trust where one person, the fiduciary, holds property on behalf of another, the beneficiary. In order to protect the interests of the beneficiary, the express trustee is held to a stringent standard; the trustee is under a duty to act in a completely selfless manner for the sole benefit of the trust and its beneficiaries to whom he owes the utmost duty of loyalty." (FNs omitted); and *Peso Silver Mines*, *supra* note 55 at 680, citing *Regal (Hastings), Ltd. v. Gulliver et al*, [1942] 1 All E. R. 378: they acted with bona fides, intending to act in the interest of [the beneficiary] ... Nevertheless they may be liable to account for the profits which they have made, if, while standing in a fiduciary relationship to [the beneficiary], they have by reason and in course of that fiduciary relationship made a profit. ... The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.

<sup>305</sup> See, *e.g.*, *Lac Minerals*, *supra* note 250 at 646-647 ("the fiduciary duty of loyalty ... will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary.").

<sup>306</sup> See, *e.g.*, Conaglen, *Fiduciary Loyalty*, *supra* note 258 at 32-58.

<sup>307</sup> Flannigan "The Boundaries of Fiduciary Accountability," *supra* note 37 at 47 ("Conventional fiduciary accountability is also narrow in the sense that it has only a negative operation. In the usual terminology, it is proscriptive rather than prescriptive"). *Cf.* Rotman, *Fiduciary Law*, *supra* note 57 at 311 and 317 ("While the proscriptive characterization of fiduciaries' duties emphasizes some of the important prohibitions imposed upon fiduciaries' behaviour, it arbitrarily circumscribes the scope of fiduciary obligations ... The Supreme Court of Canada's discussion of the nature of the Crown's fiduciary duties in *Guerin* provides a clear indication of the court's adoption of a prescriptive approach to fiduciary duties.").

<sup>308</sup> *Attorney-General v. Blake*, [1998] Ch. 439 (C.A.) at 455, cited in Conaglen, *Fiduciary Loyalty* at 202.

betokens loyalty, good faith, and the avoidance of a conflict of duty and self interest” and that it seeks to “compel obedience ... to norms of exemplary behaviour.”<sup>309</sup> Note that this *dictum* departs from the classic rule-based construct described above, suggesting that bad faith generally or conduct constituting less than “exemplary behaviour” may constitute a fiduciary breach. The implication is that fiduciary actors have *positive* or prescriptive fiduciary obligations to act in good faith, loyally, and in exemplary fashion; that fiduciary accountability is not limited to the proscriptive prohibition against self-dealing (*i.e.* profit and conflict).

Following *Can. Aero*, the next major shift towards a principle-based approach came in *Guerin* and the Crown/Aboriginal line of cases which, as discussed in detail in the next section, ultimately recognized the Crown as under a fiduciary obligation “to treat Aboriginal people fairly and honourably.”<sup>310</sup> Again, a positive fiduciary obligation to act fairly and honourably is a fair distance removed from a tractable rule-based standard, and quite distinct from the classic fiduciary prohibition against self-dealing.<sup>311</sup>

Although Dickson J. may have been concerned to limit his novel fiduciary analysis in *Guerin* to Crown/Aboriginal contexts, having described the fiduciary obligation at issue as *sui generis* in nature,<sup>312</sup> *Guerin* was distinctly influential in shaping future doctrinal development of conventional fiduciary law in Canada.<sup>313</sup>

The Supreme Court Justice perhaps most responsible for veering the court towards a principle-based approach to fiduciary accountability was Justice La Forest.<sup>314</sup> In *Lac Minerals*, he stated of fiduciary accountability that “compendiously it can be described as the fiduciary duty of loyalty

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<sup>309</sup> *Can. Aero*, *supra* note 259 at 306.

<sup>310</sup> *Mitchell*, *supra* note 29 at para 9.

<sup>311</sup> *Cf. Meinhard v. Salmon*, *supra* note 149 at 465 where Cardozo J. describes fiduciary accountability as follows: “A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior.”

<sup>312</sup> *Guerin*, *supra* note 27 at 387 (“I repeat, the fiduciary obligation which is owed to the Indians by the Crown is *sui generis*. Given the unique character both of the Indians' interest in land and of their historical relationship with the Crown, the fact that this is so should occasion no surprise.”)

<sup>313</sup> As noted in Flannigan, “Fact-Based Fiduciary Accountability in Canada,” *supra* note 55 at 447: “*Guerin* is widely recognized as the decision that signaled the Canadian departure from conventional accountability, and the subsequent struggle to articulate boundaries.” See, also, *Hodgkinson*, *supra* note 259 at 29, La Forest J. described the *Guerin*-begun line of jurisprudence as having “led to the development of a ‘fiduciary principle’ which can be defined and applied with some measure of precision.” See, also, *M.(K.) v. M.(H.)*, *supra* note 259 at para 33 where La Forest J. states that the jurisprudence has “perhaps reached a point where a ‘fiduciary principle’ can be applied through a well-defined method. The process was started in *Guerin*.”

<sup>314</sup> See, e.g., *ibid.*

and will most often include the avoidance of a conflict of duty and interests and a duty not to profit at the expense of the beneficiary.”<sup>315</sup> Like Laskin J. in *Can. Aero*, La Forest J. in this *dictum* describes the prohibition against conflict and profit as the most common *but not exclusive* type of fiduciary mandate.

Furthermore, and still speaking in regard to Justice La Forest, as noted above, while many Supreme Court of Canada decisions subsequent to *Guerin* use applicable rhetoric in describing the *content* of fiduciary accountability as potentially regulating more than self-interested behaviour, only one case outside the Crown/Aboriginal context actually finds and enforces a fiduciary breach that does not take the form of a conflict or profit, as noted above, and that decision was written by Justice La Forest. In *McInerney*, the Supreme Court held that a doctor owed a patient a fiduciary obligation to inform his patient regarding medical records that the doctor had obtained from other medical professionals. Relying heavily on *Guerin*, La Forest conceptualizes fiduciary doctrine in *McInerney* as operating to supervise behaviour broadly in the relationship at issue, states that fiduciary obligations are “shaped by the demands of the situation,”<sup>316</sup> and proceeds generally on the basis that a fiduciary actor has an obligation to act in the *best interests* of their beneficiary.<sup>317</sup>

This notion that fiduciary accountability involves an obligation to act in the “best interests” of one’s beneficiary, a notion germinated in *Guerin*, is one also picked up in other Supreme Court decisions.<sup>318</sup> Again, and unless this “best interests” mandate is interpreted as a singular duty to act in an other-regarding manner, such a conception of fiduciary accountability is a principle-based construct and not a rule-based construct (*i.e.* it is not a standard that traces the specific facts that necessitate liability).

Shifting focus, it was noted at the outset of this chapter that despite the opacity of the Supreme Court’s conventional fiduciary law jurisprudence, there are some seeds of doctrinal clarity emerging in a trend that can be traced through a recent line of decisions. In these recent decisions, the

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<sup>315</sup> *Lac Minerals*, *supra* note 250 at 646-647.

<sup>316</sup> *McInerney*, *supra* note 259 at 149.

<sup>317</sup> *Ibid* at \* (“As part of the relationship of trust and confidence, the physician must act in the best interests of the patient ... reciprocity of information between the patient and physician is *prima facie* in the patient's best interests.”).

<sup>318</sup> See, *e.g.*, *Norberg*, *supra* note 259 and *Hodgkinson*, *supra* note 259, generally.

Supreme Court appears now to be distancing itself from their principle-based conception of the content of fiduciary accountability and attempting to develop a more restrictive account of relationship regulation, one more consistent with a rule-based construct.

In *KLB*, it had been argued that lack of care by government officials in their act of placing the plaintiff children in foster homes (which led to the plaintiff being sexually assaulted in those homes) was a fiduciary breach in that it constituted a failure to act in the best interests of the children involved. McLachlin C.J. ultimately disagreed, explaining that there was “no evidence that the government put its own interests ahead of those of the children or committed acts that harmed the children in a way that amounted to betrayal of trust or disloyalty... [the] fault was not disloyalty [and so not a fiduciary breach] but failure to take sufficient care.”<sup>319</sup>

Moreover, she stated that the specific fiduciary obligation that existed in the facts of this case was an obligation to “act loyally, and not to put one’s own or others’ interests ahead of the child’s in a manner that abused the child’s trust.”<sup>320</sup> In her decision, the Chief Justice goes to some length to reject the notion that a duty to act in the best interests of a beneficiary is properly viewed as fiduciary in nature. Her rejection here is made on two bases. First, she states that a fiduciary-based best-interests ethic lacks practical utility in the sense that it fails to provide a “workable standard by which to regulate conduct ... [that it] simply does not provide a legal or justiciable standard.”<sup>321</sup> Second, she states that it results in an inappropriate result-based analysis, explaining in the circumstances of the case that:

Parents should try to act in the best interests of their children. This goal underlies a variety of doctrines in family law and liability law. However, thus far, failure to meet this goal has not itself been elevated to an independent ground of liability at common law or equity. There are good reasons for this. ... an obligation to do what is in the best interests of one’s child would seem to be a form of result-based liability, rather than liability based on faulty actions and omissions: such an obligation would be breached whenever the result was that the best interests of the child were not promoted, regardless of what steps had or had not been taken by

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<sup>319</sup> *KLB*, *supra* note 59 at para 50.

<sup>320</sup> *Ibid* at para 34.

<sup>321</sup> *Ibid* at para 46.

the parent. Breach of fiduciary duty, however, requires fault. It is not result-based liability, and the duty is not breached simply because the best interests of a child have not in fact been promoted.<sup>322</sup> (emphasis added)

This *dictum* from *KLB*. reflects a recent trend, an attempt by the Supreme Court to make clear, in the words of Justice Binnie in *Wewaykum* (a decision released shortly before *KLB*), that “not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature.”<sup>323</sup> A similar comment is made by Justice Cromwell in *Galambos*: “[a] claim for breach of fiduciary duty may only be founded on breaches of the specific obligations imposed because the relationship is one characterized as fiduciary.”<sup>324</sup>

This recent trend closely mirrors *dictum* from a leading English decision on the nature of fiduciary accountability, *Bristol & West Building Society v. Mothew*, where Millet L.J. states that:

The expression ‘fiduciary duty’ is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty.<sup>325</sup>

The question then becomes: what are the specific types of breach of duty that are uniquely fiduciary in nature? In the two most recent Supreme Court of Canada decisions, both McLachlin C.J. (in *Elder Advocates*) and Cromwell J. (in *Galambos*) continue to resist exclusively restricting fiduciary accountability to the classic prohibition against self-interested behavior (or the appearance of such), instead placing central emphasis on “abuse of power” (McLachlin C.J. uses the similar if not synonymous notion “abuse of trust”) as the type of wrong that is fiduciary in nature. Further, abuse of power (or abuse of trust) is now isolated, at least temporarily, as the exclusive type of mischief regulated by conventional fiduciary doctrine in Canada. Put another way, the Supreme Court’s current conceptualization of fiduciary accountability is as follows: an

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<sup>322</sup> *Ibid* at 44-45.

<sup>323</sup> *Wewaykum*, *supra* note 33 at para 83.

<sup>324</sup> *Galambos*, *supra* note 59 at para 37.

<sup>325</sup> [1998] Ch. 1 (C.A.) at 16.

abuse of power (or trust) is the only recognized and actionable breach of the fiduciary duty of loyalty.

In *KLB*, Chief Justice McLachlin stated the “emphasis” in terms of the content of a fiduciary “abuse of trust” is “disloyalty and promotion of one’s own or others’ interest at the expense of the beneficiary’s interests.”<sup>326</sup>

Ultimately, the Supreme Court has gone some distance to restrict their doctrine to a more rule-based conception of fiduciary accountability (arguably, a return to the classic fiduciary doctrinal construct); that is, one which stipulates that if a fiduciary actor commits an abuse of power or trust in the context of their trust-based undertakings, liability necessarily follows. This is certainly a more restricted standard than a principle-based directive essentially mandating that fiduciaries act in accordance with a high standard of moral conduct generally. However, the terms “abuse of power” and “abuse of trust” are still open to varying interpretations (*i.e.* despite McLachlin C.J.’s comment in *Elder Advocates* that the “emphasis” is to be on the prohibition of self-dealing<sup>327</sup>), and still, to some extent, beg the question: what specific types of power or trust abuses are uniquely fiduciary in nature?

In one of the most recent treatises attempting to theorize commonwealth fiduciary doctrine, Conaglen picks up on this question of what types of duties are peculiarly fiduciary in nature, delineates the main types of duties that have at times been held to be fiduciary in nature, discusses each at length, and posits in conclusion that only duties to avoid conflict and profit are properly characterized as fiduciary.<sup>328</sup>

Ultimately, it remains to be seen if the Supreme Court of Canada will follow suit, or if their concepts of “abuse of power” or “abuse of trust” will apply more broadly.

Finally, note also that during the years, *post Guerin*, where the Supreme Court jurisprudence was effectively a confused blend of the principle-based and rule-based conceptions of fiduciary doctrine, as I contend, there are a number of perplexing pronouncements regarding the

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<sup>326</sup> *KLB*, *supra* note 59 at para 33.

<sup>327</sup> *Ibid.*

<sup>328</sup> Conaglen, *Fiduciary Loyalty*, *supra* note 258 at 32-58.

conceptual *nexus* between fiduciary and non-fiduciary obligations. That is, it is relatively well settled elsewhere throughout the commonwealth (and, arguably, now again in Canada) that conventional fiduciary accountability operates as an *independent* form of legal regulation (*i.e.* regulating a precise and singular mischief: self-interested conduct in trust or trust-like contexts).<sup>329</sup> However, scattered throughout the jurisprudence and applicable academic commentary are statements that effectively conceptualize fiduciary accountability as something that does not operate entirely independently from other legal obligations (*i.e.* obligations not otherwise fiduciary in nature, such as contractual or tort obligations), but rather “superimposes” onto (or, as others have put it, becomes “molded to”<sup>330</sup> or “parasitic to”<sup>331</sup> or “subsidiary to”<sup>332</sup>) those other obligations in contexts where a particular relationship is defined as fiduciary in nature.

Some even conceptualize non-fiduciary obligations as, essentially, metamorphosing, or as taking on a fiduciary quality in applicable scenarios, meaning that a breach of a non-fiduciary obligation actually becomes a “fiduciary breach” when it takes place in the context of a “fiduciary relationship.”<sup>333</sup> Put another way, such a conceptualization posits that “if someone is a fiduciary, all of the duties that the person owes can be analyzed as fiduciary duties.”<sup>334</sup>

However, as Professor Paul Finn explained:

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<sup>329</sup> See, generally, Conaglen, *Fiduciary Loyalty*, *supra* note 258. Flannigan, for his part, describes fiduciary accountability as having independent, “parallel” application in terms of the manner in which it co-regulates certain types of societal interaction: see, *e.g.*, Flannigan, “The Boundaries of Fiduciary Accountability,” *supra* note 37 at 64.

<sup>330</sup> See, *e.g.*, Strother, *supra* note 259 at para 141 (a fiduciary obligation “enhances the contract by imposing a duty of loyalty with respect to the obligations undertaken, but it does not change the contract’s terms. Rather it is molded to those terms.”)

<sup>331</sup> See, *e.g.*, Getzler, “Rumford Market and the Genesis of Fiduciary Obligations,” *supra* note 269 at 578 (interpreting Birks’ conceptualization of fiduciary duties as being ‘parasitic’ on other applicable obligations, in that they purport to ensure optimal performance of such other obligations).

<sup>332</sup> See, *e.g.*, Conaglen, *Fiduciary Loyalty*, *supra* note 258 at 75.

<sup>333</sup> See, *e.g.*, *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 at para 37, [1995] S.C.J. No. 99 (Q.L.) [*Blueberry* cited to S.C.R.] (“whether on the particular facts of this case a fiduciary relationship was superimposed on the regime for alienation of Indian lands contemplated by the *Indian Act*” emphasis added); Rotman, *Fiduciary Law*, *supra* note 57, generally. See, also, Conaglen, *Fiduciary Loyalty*, *supra* note 258 at 11-12 where Conaglen discusses this viewpoint (which Conaglen himself does not agree with).

<sup>334</sup> Conaglen, *Fiduciary Loyalty*, *supra* note 258 at 11. Here, Conaglen is summarizing but not agreeing with this conception.

[i]t is not because a person is a ‘fiduciary’ or a ‘confidant’ that a rule applies to him. It is because a particular rule applies to him that he is a fiduciary or confidant for its purposes.<sup>335</sup>

Moreover, this notion that a non-fiduciary duty can morph into a fiduciary duty in certain instances may be viewed as a logical manifestation of the Supreme Court having adopted the non-conventional principle-based approach to fiduciary doctrine (*i.e.* since the principle that one is to act fairly, honestly, and honourably in applicable contexts is broad enough to be read *synonymously* with all different types of breach of duty). This is precisely the type of “contamination” that Flannigan refers to in the epigraph to this chapter.

Ultimately, these esoteric frolics have contributed much to the confusion here to be sure, and it would be helpful, again, for the Supreme Court to clarify whether (or not) it views conventional fiduciary accountability as independent from other types of accountability (*i.e.* regardless of the specific contexts in which it is deemed to arise, and regardless of the colourful ways in which it can be described, once it does arise, in relation to various other obligations that may exist in the context of a particularized relationship).

### Contexts in Which Conventional Fiduciary Accountability Arises

I have now noted material uncertainty in two key incidents of the Supreme Court’s doctrine on fiduciary law: (a) the core doctrinal *function* (does fiduciary law function solely to control the self-regarding impulse of actors in trust-based relationships, or is it more fundamentally concerned with policing a high standard of moral conduct generally?), and (b) the *content* of the doctrinal mandate (is fiduciary accountability broader than a prohibition against conflict and profit?). I will now consider the various types of *contexts* in which fiduciary obligations are said to arise.

The prototype factual context in which fiduciary accountability arises is the express trust. Because a trustee is given direct (and typically unmonitored) access to the assets or opportunities of a trust beneficiary on a mandate of managing those assets/opportunities in the best interests of

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<sup>335</sup> P.D. Finn, *Fiduciary Obligations*, (Sydney: Law Book Company, 1977) at 3, cited in Conaglen, *Fiduciary Loyalty*, *supra* note 258 at 9.

that beneficiary, there is seen to be a unique opportunity for that trustee to act selfishly regarding those assets/opportunities (in circumstances also seen as uniquely difficult to regulate, as already noted). For that reason, and to reiterate, an equitable and uniquely strict rule – the fiduciary obligation – developed to prohibit even the appearance of self-dealing in such contexts.

The *fiduciary obligation* has now been exported to a wide variety of categories of human interaction/relationship. The following are some examples of relationship categories that have been found by various courts to be sufficiently trust-like so as to give rise, as a matter of course, to applicable fiduciary obligations:

- Executor-beneficiary
- Solicitor-client
- Agent-principal
- Director-corporation (and director-shareholder)
- Guardian-ward
- Doctor-patient
- Parent-child
- Elected official-electorate<sup>336</sup>

Beginning in their decision in *Lac Minerals*, the Supreme Court began to follow the doctrinal practice of simply deeming that fiduciary accountability exists “*per se*” in the context of these types of traditionally-recognized categories of relationship, focussing the analysis in such contexts then on the types of conduct within such relationships that constitutes a *breach* of fiduciary accountability owed.

Courts are often faced with (a) an allegation of a breach of a fiduciary obligation in circumstances that do not fall within one of the above-noted traditional categories of “fiduciary relationship,” or (b) an allegation that an alleged fiduciary’s impugned conduct, while within the

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<sup>336</sup> When the traditional categories are delineated, as they often are, in Supreme Court decisions, this relationship category (elected official-electorate) is inexplicably left off the list. However, although it rarely rises, this has been a long-recognized category of “fiduciary relationship”: see, e.g., “Governmental Authorities,” Chapter 19 in Ellis, *Fiduciary Duties in Canada*, *supra* note 280 at 19-1; Robert Flannigan, “Fiduciary Control of Political Corruption” (2002) 26 *Advocates’ Q.* 252 at 252 (“On any conceptual understanding, the relationship between citizens and their elected representatives is fiduciary”); *Hawrelak*, *supra* note 55.

context of a relationship of a kind traditional recognized as fiduciary in nature, is not a breach of duty that is itself fiduciary in nature. It is in these types of situations where attempts have been made to formulate a rationale to justify (or not) extending the scope of fiduciary accountability to a novel set of facts.

In order to determine whether or not fiduciary obligations ought to be extended to a new type of relationship category or factual situation,<sup>337</sup> courts in various jurisdictions (as well as academic commentators) have struggled mightily to conceptualize what it is about the traditional categories of relationship that gives them their fiduciary quality (assuming that there must be a universal principle or rationale that unifies the various categories).<sup>338</sup>

For its part, the Supreme Court of Canada has been wildly inconsistent in its attempts to articulate the conceptual basis (or bases) upon which the classic trust-based fiduciary obligation has been (and ought to be) extended to other types of human interaction. As noted, for instance, in the indictment of their jurisprudence by McEachern C.J.B.C. in *Critchley*, their approach is seen by some as having been uniquely expansive.

Turning then to the applicable specifics of the Supreme Court's jurisprudence, it may be observed that beginning with its decision in *Guerin*, the Supreme Court developed a litany of (effectively competing) tests and rationales for what ought to constitute the essential justification for the imposition of fiduciary accountability. Detailed analyses of some of the various tests and principles have been set out elsewhere.<sup>339</sup> In summary, what the Court initially attempted to

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<sup>337</sup> This is an analysis often referred to by the Supreme Court as a "fact-based" assessment of whether or not fiduciary accountability arises; as conceptually distinguished from the "status based" context where fiduciary accountability is simply deemed because the relationship category at issue is traditionally-recognized as having a fiduciary quality. Other terminological distinctions the Supreme Court has at times used is that between "ad hoc" and "per se" fiduciary accountability (again, the former arises when a "fact based" assessment leads to liability, and the latter arises when a relationship at issue is one traditionally recognized as fiduciary). See, e.g., *Hodgkinson*, *supra* note 259, generally.

<sup>338</sup> See, e.g., *Lac Minerals*, *supra* note 250 at 644 where La Forest J. states that "[i]n specific circumstances and in specific relationships, courts have no difficulty in imposing fiduciary obligations, but at a more fundamental level, the principle on which that obligation is based is unclear. ... It has been said that the fiduciary relationship is 'a concept in search of a principle' ... Some have suggested that the principles governing fiduciary obligations may indeed be undefinable ... while others have doubted whether there can be any 'universal, all-purpose definition of the fiduciary relationship' ... The challenge posed by these criticisms has been taken up by courts and academics convinced of the view that underlying the divergent categories of fiduciary relationships and obligations lies some unifying theme."

<sup>339</sup> See, e.g., Flannigan "The Boundaries of Fiduciary Accountability," *supra* note 37 at 67-76; Leonard I. Rotman, "The Vulnerable Position of Fiduciary Doctrine in the Supreme Court of Canada," (1996) 24 Man. L.J. 60-91

isolate was an abstract indicator (or set of indicators) that would operate to determine, on a case-by-case basis, whether fiduciary obligations are indeed owed in any given context.

In *Guerin*, where fiduciary accountability was first imported to the Crown/Aboriginal context, Justice Dickson offered this as the conceptual test for when fiduciary accountability arises:

... 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.<sup>340</sup>

This oft-cited dictum from *Guerin* was later picked up by Justice Wilson in *Frame* who went on to set out a “rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent” in context.<sup>341</sup> Attempting to synthesize previous case law, she offered a flexible conceptual framework, essentially stating that fiduciary accountability would be appropriate in circumstances where some or all of the following three characteristics are present:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.<sup>342</sup>

Wilson J.’s “rough and ready guide” from *Frame* is widely cited in subsequent Supreme Court decisions. Various Supreme Court Justices sought to put their own spin on how Wilson J.’s guide should be applied. Justice La Forest, for instance, was a proponent of the view that the determinative question should be whether a claimant’s expectation that a defendant ought to have acted in his or her best interests in the circumstances at issue was reasonable or legitimate

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<sup>340</sup> *Guerin*, *supra* note 27 at 384

<sup>341</sup> As it was later described by Justice La Forest in *Lac Minerals*, *supra* note 250 at 647.

<sup>342</sup> *Frame*, *supra* note 259 at 136.

(*i.e.* a reasonable/legitimate expectations test).<sup>343</sup> In contrast, Chief Justice McLachlin (in earlier decisions) saw as more centrally determinative the question of whether power or discretion was ceded by a claimant (explicitly or implicitly) to such an extent that the defendant was in a position to adversely impact the interests of the claimant (*i.e.* a power-ceding test).<sup>344</sup>

More recently, however, the Supreme Court has fundamentally changed course. In *Galambos* and *Elders Advocates*, the Supreme Court has effectively rejected the *Frame* approach of using flexible, abstract criteria/indicia (as well as the reasonable-expectations and power-ceding tests of La Forest J. and McLachlin C.J., noted above) and has embraced more of an *essentialist* approach (*i.e.* one which holds that for fiduciary accountability to arise, certain essential facts must be present).

The current three-part Supreme Court of Canada test for when fiduciary accountability arises, as articulated by Chief Justice McLachlin in *Elders Advocates*, is as follows:

- 1) First, the evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary;
- 2) Second, the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them; and
- 3) Finally ... the claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary ...<sup>345</sup> (footnotes omitted)

The first two components of the new test offer discernible boundaries of accountability, and are common features of the Supreme Court's post-*Guerin* jurisprudence. For fiduciary accountability to arise, there must have been an undertaking by an alleged fiduciary to act in the best interests of a beneficiary (which undertaking may be explicit as in a statutory or contractual commitment, or implicit as, for instance, self-evidently present in doctor-patient or parent-child

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<sup>343</sup> See, *e.g.*, *Lac Minerals*, *supra* note 250 at 648; and *Hodgkinson*, *supra* note 259 at para 38.

<sup>344</sup> See, *e.g.*, *Hodgkinson*, *supra* note 259 at paras 117-137 (*per* McLachlin J., as she then was, and Sopinka J.).

<sup>345</sup> *Elder Advocates*, *supra* note 31 at para 36.

relationships<sup>346</sup>) and the beneficiary must have been vulnerable in the sense that the alleged fiduciary had power or discretion over them or their interests. The third component, however, introduces as an essential pre-condition to fiduciary accountability a notion that will require further judicial elaboration. There is little guidance in the Supreme Court's jurisprudence on what types of interests, for instance, may be sufficiently vital or substantial to satisfy the third component of the test.<sup>347</sup>

Before moving on, a current debate between two leading commentators is notable here. Flannigan has long promoted the importance of following a strictly essentialist approach to the identification of conceptual boundaries of fiduciary accountability (note, also, that Frankel, for her part, has also recently articulated a proposed essentialist test<sup>348</sup>). For Flannigan, fiduciary accountability arises only (and always) when one person is entrusted with limited access to the

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<sup>346</sup> See, e.g., *Galambos*, *supra* note 59 at para 75.

<sup>347</sup> On how the Supreme Court of Canada has addressed this interest-criticality item in the Crown/Aboriginal context, see *infra* notes 435 and 436 and the text surrounding each. Generally, see, e.g., Smith, "The Critical Resource Theory of Fiduciary Duty," *supra* note 254 at 1444:

What things qualify as "critical resources," thus justifying the imposition of fiduciary duty? ... Whether the existence of a particular thing justifies the imposition of fiduciary duties, therefore, depends on whether that thing provides the fiduciary with the occasion to act opportunistically. And whether that thing provides the fiduciary with the occasion to act opportunistically will depend in large part on whether society has made a normative decision that the thing belongs to the beneficiary. So what is a "critical resource"? Like property, critical resources may be tangible or intangible. The "owner" of critical resources need not have legally enforceable rights in the same way that an owner of property has such rights, but she must have residual control rights that, at a minimum, provide practical control over the resources.

See, also, Frankel, *Fiduciary Law*, *supra* note 260 at 13-25. For an argument that the criticality of the interests at issue is irrelevant to whether or not fiduciary accountability out to arise, see, e.g., Robert Flannigan, "Fiduciary Mechanics"(2008) 14 C.L.E.L.J. 25 at 25-26, 46:

Others regard the imposition of fiduciary liability on mechanics as a feral extension of the jurisdiction. They assume it to be self-evident that mechanics are not regulated by fiduciary accountability. They are mistaken. ... Opportunism does not change its nature because an arrangement ostensibly is less socially important or less vital than others.

*Cf.* Conaglen, *Fiduciary Loyalty*, *supra* note 258 at 254.

<sup>348</sup> Frankel, *supra* note 260 at 6:

The suggested features that all fiduciaries share are the following:

First, fiduciaries offer mainly services (in contrast to products). The services that fiduciaries offer are usually socially desirable, and often require expertise, such as healing, legal services, teaching, asset management, corporate management, and religious services.

Second, in order to perform these services effectively, fiduciaries must be entrusted with property or power. Third, entrustment poses to entrustors the risks that the fiduciaries will not be trustworthy. They may misappropriate the entrusted property or misuse the entrusted power or they will not perform the promised services adequately.

Fourth, there is the likelihood that (1) the entrustor will fail to protect itself from the risks involved in fiduciary relationships; (2) the markets may fail to protect entrustors from these risks; and that (3) the costs for the fiduciaries of establishing their trustworthiness may be higher than their benefits from the relationships. (footnotes omitted)

assets or opportunities of another and for a defined purpose.<sup>349</sup> Conaglen, on the other hand, recently criticized Flannigan’s essentialist model, and cast doubt on whether a truly essentialist or universal test for fiduciary accountability is possible given the wide variety of social and factual contexts in which it is said to arise.<sup>350</sup> Conaglen cites two notable Canadian commentators on fiduciary law in lamenting as “notoriously intractable” the task of isolating such a test<sup>351</sup> and noting the fact the task has been likened to the search by the Knights of Antiquity for the Holy Grail<sup>352</sup> (note that Rotman, for his part, cites these types of dynamics to argue that the search for such an essentialist test should be abandoned<sup>353</sup>).

Further, Conaglen opines that a reasonable/legitimate expectations test of a kind earlier promoted by Justice La Forest (and one which allows recourse to the various types of abstract criteria noted above to have been used in the past by the Supreme Court) is the most intellectually satisfying of all available. He conceded the imperfect nature of this type of non-essentialist approach but extrapolated that “courts have persevered with the concept, and the skies have not fallen.”<sup>354</sup> To the contrary, Flannigan has argued, metaphorically, that the skies in this area *literally have fallen*, explaining that “a conceptual fog” has descended over the Supreme Court’s fiduciary doctrine as a result of the non-essentialist approach they followed post-*Guerin* and prior to *Galambos* and *Elders Advocates*.

Ultimately, while the Supreme Court has embraced a move to a more restricted, essentialist approach to the question of when fiduciary accountability arises, it remains to be seen how their new test will be applied by lower courts and, in particular, how the third component of the test – the interest in question being sufficiently vital or substantial – will be interpreted.

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<sup>349</sup> See, e.g., Flannigan, “The Boundaries of Fiduciary Accountability,” *supra* note 37 at 36-54.

<sup>350</sup> Conaglen, *Fiduciary Loyalty*, *supra* note 258 at 252 and 268.

<sup>351</sup> Weinrib, “The Fiduciary Obligation,” *supra* note 48 at 5, cited in Conaglen, *Fiduciary Loyalty*, *supra* note 258 at 9.

<sup>352</sup> D.W.M. Waters, “Banks, Fiduciary Obligations and unconscionable Transactions” (1986) 65 Can. B. Rev. 37 at 56, cited in Conaglen, *Fiduciary Loyalty*, *supra* note 258 at 9.

<sup>353</sup> Rotman, *Fiduciary Law*, *supra* note 57 at 13, citing Justice E.W. Thomas, “An Affirmation of the Fiduciary Principle,” (1996) N.Z.L.J. 405 at 405:

Perhaps we should heed instead, the words of E.W. Thomas J. who says that the problem with fiduciary law ‘lies not in the concept of the fiduciary relationship itself, but in the quest of judges, lawyers and academics for a precision which the law is incapable of delivering.’ The fact that the quest for a fiduciary taxonomy continues more than 300 years after the initial appearance of the fiduciary concept in English law should send a message to those who seek this alleged Holy Grail.

<sup>354</sup> Conaglen, *Fiduciary Law*, *supra* note 258 at 261.

## b. Non-Conventional – or *Sui Generis* – Crown/Aboriginal Fiduciary Doctrine

In the previous section, and at a high level, I articulated two distinct and competing conceptualizations of fiduciary doctrine – the principle-based (*i.e.* the notion that the fiduciary concept is more a principle that gives rise to specific duties as opposed to merely a specific duty in and of itself<sup>355</sup>) and the rule-based (*i.e.* that fiduciary doctrine is essentially limited to a singular rule against self-interested conduct in applicable contexts) – and noted that the Supreme Court of Canada appears to be returning towards a rule-based construct, after having *experimented* post-*Guerin*, with a principle-based approach.<sup>356</sup>

Accepting the premise that these recent developments mark a return to fiduciary doctrine's conventional doctrinal construct, one may begin to apprehend the difficulty of using conventional fiduciary doctrine to regulate Crown conduct generally in Aboriginal contexts. That is, when Aboriginal and treaty rights come before a court, it is most often in the context of a societal friction between an Aboriginal or treaty rights-holder and the rights or interests of some other member or segment of society, or society *writ large* of which the (often marginalized) Aboriginal rights holder is a part. In such contexts, the Crown is in a position of having to balance the various (often conflicting) interests involved with an eye towards some type of reconciliation; that is the essential function of their role. Consequently, they will not generally be seen as having undertaken to act *exclusively* in the best interests of anybody.<sup>357</sup> And so, pursuant to the Supreme Court's current test for when fiduciary accountability arises (*i.e.* their conventional doctrine), the Crown in such scenarios would typically not owe fiduciary obligations to any one party (Aboriginal or non-Aboriginal) with respect to the reconciliation of the applicable interests in dispute.<sup>358</sup>

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<sup>355</sup> Recall that McEachern C.J.B.C. referred to this type of an approach as an ill-advised “experiment” in *Critchley*, *supra* note 290 at 79-85.

<sup>356</sup> Recall generally from the discussion above that Justice La Forest saw *Guerin* as effectively incubating a principle-based approach and he, nearly single-handedly, reconceived conventional fiduciary law on that basis.

<sup>357</sup> See, *e.g.*, *Elder Advocates*, *supra* note 31 at para 44: “Compelling a fiduciary to put the interests of the beneficiary before their own is ... essential to the [fiduciary] relationship. Imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole...”

<sup>358</sup> See, generally, *Elder Advocates*, *supra* note 31. Note, however, that Crown actors often owe a fiduciary duty to the electorate as a whole: see *supra* note 335 and surrounding text.

There are other instances of Crown/Aboriginal interaction, however (*i.e.* outside the contexts that generally invoke a Crown mandate of reconciling Aboriginal or treaty rights with the interests of a third party or the overall citizenry), where fiduciary accountability clearly does arise in accordance with the prevailing, conventional doctrine.<sup>359</sup> The factual circumstances in the *Guerin* litigation are one such instance. In the circumstances of *Guerin*, the Crown had undertaken, pursuant to their applicable statutory mandate, to act exclusively in the best interests of the Musqueam when exercising their discretionary powers in the exercise of their mandate (*i.e.* of negotiating a fair deal with a third party for the land interest the Musqueam ultimately surrendered to the Crown for lease to a third party). In *Guerin*, that undertaking was part of the triggering criteria relied upon by Dickson J. to found fiduciary accountability.<sup>360</sup> Conventional fiduciary duties, based on any known doctrinal conception, arose in that context. That is, the Crown and its agents were prohibited on the facts in *Guerin*, in accordance with conventional fiduciary doctrine, from acting opportunistically in relation to their assumed discretion over the applicable Musqueam interests.<sup>361</sup>

Another instance where conventional fiduciary accountability arises in the context of Crown/Aboriginal interaction are situations like the one in *Ermineskin Indian Band and Nation v. Canada*<sup>362</sup> where the Crown undertakes a statutory duty to manage resource royalty payments (*i.e.* royalties paid on resources extracted from Aboriginal lands) exclusively in the interests of an Aboriginal group. In those situations, there are clearly conventional fiduciary obligations that prohibit the Crown from, effectively, stealing the Aboriginal group's money.

However, and as noted, the Supreme Court's Crown/Aboriginal fiduciary doctrine was not developed in accordance with the conventional rule-based prohibition against self-dealing. Rather, it was brought in initially to both promote a high standard of moral conduct on the part of the Crown generally and to regulate Crown dishonour in the context of the Crown's dealings with Aboriginal peoples in circumstances where there was the potential for Crown conduct to

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<sup>359</sup> In accordance with the newly reconceptualised test for fiduciary accountability set out in *Elder Advocates*, *supra* note 31 at 36.

<sup>360</sup> *Guerin*, *supra* note 27 at 385.

<sup>361</sup> As to what a classic fiduciary breach may specifically look like in such contexts, see discussion below under section III(b)(ii).

<sup>362</sup> 2009 SCC 9, [2009] 1 S.C.R. 222 [*Ermineskin* cited to S.C.R.].

infringe or negatively impact Aboriginal or treaty rights (including Indian land interests), and it developed in accordance with a distinctly principle-based approach.

To properly conceptualize the genesis of Crown/Aboriginal fiduciary doctrine in Canada, we must look a bit closer at the circumstances surrounding the *Guerin* litigation. *Guerin* was the first Supreme Court of Canada decision to explicitly import fiduciary concepts into the core of Canadian Crown/Aboriginal Law. In that case, the Supreme Court was addressing a situation where the Musqueam Band had leased a portion of their reserve lands to a third party for use as a golf course (the impugned conduct had all taken place back in the late 1950s). As already noted, pursuant to the *Indian Act* framework, the Musqueam had been required to first surrender the lands to the federal government who then negotiated the lease with the third party (*i.e.* on the Musqueam's behalf), on what was effectively a statutory undertaking to act exclusively in the Musqueam's best interests.<sup>363</sup>

Aboriginal peoples in Canada, of course, are typically precluded from disposing of their own lands to any entity other than the Crown, and the Crown for its part, is then mandated, upon land interests being surrendered to it, to act on the behalf of the applicable Aboriginal group in relation to those lands. This *inalienability* dynamic regarding Aboriginal peoples and their lands has always been a feature of Canadian constitutionalism (and remains to this day) and dates back at least to the *Royal Proclamation (1763)* where the Crown formally assumed this type of responsibility.<sup>364</sup> The essential purpose of this arrangement, it has often been said, is the protection of Aboriginal peoples against "exploitative bargains" in relation to the disposition of their lands.<sup>365</sup>

What generally transpired in the circumstances of the *Guerin* case is that the federal Crown, in their dealings with the third party lessor, made some late adjustments to the terms of the lease that were never discussed with the Musqueam, adjustments that were necessary to effect the deal but which made the transaction significantly less advantageous (*i.e.* for the Musqueam). Further, the Crown had failed to take into account during their negotiations certain concerns that the Band had previously raised with them. And once the lease was finalized, and despite repeated requests

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<sup>363</sup> *Guerin*, *supra* note 27 at 383-384.

<sup>364</sup> See, generally, *Royal Proclamation (1763)*, [reprinted in R.S.C. 1985, App. II, No.1].

<sup>365</sup> See, *e.g.*, *Wewaykum*, *supra* note 33 at para 100.

from the Band, the Musqueam were not shown a copy of the lease until approximately twelve years after it was signed.

It was not suggested on the facts of the case that the Crown acted out of self-regard or with any particular ill intent; rather, the effective issue was whether they acted in too unilateral (or dishonourable) a fashion, whether they ought to have gone back to the Musqueam to discuss the final negotiated adjustments to the lease before finalizing it, and whether they should have worked harder to address some of the comments and concerns the Musqueam had raised in prior discussions with Crown officials regarding the lease, particularly since they had initially “induced” the Musqueam to avail themselves of the opportunity.<sup>366</sup>

This case was the first major Supreme Court decision to address, effectively, the nature of Crown liability doctrine following the repatriation of the constitution in 1982 which involved, among others, the following two formal changes:

- 1) Aboriginal and treaty rights were explicitly confirmed as legal (indeed constitutional) in nature; and
- 2) The *Constitution Act, 1982* was declared the supreme law of Canada<sup>367</sup> meaning, effectively, that Crown laws and Crown conduct could now be judicially reviewed to ensure applicable consistency with the constitution.

Prior to 1982, Crown responsibility in the context of Aboriginal lands was typically described as constituting a type of “political trust” (as opposed to a legal trust) and the Crown was effectively immune from judicial scrutiny regarding such conduct. A notable line of jurisprudence developed describing the nature of that form of Crown immunity.<sup>368</sup> Predictably, therefore, there was substantial effort made in *Guerin* to conceptualize the resultant Crown/Musqueam relationship using “trust” language (indeed, the Musqueam had framed their claim in trust). For instance, and although Dickson J. refused to characterize that relationship as an express (legal) trust, stating rather that the relationship was *trust-like* and so attracted fiduciary accountability,

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<sup>366</sup> *Ibid* at 389.

<sup>367</sup> *Constitution Act, 1982*, *supra* note 18 at s. 52.

<sup>368</sup> See, e.g., Rotman, *Fiduciary Law*, *supra* note 57 at 562-265.

Wilson J., in a minority decision, arrived at the conclusion that the relationship (*i.e.* between the Crown and the Musqueam, upon the surrender) was indeed an express trust.<sup>369</sup>

Returning to the specific facts in *Guerin*, the Musqueam had argued that the Crown had failed to discharge its legal obligation in sufficient accordance with Musqueam best interests. Dickson J. ultimately agreed with that argument, concluding that the Crown had a fiduciary duty (but not a trust duty) in this scenario to act with “utmost loyalty” in the best interests of the Musqueam.<sup>370</sup>

Dickson J. did not, however, base his finding of fiduciary *breach* in the conventional way (*i.e.* on the Crown’s conduct in putting its own interests in conflict with the applicable interests of the Musqueam). Rather, he conceptualized fiduciary doctrine as permitting the Court, in circumstances where fiduciary accountability is recognized as having arisen (*i.e.* by the Crown having assuming a discretionary power to act exclusively on the Musqueam’s behalf), to then flexibly monitor the entirety of the Crown’s exercise of that discretion and to sanction applicable moral transgressions as breaches of the fiduciary duty to act loyally in the best interests of the Aboriginal group. Dickson J. described the applicable Crown conduct that had transpired in *Guerin* as unconscionable (*i.e.* seemingly conceiving unconscionability here in a plain or *sui generis* sense of that word, since the conduct at issue would not have constituted conventional *unconscionability* at law,<sup>371</sup> nor was any such precedent cited to suggest it did). Dickson J. described his finding of unconscionability here as “the key to a conclusion that the Crown breached its fiduciary duty.”<sup>372</sup>

Moreover, Justice Dickson did not cite judicial authority in support of this conceptualization of the fundamental nature of fiduciary doctrine.<sup>373</sup> He did refer vaguely, and more than once, to the fiduciary obligation enforced in this case as *sui generis*,<sup>374</sup> which suggests he may well have been concerned about restricting his *dictum* here to the specific facts of the case. However, recall that all fiduciary obligations vary depending on the context in which they arise and are, arguably

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<sup>369</sup> *Guerin*, *supra* note 27 at 355.

<sup>370</sup> *Ibid* at 390.

<sup>371</sup> As pointed out in Flannigan, “The Boundaries of Fiduciary Accountability,” *supra* note 37 at 63.

<sup>372</sup> *Guerin*, *supra* note 27 at 388.

<sup>373</sup> He cited two lower court decisions to support the general principle that fiduciary accountability is tailored to context: *Guerin*, *supra* note 27 at 384-385. However, he cited no judicial authority in support of the manner in which he defined the core fundamentals of fiduciary doctrine.

<sup>374</sup> *Guerin*, *supra* note 27 at 387.

and in that sense, *sui generis*. Recall also that the fundamentals do not vary (*i.e.* in conventional fiduciary doctrine); rather only the *application* of those fundamentals varies from context to context.

Here, in radically varying the applicable doctrinal *fundamentals*, Dickson J. arguably committed a “conceptual error,”<sup>375</sup> perhaps as a result of the fact that there were, recall, some conflicting precedents in fiduciary law at that time in Canada (on this, we cannot be sure, however, since he cited no such precedents). This flawed doctrinal genesis forms the starting point of the broader argument I make later in this chapter that the Supreme Court’s Crown/Aboriginal doctrine in its entirety, and including its (adjusted) prevailing fundamentals in more recent decisions (*i.e.* as those prevailing decisions are still embedded with doctrinal residue of this first fundamentally flawed precedent), takes the form of a classic Dworkinian mistake.

Moreover, it was (again) not made clear in his reasons whether Dickson J. intended that the *sui generis* Crown/Aboriginal fiduciary accountability he recognized in *Guerin* would be confined to the facts of that case (*i.e.* Aboriginal land-surrender scenarios) or whether it was to apply more broadly in Crown/Aboriginal contexts. We certainly know, from the discussion in the previous section, that his decision was applied broadly outside the Crown/Aboriginal context; effectively exported for a period of time to the core of the conventional doctrine.

In *Sparrow*, Justice Dickson’s applicable *dicta* from *Guerin* was interpreted as a generalized fiduciary-based *principle* that Crown/Aboriginal relationships are fiduciary in nature and that the Crown is to act “in a fiduciary capacity” in all of its dealings involving Aboriginal and treaty rights, even those where the Crown has not undertaken a specific mandate of acting exclusively in the interests of an Aboriginal group.

The *Sparrow* litigation involved a claim, again by the Musqueam, that in limiting the length of fishing nets that Band members could use (*i.e.* in the terms of the Band’s food fishing license issued), the federal Crown had unconstitutionally infringed the exercise of Musqueam Aboriginal rights (*i.e.* fishing rights). The Supreme Court did not make a determination in their decision on whether the Crown conduct at issue constituted any type of breach of duty (fiduciary or

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<sup>375</sup> Flannigan, “The Boundaries of Fiduciary Accountability,” *supra* note 37 at 63.

otherwise) – they sent the matter back to trial for reconsideration of the liability issues – but they set out a detailed framework describing the manner in which Crown regulatory powers are restrained in instances where Aboriginal and treaty rights could potentially be impacted.

The *Sparrow* Court confirmed that Aboriginal and treaty rights are not absolute, not immune from Crown regulation in contemporary society. However, they also confirmed that the constitutionalization of Aboriginal and treaty rights had the effect of placing material, legal constraints on applicable Crown (sovereign) regulatory powers. They held that any infringement of an Aboriginal or treaty right by Crown regulation must be *justified* in accordance with a detailed legal framework set out in the decision.

In describing their applicable justification test, they held that the legal restraint on Crown power constitutionalized in section 35 was, doctrinally, fiduciary in nature. Towards this effect, they first stated that:

the words “recognition and affirmation” [*i.e.* in section 35] incorporate the fiduciary relationship ... and so import some restraint on the exercise of sovereign power ... federal power must be reconciled with federal duty ...<sup>376</sup>

Furthermore, and as noted in the previous chapter, where they sought to articulate a general ethic or constitutional principle that would ground applicable Crown obligations in the context of their regulatory interactions with Aboriginal and treaty rights, they held that the Crown had an obligation to generally act “in a fiduciary capacity” in relation to Aboriginal and treaty rights holders. The key doctrinal pronouncement here, again, is this one:

*Guerin* [fiduciary accountability], together with *R. v. Taylor and Williams* [the honour of the Crown]... ground a general guiding principle for s.35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is

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<sup>376</sup> *Sparrow*, *supra* note 19 at 1109.

trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.<sup>377</sup>

The main take away for the purposes of the present section is that *Sparrow* espoused a proposition, indeed a general constitutional principle, that any infringement of Aboriginal or treaty rights by the Crown in its regulatory function must be undertaken in accordance with a standard of conduct similar to that generally required of a fiduciary, mindful of the reality that there would typically be conflicting interests.

This principle-based conception of fiduciary accountability (*i.e.* that a *general* fiduciary principle gives rise to *specific* fiduciary obligations in different contexts) was at the core of Crown/Aboriginal Law following *Sparrow* and for many years, and a substantial body of jurisprudence built up around it.<sup>378</sup> I will look closer at the fundamentals of this jurisprudence shortly.

As has been noted, however, in more recent decisions the Supreme Court has been effectively dismantling this fiduciary-based legal framework and replacing it with the honour of the Crown-based framework. In *Wewaykum*, for instance, Justice Binnie's decision reads as though he was on a mission to substantially rein in the scope of Crown/Aboriginal fiduciary accountability, starting with this important doctrinal statement about its jurisdictional boundaries:

... 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 ...<sup>379</sup>

Further, he stated that “not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature”,<sup>380</sup> and he went on to highlight the inherent conflict of

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<sup>377</sup> *Ibid* at 1108.

<sup>378</sup> See, generally, McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples*, *supra* note 49 at 147-232.

<sup>379</sup> *Wewaykum*, *supra* note 33 at para 81.

<sup>380</sup> *Ibid* at para 83.

interest that the Crown often finds itself in when tasked with balancing interests between Aboriginal and non-Aboriginal entities, explaining that:

When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting ...<sup>381</sup>

Binnie J. was clearly uncomfortable with the principle-based fiduciary construct that the Supreme Court had developed for this area to date, and was taking initial steps towards reshaping its doctrinal fundamentals. However, despite his refrains, Binnie J. still described the content of fiduciary accountability in the circumstances of that case, in an exceedingly principle-based manner, still conceptualizing applicable Crown obligations as flowing from a fiduciary principle.<sup>382</sup>

In *Haida Nation*, however, Chief Justice McLachlin went substantially further than Binnie J. had in *Wewaykum* in terms of dismantling the applicable principle-based fiduciary construct. That is, she instituted a *replacement principle* (*i.e.* the honour of the Crown principle) in the place of the previous fiduciary-based principle, and sourced the applicable duty enforced in that case (*i.e.* the consultation duty) to that replacement principle and not to any overarching fiduciary principle.

However, despite this doctrinal eclipsing of the previous fiduciary-based construct with the honour of the Crown “essential legal framework” installed in *Haida Nation*, McLachlin C.J. articulated a delimited, residual jurisdiction for fiduciary accountability in Crown/Aboriginal contexts, as follows:

Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty ... The content of the fiduciary duty may vary to take into account the Crown’s other, broader obligations. However, the duty’s fulfilment requires that the Crown act with

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<sup>381</sup> *Ibid* at paras. 82-83, 96.

<sup>382</sup> *Ibid* at para 86.

reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake.

As noted in the previous chapter, this conceptualization of the intersection between Crown honour accountability and Crown fiduciary accountability in Aboriginal contexts was, although not acknowledged in the decision, a fundamental doctrinal re-orientation.<sup>383</sup>

Against this general backdrop of the key pronouncements in the development of the Supreme Court's *sui generis* Crown/Aboriginal fiduciary doctrine, I move now to a more detailed examination of the doctrine's fundamentals. I will use the same format I did in the previous section on conventional fiduciary doctrine by examining three discreet incidents of the Supreme Court's (evolving, but still non-conventional) Crown/Aboriginal doctrine: its *function*; the *content* of the duties it is to include; and the specific Crown/Aboriginal *contexts* that give rise to it.

#### Function of Crown/Aboriginal Fiduciary Accountability

Prior to the doctrinal transformation effected in *Haida Nation*, the Supreme Court's *sui generis* and principle-based fiduciary construct constituted the core of Crown/Aboriginal Law in Canada. In general terms, its doctrinal *function* was to regulate Crown conduct in circumstances where there was some potential for adverse impacts to Aboriginal or treaty rights (or to *Indian Act*-based reserve land interests that have been tactically surrendered), and to specifically prescribe that in any such instances, the Crown must act honestly, fairly, and honourably in relation to the applicable Aboriginal interests involved. Put another way, its function was to *restrain* Crown conduct (or, put another way, prohibit applicable Crown dishonour), where such regulation was deemed necessary to ensure honourable dealings with potentially-impacted constitutional rights holders. At various points, the Supreme Court referred to this function using the language of "supervision"; that this generalized fiduciary obligation (or ethic) operated to supervise applicable Crown conduct.<sup>384</sup>

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<sup>383</sup> See, e.g., *supra* notes 188 and 190 and the text surrounding each.

<sup>384</sup> See, e.g., *Guerin*, *supra* note 27 at 385 ("Equity will then "supervise the relationship"); *Wewaykum*, *supra* note 34 at 78 ("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...").

In terms of the specific operative dynamics of the doctrine, the *general* fiduciary principle often *functioned* to give rise to *specific* off-shoot fiduciary obligations as required in applicable contexts to ensure these broader constitutional functions were promoted.

The doctrinal reordering in *Haida Nation*, of course, had the effect of dramatically changing the *function* of Crown/Aboriginal fiduciary accountability. That is, the broad functions, described above, involving the general regulation (and restraint) of Crown conduct in constitutional reconciliation scenarios were effectively usurped by the honour of the Crown-based “essential legal framework.” And it is now quite uncertain what function “off-shoot” Crown/Aboriginal fiduciary accountability will serve.

As noted, and as we examine in more detail in the next two subsections, the prevailing framework (*i.e.* that set out in *Haida Nation*) dictates that (a) the *content* of a Crown/Aboriginal fiduciary obligation is to act “with reference to the best interests” of an Aboriginal community, (b) in a context where the Crown has assumed a sufficient amount of discretion over specific, cognizable interests belonging to that community.

The Supreme Court has not been explicit as to why this type of *sui generis* Crown/Aboriginal fiduciary accountability has been retained as part of the core of Crown/Aboriginal Law; they have not articulated the general function of this residual type of fiduciary accountability.

The implicit indication from *Haida Nation* and subsequent Supreme Court decisions is that a (still non-conventional) fiduciary duty to act in the best interests of an Aboriginal community will still apply in circumstances like the one that arose in *Guerin*, where the Crown undertakes a statutory obligation to an Aboriginal community to manage surrendered land interests on their behalf.<sup>385</sup> In such circumstances, the Crown is explicitly tasked with exercising a discretionary

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<sup>385</sup> See, *e.g.*, *Manitoba Metis Federation*, *supra* note 5, generally; and *Elder Advocates*, *supra* note 31 at para 49:

The government, as a general rule, must act in the interest of all citizens ... It is entitled to make distinctions between different groups in the imposition of burdens or provision of benefits ... In the Aboriginal context, an exclusive duty in relation to Aboriginal lands is established by the special Crown responsibilities owed to this sector of the population and none other.

See, also, *Ermineskin*, *supra* note 361. In *Ermineskin*, all sides conceded that Crown fiduciary accountability arose in the circumstances of the case. There was substantial discussion, however, in relation to the source of that accountability. The appellants claimed (unsuccessfully) that the source of the fiduciary accountability was Treaty 6 and that, therefore, government legislation that constrained the ability of Crown agents to invest monies held by the

power and acting exclusively for the benefit of the First Nation. So, again, this begs the question: what function (additional to or as some adjunct to those served generally by the over-arching honour of the Crown-based governing framework, and in addition to the explicit statutory mandate that the Crown, effectively, act for the sole benefit of an applicable First Nation) is served by placing a non-conventional fiduciary obligation on the Crown in such circumstances, specifically mandating that they act with reference to the best interests of the applicable Aboriginal community?

It is unclear whether, for instance, a specific fiduciary obligation, once triggered in such contexts, is intended to function generally to mandate some unarticulated high measure of moral conduct (*i.e.* higher, in some meaningful way, than that which would otherwise be required under Crown honour accountability), whether it is to singularly prohibit a certain type of Crown behaviour (*e.g.* acting other than exclusively for the benefit of the applicable Aboriginal group), or whether it is to simply (and unconventionally) be *superimposed* onto the Crown honour-based legal framework (meaning that *liability* dynamics would be entirely dictated by the Crown honour framework; and the superimposed fiduciary quality would only have *remedial* significance<sup>386</sup>). And further clarification from the Supreme Court is required.

#### Content of Crown/Aboriginal Fiduciary Accountability

Looking at this next incident of the Supreme Court's Crown/Aboriginal fiduciary doctrine – the content of Crown/Aboriginal fiduciary accountability – I conceptualize it, again, both prior to and subsequent to the Supreme Court's transformative decision in *Haida Nation*. Prior to *Haida Nation*, Crown liability doctrine in Crown/Aboriginal Law was structured around a hierarchy of sorts of *sui generis* fiduciary principles and obligations. There was a generalized fiduciary principle and specific off-shoot fiduciary obligations. *You may wish to sit down for this part.*

Rotman described this type of doctrinal construct as a “two-pronged fiduciary duty [owed by the Crown] to Aboriginal peoples” and he explains the applicable dynamics as follows:

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Crown on the behalf of the appellants was unconstitutional for infringing Treaty rights: *Ermineskin*, *supra* note 361 at para 67.

<sup>386</sup> This is not how conventional fiduciary doctrine typically operates: see, *e.g.*, *supra* note 328 and surrounding text. Therefore, if this is the Supreme Court's intention, they should be explicit so as to prevent further confusion.

On a macroscopic level, the Crown ought to be understood to owe a general, overarching fiduciary duty to the Aboriginal peoples [which he describes elsewhere as requiring the Crown to generally act “honourably, with honesty, integrity, and the utmost good faith in the Aboriginals’ best interests”<sup>387</sup>] ... In addition to the Crown’s general duty, the Crown may also owe specific fiduciary duties to particular Aboriginal groups stemming from its particular interactions with them ... It is possible for the Crown to owe both a general and one or more specific fiduciary duties to an Aboriginal group as a result of its intercourse with them.<sup>388</sup>

Moreover, a general fiduciary obligation, or principle, was articulated in *Sparrow* (i.e. a mandate to act honourably) but was seen as a mere extension of the *Guerin dicta*. There is an important distinction, however, between the *Sparrow* and *Guerin* conceptualizations of the fiduciary mandate.

In *Guerin*, the Crown’s fundamental fiduciary obligation, as stated by Dickson J., was, in effect, to act *exclusively for the benefit of the First Nation*.<sup>389</sup> And once he observed that obligation to have been triggered, he conceptualized fiduciary doctrine as allowing him to then generally (and flexibly) monitor the Crown’s conduct in the carrying out of that obligation, as indicated at the outset of this chapter.<sup>390</sup> In *Sparrow*, however, the fundamental mandate of the fiduciary obligation was described as something less than an obligation to act exclusively for the benefit of the First Nation; it was described as a legal mandate to act honourably and with integrity in applicable scenarios, mindful of inherent conflicts. In some instances, it was conceptualized by the Supreme Court as a mandate to merely “take into account” Aboriginal interests in applicable scenarios.<sup>391</sup> In any event, the fiduciary mandate in *Sparrow* was ultimately (and unequivocally)

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<sup>387</sup> Rotman, *Fiduciary Law*, *supra* note 57 at 606.

<sup>388</sup> *Ibid* at 600-601.

<sup>389</sup> *Guerin*, *supra* note 27 at 377 (“In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. ... It is rather a fiduciary duty.”).

<sup>390</sup> There was no evidence the Crown failed to discharge that singular obligation by, for instance, acting in furtherance of its own or a third party’s interest (i.e. acting in conventional fiduciary breach). Rather, the impugned conduct was simply not up to a standard that the Court determined was required in context.

<sup>391</sup> See, e.g., *Gladstone*, *supra* note 145 at para 63. See, also, Lambert J.’s interesting conceptualization of the content of the Crown’s fiduciary obligation in *Haida Nation BCCA No. 1*, *supra* note 145 at para 62:

to involve a balancing and a reconciliation of the various (Aboriginal and non-Aboriginal) interests involved.

In effect then, there were two parallel fiduciary constructs within Crown/Aboriginal Law prior to *Haida Nation*. In the *Guerin* construct, there was both (1) a (somewhat generalized) fiduciary obligation to act exclusively for the benefit of an Aboriginal community (as it was often interpreted<sup>392</sup>) and, (2) specific fiduciary obligations that could then trigger and vary substantially in form depending on context and, evidently, have little or no connection to the over-arching obligation to act exclusively in the Aboriginal group's interests (*i.e.* a duty to not act unconscionably, the specific duty effectively enforced in *Guerin*, is not fundamentally linked to a singular obligation to act *exclusively* in one party's interests; doctrinally, the two obligations are entirely distinct).

In the *Sparrow* construct, there was a general fiduciary obligation (or principle) to act with high honour and integrity, and then specific off-shoot fiduciary obligations. The latter, again, were to vary depending on context but, under this construct (unlike in the *Guerin* construct), the off-shoot specific fiduciary obligations were clearly linked to the over-arching general obligation, and played a supporting, doctrinal role in relation thereto.

So, again, the initial take away here is that there was a complex hierarchy of fiduciary obligations (inconsistently applied) in Crown/Aboriginal Law prior to *Haida Nation* involving both general and specific obligations. The general fiduciary obligation described in *Sparrow* which, again, mandated that in applicable scenarios the Crown is to act in accordance with a "high standard of honourable dealing" clearly took the doctrinal form of a Dworkinian abstract principle which, recall, operates to incline a judicial decision one way or another but does not by itself dictate specific results; rather, it may give rise to specific rights and obligations (and rules)

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The fiduciary duty of the Crown, federal or provincial, is a duty to behave towards the Indian people with utmost good faith and to put the interests of the Indian people under the protection of the Crown so that, in cases of conflicting rights, the interests of the Indian people, to whom the fiduciary duty is owed, must not be subordinated by the Crown to competing interests of other persons to whom the Crown owes no fiduciary duty.

<sup>392</sup> See, *e.g.*, *Blueberry*, *supra* note 332 at para 38; and *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746 at paras 52 and 53, 206 D.L.R. (4th) 385 [*Osoyoos* cited to S.C.R.].

in different contexts. Of course, as I noted above, the honour of the Crown principle is of the same doctrinal varietal.<sup>393</sup>

However, the threshold fiduciary obligation in *Guerin* (*i.e.* the obligation to act exclusively for the benefit of a First Nation<sup>394</sup>), actually does not take the form of an abstract principle. Rather it takes the form of a Dworkinian concrete obligation (or rule); recall that such obligations, by themselves, are capable of adjudicative enforcement (unlike abstract principles) and explicitly specify the essential facts necessary to ground liability. So here, and according to this Dworkinian form only (*i.e.* and not to the broader manner in which Dickson J. used it in *Guerin*), the general *Guerin* obligation would operate doctrinally as follows: if the Crown was found to have not acted exclusively in the interests of an applicable First Nation, liability would necessarily follow on that basis.

Furthermore, the specific fiduciary obligations that flow from either *Sparrow* or *Guerin*'s central fiduciary obligation are also, for their part, Dworkinian concrete obligations (or rules) capable of adjudicative enforcement.

The jurisprudence following *Sparrow* in relation to these applicable doctrinal fundamentals was, to use a colloquial term, a conceptual *mess*. The distinction between the *Guerin* and *Sparrow* constructs, described above, was often missed, and understandably so; that is, despite the description in *Guerin* of the fundamental fiduciary duty as a mandate to act exclusively in the interests of the Aboriginal group, Dickson J. enforced that duty in *Guerin* as though it operated as a more generalized principle that could give rise to specific off-shoot Crown obligations (*i.e.* again, ostensibly, once fiduciary accountability triggered, Dickson J.'s view was that it could then operate to effectively prohibit a broad range of Crown immorality in context).

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<sup>393</sup> Note that in *Wewaykum*, *supra* note 33 at para 80, Justice Binnie noted the similarity between the honour of the Crown principle and the generalized fiduciary obligation, stating that “[s]omewhat associated with the ethical standards required of a fiduciary in the context of the Crown and Aboriginal peoples is the need to uphold the ‘honour of the Crown’...”.

<sup>394</sup> Note that, of course, in *Guerin*, Dickson J.'s decision stood for the proposition that once this fiduciary obligation triggers, then a reviewing Court may exercise broad discretionary powers to “supervise” applicable Crown conduct; that is, the fiduciary duty to act solely for the benefit of the First Nation was, in effect, not the only enforceable duty observed.

Furthermore, some courts appeared to understand the *Sparrow* mandate as essentially directing the Crown to act exclusively in the best interests of an Aboriginal community in applicable scenarios,<sup>395</sup> while others interpreted it, correctly in the non-conventional mandate directed unequivocally by *Sparrow*, as intended to be capable of “tolerating conflicts of interest”<sup>396</sup> and only mandating, fundamentally, honourable conduct.<sup>397</sup>

Conversely, some courts understood the *Guerin* mandate as directing, generally, honourable conduct,<sup>398</sup> while others understood it as fundamentally mandating the Crown to act *exclusively* in the interest of the applicable Aboriginal group.<sup>399</sup> In yet other instances, the two doctrinal mandate varieties were simply blended together when courts were talking about Crown/Aboriginal fiduciary doctrine, and without explicit acknowledgment of the meaningful distinction between the two noted here.<sup>400</sup>

In any event, and for conceptual context, some examples of specific fiduciary duties that have been explicitly recognized by the Supreme Court in the Crown/Aboriginal context prior to *Haida Nation* include:

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<sup>395</sup> See, e.g., *Blueberry*, *supra* note 332 at para 38 (“obligated to exercise that power or discretion solely for the benefit of the [First Nation]”). See, also, *Osoyoos*, *supra* note 391 at paras 52 and 53 (in *Osoyoos*, the Court determined that the Crown could not be restrained by fiduciary obligations when making a decision to expropriate Osoyoos lands for public purposes).

<sup>396</sup> *Squamish Indian Band*, *supra* note 32 at para 473.

<sup>397</sup> See, e.g., *Gladstone*, *supra* note 145 at para 63 (“courts should assess the government's actions not to see whether the government has given exclusivity to that right (the least drastic means) but rather to determine whether the government has taken into account the existence and importance of such rights..”); and *Delgamuukw*, *supra* note 13 at para 190 (“the Crown is subject to a fiduciary obligation to treat the aboriginal peoples fairly”) and at 162:

The second part of the test of justification requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples. What has become clear is that the requirements of the fiduciary duty are a function of the “legal and factual context” of each appeal (*Gladstone*, *supra*, at para. 56). *Sparrow* and *Gladstone*, for example, interpreted and applied the fiduciary duty in terms of the idea of priority. The theory underlying that principle is that the fiduciary relationship between the Crown and aboriginal peoples demands that aboriginal interests be placed first. However, the fiduciary duty does not demand that aboriginal rights always be given priority.

<sup>398</sup> See, e.g., *Sparrow*, *supra* note 19 at 1109 (“the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen*...”).

<sup>399</sup> See, e.g., *Fairford First Nation v. Canada (Attorney General)*, [1999] 2 C.N.L.R. 60 at para 67, [1998] F.C.J. No. 1632 (Q.L) (F.C.T.D. per Rothstein J. as he then was) (“its fiduciary duty of loyalty to the Indian band to the exclusion of other interests...”).

<sup>400</sup> *Mitchell*, *supra* note 29 at para 9 (Crown fiduciary accountability was described there as a duty “to treat aboriginal peoples fairly and honourably, and to protect them from exploitation.”).

- a fiduciary duty to not act unconscionably when exercising statutory discretionary power to manage surrendered First Nation land interests;<sup>401</sup>
- a fiduciary duty to correct errors made in relation to a previous land surrender;<sup>402</sup>
- a fiduciary duty, where the Crown is allotting reserve lands, to secure for the First Nation access to their traditional fishery as part of that allotment;<sup>403</sup> and
- a fiduciary duty to minimally impair a First Nation's interests when the Crown has made a decision to expropriate reserve lands for public purposes;<sup>404</sup>

In addition, Chief Justice Lamer noted in *Delgamuukw* that in scenarios where the Crown is attempting to justify applicable infringements of Aboriginal or treaty rights, the Crown may, depending on context, owe (a) a fiduciary duty to consult an applicable Aboriginal community regarding a proposed infringement,<sup>405</sup> and/or (b) a fiduciary duty to give Aboriginal interests priority over applicable non-Aboriginal interests regarding a government initiative at issue.<sup>406</sup>

Moving on then, and what should now be clear (in addition to the fact that this doctrine had become, conceptually, quite unsettled prior to *Haida Nation*), is that the combined effect of *Wewaykum* and *Haida Nation* was a dramatic reorientation of the applicable doctrinal fundamentals at play here. Certainly, it is evident that the generalized fiduciary obligation (in doctrinal form, an abstract principle that calls for honourable conduct) has been replaced by the honour of the Crown (abstract) principle which effectively mandates the same thing.<sup>407</sup> It is also evident that off-shoot obligations seen as flowing from the general Crown honour principle are (unless explicitly stated) not to be seen as fiduciary in nature (*e.g.* the duty to consult ground in *Haida Nation* is explicitly a Crown honour-based duty, not some type of *sui generis* fiduciary-based duty).

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<sup>401</sup> *Guerin*, *supra* note 27. Note that in *Wewaykum*, *supra* note 33 at para 100, Binnie J. stated that the *Guerin*-begun duty is best conceptualized as a specific duty to “prevent exploitative bargains.”

<sup>402</sup> *Blueberry*, *supra* note 332 (*per* Gonthier in dissent).

<sup>403</sup> *R. v. Lewis*, [1996] 3 C.N.L.R. 131, 133 D.L.R. (4th) 700.

<sup>404</sup> *Osoyoos*, *supra* note 391.

<sup>405</sup> *Delgamuukw*, *supra* note 13 at para 168.

<sup>406</sup> *Ibid* at para 162

<sup>407</sup> Recall that Deschamps J. essentially acknowledged as much in her minority decision in *Little Salmon/Carmacks*, *supra* note 14 at 105, noting that Crown honour accountability has been “substituted” for (the “paternalistic”) Crown fiduciary accountability. And, in any event, it is clear that Crown honour accountability is duplicative in substance and is the one the Supreme Court is now following.

However, in *Haida Nation*, again, the Supreme Court left explicit jurisdiction for a type of “off-shoot” *specific* fiduciary obligation (*i.e.* as one of the many off-shoot honour-based Crown obligations that may arise). Regarding the content of such off-shoot fiduciary accountability, recall that Chief Justice McLachlin stated that, while it may vary depending on context, it will fundamentally mandate “that the Crown act with reference to the Aboriginal group’s best interest in exercising discretionary control over the specific Aboriginal interest at stake.”<sup>408</sup>

This notion that a duty to act in a beneficiary’s “best interests” is itself fiduciary in nature was first indicated in *Guerin* and then, as we noted in the previous section, adopted as part of the conventional fiduciary doctrine for a period of time before ultimately being rejected in *KLB* as doctrinally unsound.<sup>409</sup> That is, a duty to act in the best interest of another is not, conventionally, a fiduciary duty. To the contrary, as noted and as we will consider in more detail in the next section, an undertaking to act in the best interests of another is an essential *pre-condition* to the creation of fiduciary accountability in Canada (*i.e.* in the prevailing conventional test<sup>410</sup>), as opposed to being part of the content of any such accountability.

In any event, pursuant to the *Haida Nation* test, this *best interests*-based duty remains at this point *the* fundamental type of fiduciary obligation in scenarios where *sui generis* Crown/Aboriginal fiduciary accountability is deemed owing (*i.e.* pursuant to the *Haida Nation*-framed test). There are at least three possible ways in which to interpret the content of a mandate to act “with reference to the best interests” of an Aboriginal beneficiary (*i.e.* in situations where the Crown has assumed discretionary control over specific interests); that is, three possible ways to conceptualize the content of *Haida Nation*’s *sui generis* specific fiduciary obligation construct:

- 1) as a mandate to bring about the best possible outcome (or a sufficiently positive outcome) for the applicable Aboriginal group;<sup>411</sup>
- 2) as a mandate to generally act in accordance with a high standard of conduct;<sup>412</sup> or

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<sup>408</sup> *Haida Nation*, *supra* note 2.

<sup>409</sup> *Supra* notes 321--322 and the text surrounding each.

<sup>410</sup> See *supra* note 345 at para 36 and surrounding text.

<sup>411</sup> This type of results-based analysis (*i.e.* where a reviewing court has broad after-the-fact supervisory capacity) was, in effect, how the Supreme Court ultimately conceived the doctrinal mandate generally in cases like *Guerin* and *Wewaykum*: see *supra* note 383.

- 3) as a singular prohibition against acting other than exclusively for the benefit of the Aboriginal group.<sup>413</sup>

It seems unlikely that the first is what McLachlin C.J. intended, or that this is where the Supreme Court will go in developing this *sui generis* obligation. Recall that she herself wrote the decision in *KLB* where this type of a mandate was rejected as lacking practical utility, as failing to provide a “workable (legal or justiciable) standard by which to regulate conduct,” and as mandating a doctrinally inappropriate type of result-based analysis.<sup>414</sup>

It is slightly more conceivable that the second – a mandate to generally act in accordance with a high standard of conduct in scenarios that are deemed to trigger fiduciary accountability – is what was intended, or where the Supreme Court will ultimately land.<sup>415</sup> This would effectively constitute a duplication of (or return to) the fiduciary-based *principle* that the honour of the Crown construct evidently replaced; a return, that is, to something like the *Wewaykum* mandate (act “with a view to” the best interests of applicable Aboriginal interests, while mindful of conflicts<sup>416</sup>) or the *Gladstone* mandate (act so as to meaningfully “take into account” applicable Aboriginal interests<sup>417</sup>). That is, doctrinally, the fiduciary obligation in this scenario (again) would not be a concrete obligation (so not really a *specific* fiduciary *obligation*, as it is described in *Haida Nation*); rather it would be an abstract (fiduciary) principle that could give rise to different types of specific (fiduciary) obligations in context. And it would, in effect, operate to take over the doctrinal role that the honour of the Crown principle would otherwise play (*i.e.* in those specific circumstances where off-shoot fiduciary accountability is deemed to arise).<sup>418</sup>

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<sup>412</sup> Both *Guerin* and *Sparrow* are capable of being interpreted as mandating this type of generalized fiduciary content.

<sup>413</sup> This is how the mandate was generally understood in cases like *Blueberry* and *Osoyoos*: see *supra* note 391.

<sup>414</sup> *Supra* notes 321 and 322 and the text surrounding each.

<sup>415</sup> It appears, generally from cases like *Wewaykum*, *Haida Nation*, and *Manitoba Metis Federation*, that the Supreme Court is more likely to continue to align its Crown/Aboriginal fiduciary doctrine with its conventional doctrine, rather than reverse course and re-embrace a principle-based approach.

<sup>416</sup> *Wewaykum*, *supra* note 33 at para 86.

<sup>417</sup> *Gladstone*, *supra* note 145 at para 63.

<sup>418</sup> Another way to conceptualize the nexus between the two in this type of scenario is that Crown fiduciary accountability would be *superimposed* on the Crown honour accountability framework, presumably to further incentivize the Crown by the threat of more onerous remedial consequences. In *Blueberry*, *supra* note 332 at para 37, for instance, this is how McLachlin J. (as she then was) conceptualized the nexus between Crown fiduciary obligations and the other applicable obligations at play (in that case, statutory obligations).

Again, this is an unlikely (and surely unwise) outcome here; it would obviously create a very muddled doctrinal framework.

It seems most likely, then, that what is intended in terms of the fundamental *content* of *Haida Nation*-based off-shoot fiduciary duties or, at least, where it is most likely the Supreme Court will land here, is for them to use this specific fiduciary duty to singularly prohibit the Crown from acting other than exclusively for the benefit of the applicable Aboriginal group in applicable scenarios, forsaking all other interests, including their own.

This is, recall from the previous section, moving somewhat closer to the conventional nature of the content of fiduciary accountability. The conventional doctrine prohibits acting in relation to a fiduciary's own interests (*i.e.* the mischief regulated is opportunistic behaviour), whereas this third conceivable account of *Haida Nation*'s fiduciary-based mandate (*i.e.* as an effective prohibition against acting other than exclusively in the interests of the applicable Aboriginal group), while certainly prohibiting the Crown from acting in their own interests (*i.e.* acting opportunistically), would also be potentially focussed on prohibiting the Crown from taking into account the interests of applicable (non-Aboriginal) third parties, which is to say that the latter mandate is still capable of regulating more than just opportunistic Crown conduct (*i.e.* the mischief predominantly regulated by conventional fiduciary doctrine). And it is, non-conventionally, arguably more focussed on protecting Aboriginal groups *from third parties*, and not from *the fiduciary*, the Crown (*e.g.* by protecting them against "exploitative bargains" in land-surrender scenarios).<sup>419</sup>

#### *Contexts in Which Crown/Aboriginal Fiduciary Accountability Arises*

As with the first two incidents of Crown/Aboriginal fiduciary doctrine, I start this subsection by looking to pre-*Haida Nation* jurisprudence. Here, the focus is on the specific *contexts* that have been seen as giving rise to fiduciary accountability. Essentially, there were two main types of factual contexts seen, pre-*Haida Nation*, as giving rise to Crown/Aboriginal fiduciary accountability. The first was the *Guerin*-like situation where a First Nation surrenders land interests to the Crown, putting the Crown to a (typically statutory) duty to act as a private agent

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<sup>419</sup> This distinction was noted in Flannigan, "The Boundaries of Fiduciary Accountability," *supra* note 37 at 62.

of sorts in relation to those interests. The second was the *Sparrow*-like situation where the Crown is undertaking a public initiative that has the potential to infringe Aboriginal or treaty rights.

In the latter type of scenario, fiduciary accountability was said to trigger in the form of positive (fiduciary) obligations to honourably address, and effectively *justify*, a potential rights infringement (*i.e.* through some combination of methods such as consulting the potentially-impacted rights holder, taking steps to minimally impair the applicable Aboriginal interests involved, or giving applicable Aboriginal interests priority over non-Aboriginal interests).<sup>420</sup>

Note that the former – the *Guerin*-like scenario – actually does give rise to conventional fiduciary accountability (though, as noted in the previous section, no conventional fiduciary *breach* took place on the facts of *Guerin*<sup>421</sup>), while the latter – the *Sparrow*-like situation – does not. That is, the latter involved a particularly novel conception of fiduciary accountability, bearing little if any resemblance to conventional doctrine.

As indicated in the previous subsection, subsequent Supreme Court jurisprudence at times (mis) interpreted the non-conventional *Sparrow* precedent as mandating that fiduciary accountability could only *arise* in situations where the Crown had undertaken to act exclusively in the best interests of an Aboriginal group or when it would be appropriate to say that they should.<sup>422</sup> In such cases, where the Crown’s public law duties to their applicable electorate were seen to conflict with a (claimed) fiduciary duty to act exclusively in the best interest of an Aboriginal group, such a fiduciary duty was effectively precluded. In other cases, recall, the *Sparrow* precedent was interpreted to the effect that *sui generis* Crown/Aboriginal fiduciary obligations could “tolerate conflicts of interests”; that is, as a generalized and *sui generis* form of fiduciary accountability (*i.e.* a mandate to, essentially, act honourably) that could arise even in contexts where there were competing (Aboriginal or non-Aboriginal) interests.<sup>423</sup>

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<sup>420</sup> This was generally how the *Delgamuukw* Court interpreted *Sparrow*: see *Delgamuukw*, *supra* note 13 at 162-168.

<sup>421</sup> There was no suggestion that the Crown acted opportunistically.

<sup>422</sup> *Supra* note 391 and surrounding text.

<sup>423</sup> *Supra* note 396 and surrounding text.

Furthermore, the rhetoric that often accompanied the Supreme Court's description of Crown/Aboriginal fiduciary accountability led many courts<sup>424</sup> and commentators<sup>425</sup> to conclude that it was (or ought to be) a type of "at large" (or plenary) form of accountability. This fact, however, appears clearly to have led Justice Binnie, in *Wewaykum*, to lament the "flood" of fiduciary duty claims borne from this (mis) perception, and to explicitly reject the notion of a plenary, or over-arching fiduciary principle.<sup>426</sup> After listing a number of different types of claims that had been based on fiduciary duty (*i.e.* in lower courts), none of which involved facts that would appear to trigger conventional fiduciary accountability,<sup>427</sup> Binnie J. stated as follows:

I offer no comment about the correctness of the disposition of these particular cases on the facts, none of which are before us for decision, but 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*, *supra*, at p. 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.<sup>428</sup>

This focus on a requisite threshold in terms of the *sufficiency* of Crown discretion assumed in relation to specific Aboriginal interests hints at a return to more conventional boundaries for fiduciary accountability in Crown/Aboriginal contexts. Despite his refrain, however, Justice Binnie still acknowledges, in *Wewaykum*, a quite generalized and non-conventional notion of fiduciary accountability arising in two different circumstances where Indian reserve lands were

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<sup>424</sup> See, *e.g.*, *Van der Peet*, *supra* note 26 at para 24 ("[t]he Crown has a fiduciary obligation to Aboriginal peoples"); *Delgamuukw*, *supra* note 13 at 162 ("the special fiduciary relationship between the Crown and Aboriginal peoples"); and *Mitchell*, *supra* note 29 at para 9 ("an obligation to treat Aboriginal peoples fairly and honourably").

<sup>425</sup> See, *e.g.*, *Rotman*, *Parallel Paths*, *supra* note 47 at 11 (Rotman posits that the Crown's "over-arching" fiduciary obligation applies to "virtually every aspect of relations between the Crown and aboriginal peoples.")

<sup>426</sup> *Wewaykum*, *supra* note 33 at para 81.

<sup>427</sup> *Ibid* at para 82.

<sup>428</sup> *Ibid* at para 83.

involved (explicitly noting, while doing so, the reality of conflicting non-Aboriginal interests; which conflicting interests, he held, did not preclude a finding of fiduciary accountability<sup>429</sup>):

- 1) Circumstances where the Crown is creating reserve lands for a First Nation (in this context, he articulates the fiduciary duty as essentially mandating honourable conduct, and as a mandate well short of acting exclusively in the interests of the First Nation<sup>430</sup>);
- 2) Generally, in relation to First Nation reserve lands (here, he defines the fiduciary duty as prescribing not just honourable dealing generally, but one whose content “expands [*i.e.* upon reserve creation] to include the protection and preservation of the band’s quasi-proprietary interest in the reserve from exploitation.”<sup>431</sup>

Furthermore, the Supreme Court in *Haida Nation* effectively took Binnie J.’s lament to heart and radically reoriented this area of law (again, without explicitly acknowledging as much). As noted, they installed the honour of the Crown as a replacement principle for the non-conventional fiduciary principle that was, to that point and in its various forms, the doctrinal core of Crown/Aboriginal Law. As a result of this decision, it appears it is no longer the case that fiduciary accountability is intended to arise in the classic *Sparrow* scenario where the Crown is proposing some public initiative that could potentially impact Aboriginal or treaty rights.<sup>432</sup> *Haida Nation* arguably had the doctrinal effect of eclipsing the *Sparrow* precedent in this regard, and Crown-honour based obligations such as the duty to consult and accommodate, now typically govern such scenarios.<sup>433</sup>

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<sup>429</sup> *Ibid* at para 96.

<sup>430</sup> *Ibid* at para 86. It has been observed elsewhere that the fact the fiduciary duty articulated here in *Wewaykum* was in the context of reserve creation in an area outside the traditional territory of the applicable First Nation means it could be restricted to its facts, and that reserve creation inside the traditional territory of a First Nation ought to be attended by a stricter Crown obligation (*e.g.* an obligation to act solely in First Nation’s interest). See Senwung Luk, “Not So Many Hats: The Crown’s Fiduciary Obligations to Aboriginal Communities since *Guerin*” (2013) 76(1) *Sask. L. Rev.* 1 at 22:

This explains the reasoning behind the establishment of less onerous content for the Crown’s fiduciary obligations prior to reserve creation: the reserve was being created for the applicant Bands *outside of their traditional territory* ... In that sense the Crown was exercising a public law function ... As such, reserves were created for the Bands in the same vein as land grants were being made to non-Aboriginal settlers.

<sup>431</sup> *Wewaykum*, *supra* note 33 at para 86.

<sup>432</sup> *Cf.*, however, *Elder Advocates*, *supra* note 31 at para 39 where McLachlin C.J., in *obiter dictum*, speaks generally of the *Sparrow* fiduciary duty without suggesting it has been “substituted” out, replaced by Crown honour accountability.

<sup>433</sup> It should be noted that pursuant to the prevailing duty to consult and accommodate framework, it is arguable that in certain situations, the full-blown consent of an Aboriginal or treaty rights holder may be required in order for

As for the effective test that now forms part of the Crown honour-based “essential legal framework” in this area to dictate when fiduciary accountability will trigger, McLachlin C.J. said this (speaking in relation in the circumstances of the *Haida Nation* case):

Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty ... Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.<sup>434</sup>

So, based on the combined *dicta* from *Wewaykum* and *Haida Nation*, we can articulate the current, applicable test as follows: non-conventional Crown/Aboriginal fiduciary accountability will arise when the Crown assumes a sufficient amount of discretion over sufficiently-specific Aboriginal interests. The interest in question must be “cognizable” and the Crown’s assumption of discretion over that interest must be such that it “invokes responsibility in the nature of a private law duty.”<sup>435</sup>

In terms of the Aboriginal interest that must be the object of the Crown’s assumed discretion (*i.e.* for fiduciary accountability to be said to arise), the explicit indication is that Aboriginal land interests are the primary but not necessarily explicit focus.<sup>436</sup> We may also note that the interest must be linked to an Aboriginal or treaty right (surrendered First Nation *reserve* land interests

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Crown honour to be upheld before a proposed Crown initiative proceeds. This principle goes back to *Delgamuukw*, *supra* note 13 at 168 (“Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.”)

<sup>434</sup> *Haida Nation*, *supra* note 2 at para 18.

<sup>435</sup> *Wewaykum*, *supra* note 33 at para 85.

<sup>436</sup> See, e.g., *Elder Advocates*, *supra* note 31 at para 49:

where the alleged fiduciary is the government, it may be difficult to establish ... The government, as a general rule, must act in the interest of all citizens ... It is entitled to make distinctions between different groups in the imposition of burdens or provision of benefits ... In the Aboriginal context, an exclusive duty in relation to Aboriginal lands is established by the special Crown responsibilities owed to this sector of the population and none other... (emphasis added)

See, also, *Manitoba Metis Federation*, *supra* note 5 at para 51 (“a fiduciary duty may arise ... where the Crown administers lands or property in which Aboriginal peoples have an interest” [emphasis added]). *Ermineskin*, *supra* note 361 constitutes a clear example of where the Crown was administering First Nation’s property (other than land) in a context where fiduciary accountability arose. Of course, fiduciary accountability would have arisen in that context whether or not the beneficiary was Aboriginal.

presumably qualify<sup>437</sup>),<sup>438</sup> and that interests based on *asserted* Aboriginal or treaty rights (*i.e.* unproven rights) will not suffice.<sup>439</sup>

In terms of what will constitute a measure of discretion (*i.e.* over the specific Aboriginal interests) that is sufficient to ground fiduciary accountability, the Supreme Court was demonstrably vague in both *Wewaykum* and *Haida Nation*. However, in the recent *Elder Advocates* decision, which involved an unsuccessful attempt to use the Crown/Aboriginal non-conventional conception of fiduciary doctrine in a non-Aboriginal context (*i.e.* a class-action group of elderly patients in long-term care facilities in Alberta were impugning the Alberta government for an increase in applicable expenses and basing their claim in, *inter alia*, Crown fiduciary accountability), McLachlin C.J. there spoke to the sufficiency of discretion that would be required for the grounding of such an obligation.<sup>440</sup> Specifically, she stated that “the degree or control exerted by the government over the interest in question must be equivalent or analogous to direct administration of that interest before a fiduciary relationship can be said to arise.”<sup>441</sup> This conceptualization of the sufficiency of assumed Crown discretion is likely transportable to the Crown/Aboriginal context, and provides some further guidance for how the Supreme Court may address this item.

Finally, there is one other notable component regarding the *Haida Nation* test for the triggering of fiduciary accountability. That is, the resulting duty must be “in the nature of a private law duty.” This component of the framework was rationalized in *Guerin*, and has been confirmed in

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<sup>437</sup> On the question of whether or not a First Nation’s “quasi-proprietary” interest in its reserve lands is fundamentally distinct from Aboriginal Title-based interests in land, see, *e.g.*, *Guerin*, *supra* note 21 at 379-382 and *Osoyoos*, *supra* note 391 at paras 41-47, 160-170.

<sup>438</sup> *Manitoba Metis Federation*, *supra* note 5 at para 53.

<sup>439</sup> *Haida Nation*, *supra* note 2 at para 18.

<sup>440</sup> The Chief Justice’s decision in *Elder Advocates* is somewhat puzzling from a doctrinal perspective because she seems to accept that in certain instances, a duty to act in the best interests of another could be a duty properly characterized as a conventional fiduciary duty, even though she otherwise described the doctrinal fundamentals as consistent with the reorientation of conventional fiduciary doctrine that was effected in the *Galambos* decision (including the fact that an obligation to act in the best interests of another is a pre-condition of fiduciary accountability and, by implication, presumably not the content of the fiduciary accountability itself). Also, recall she went to some lengths in *KLB* to reject the notion that a duty to act in another’s best interests is itself fiduciary in nature: see *KLB*, *supra* notes 321 and 322 and the text surrounding each. Of course, there is a meaningful distinction to be drawn (though it often is not) between a singular obligation to act *exclusively* in another’s interest and a duty to act generally in the best interests of another.

<sup>441</sup> *Elder Advocates*, *supra* note 31.

*post Haida Nation* decisions as a prevailing component of the current test.<sup>442</sup> In *Guerin*, Dickson J. held that because the applicable Musqueam’s land interest pre-existed Crown sovereignty, that had the effect of making the Crown’s duty (*i.e.* in administering that interest) of a kind that is “in the nature of a private law duty.”<sup>443</sup> Specifically, he states at page 385 that:

... the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty.

He appears here to have effectively conceptualized the Crown-Musqueam relationship as something akin to a sovereign-to-sovereign relationship in this context (*i.e.* in light of the “pre-existing” nature of the interest), and on that basis held that it was not appropriate to view the Crown’s duty as public in nature.<sup>444</sup>

I would contend that this component of the test has questionable utility (or appropriateness) in the context of the prevailing *Haida Nation*-framed test for Crown/Aboriginal fiduciary accountability. That is, the *Haida Nation* test is more of an essentialist fact-based test than the *Guerin* and *Sparrow* tests, not too dissimilar from the prevailing test in conventional fiduciary law (as discussed further below). If a scenario arose where the Crown assumed substantial discretion over the land or property interests of an Aboriginal community (to such an extent, for instance, that it constituted direct administration of that interest, falling within the test articulated in *Elder Advocates*), it would seem applicable fiduciary accountability ought to arise. If the Supreme Court is willing to recognize fiduciary accountability on such facts in non-Aboriginal contexts (as they stated in *Elder Advocates* they would be), then there is surely no rational basis upon which to deny it in Aboriginal contexts.

Moving on, the most recent decision of the Supreme Court to address a claim of fiduciary obligation in a Crown/Aboriginal context was *Manitoba Metis Federation*. The facts of that case

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<sup>442</sup> *Manitoba Metis Federation*, *supra* note 5; and *Elder Advocates*, *supra* note 31. See, also, *Wewaykum*, *supra* note 33.

<sup>443</sup> *Guerin*, *supra* note 27 at 385.

<sup>444</sup> *Ibid* at 380-385.

were discussed above.<sup>445</sup> The claim of fiduciary accountability was ultimately rejected by the Supreme Court.<sup>446</sup> The interesting and novel dynamic in this case, for present purposes, was the fact that Chief Justice McLachlin held that Crown fiduciary accountability could arise either in accordance with the *Haida Nation*-based non-conventional test, or the prevailing conventional test most recently articulated in *Elder Advocates* (again, by the Chief Justice).

This creates a strange and circular doctrinal dynamic in the Crown/Aboriginal context. That is, in accordance with one of the two operable tests (*i.e.* the conventional test), a Crown undertaking to act exclusively for the benefit of the Aboriginal group is an essential *pre-condition* to a finding of Crown fiduciary accountability while, in the other (*i.e.* the non-conventional test), a mandate to act exclusively for the benefit of the Aboriginal group is the fundamental *content* of the fiduciary accountability itself (assuming, as we concluded in the previous subsection, that this is how the *Haida Nation* fiduciary mandate is to be interpreted).

As further argued in the next section, this aspect of the *Manitoba Metis Federation* decision brings into particularly stark relief just how confused the Supreme Court's Crown/Aboriginal fiduciary doctrine has become, and supports the more general argument that this *sui generis* doctrine is fundamentally structured around judicial reasoning that clearly takes the form of a Dworkinian mistake.

Finally, the Supreme Court's decision in *Mikisew* is noteworthy here. *Mikisew* was decided approximately a year after *Haida Nation* (and *Taku River*) and it set out the framework for the application of the duty to consult/accommodate framework in the context of established treaty rights (*i.e.* *Haida Nation* had previously set out the applicable framework for that duty in the context of asserted but unproven rights). In light of the fact that Justice Binnie had held in *Wewaykum* that the Crown may owe both generalized and specific fiduciary duties in circumstances where its conduct may impact a First Nation's *reserve* lands, there was reason to expect in *Mikisew* – another decision authored by Justice Binnie and in circumstances where the

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<sup>445</sup> *Manitoba Metis Federation*, *supra* note 5.

<sup>446</sup> Based on (a) the finding that the Metis interest in question was not a “specific or cognizable Aboriginal interest” because it was not linked to a collectively-held Aboriginal or treaty right (meaning it did not meet the non-conventional test from *Haida Nation*) and (b) because there was no evidence that Crown had undertaken to act exclusively in the interests of the applicable Metis children (meaning it did not meet the conventional test from *Elder Advocates*): see *Manitoba Metis Federation*, *supra* note 5 at paras 51-64.

proposed Crown conduct was indeed going to impact the Mikisew’s use and enjoyment of their reserve lands<sup>447</sup> – that the duty to consult framework there may have been described as fiduciary-based instead of honour-based. However, that was not the outcome. Addressing the fundamental doctrinal matter in a somewhat perfunctory manner, Justice Binnie stated only that “the duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties.”<sup>448</sup> He made no reference to his *Wewaykum dictum*.

Therefore, it appears that Crown fiduciary accountability will not trigger simply on the occurrence of Crown conduct that impacts (or potentially impacts) an Aboriginal group’s use and enjoyment of their lands. This is evidently the case even though the Crown has assumed substantial discretion over reserve lands in Canada, for instance, and that Aboriginal interests in relation to such lands are cognizable, proven and constitutional. Rather, such scenarios will evidently be governed by Crown honour accountability, as was the case in *Mikisew*. Further, something more than interference with land-use activities will seemingly be required to ground Crown fiduciary accountability; evidently, that something will be a greater measure of assumed Crown discretion such as that constituting “direct administration” of the land or property interest at issue (such as *Guerin*-like or *Ermineskin*-like factual contexts).

I move now to an overview of the demonstrably flawed nature of the Supreme Court’s Crown/Aboriginal fiduciary-based construct before, then, ultimately articulating some thoughts on what we may expect moving forward in terms of residual doctrinal space for the application of fiduciary concepts in Crown/Aboriginal contexts.

#### **i. Conceptualized as a Dworkinian *Mistake***

As noted at the outset, a central contention made in this project is that the Supreme Court of Canada’s Crown/Aboriginal fiduciary doctrine was structured around a materially flawed core; on initial judicial reasoning, that is, that takes the form of a classic Dworkinian mistake. I have also been arguing that the Supreme Court has been slowly mending their flawed doctrine,

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<sup>447</sup> *Mikisew*, *supra* note 4 at para 51.

<sup>448</sup> *Ibid* at para 51.

effectively detangling themselves from it while, at the same time, ushering in a new construct (*i.e.* the “essential legal framework” structured around the core of Crown honour accountability).

Furthermore, it has been demonstrated in this chapter that *Guerin* and *Sparrow*, taken together, incubated a fundamentally non-conventional form of fiduciary accountability. I conceptualize this non-conventional form as a *principle-based* approach (*i.e.* structured around the notion that a general fiduciary obligation mandating only honourable conduct generally – actually a Dworkinian abstract principle in doctrinal form – gives rise to specific, enforceable fiduciary obligations as tailored to context). I have explained that this principle-based account is meaningfully distinct from the conventional *rule-based* approach to fiduciary doctrine (*i.e.* which involves only a singular rule *against* self-interested conduct).

I have also demonstrated that this principle-based approach to fiduciary accountability developed for *sui generis* use in Crown/Aboriginal contexts was, subsequent to *Guerin*, adopted in conventional contexts and that, for a period of time, it actually had the effect of shifting the conventional fundamentals of fiduciary law towards the principle-based approach. Finally, I noted the Supreme Court has largely resurrected a rule-based construct for its conventional fiduciary doctrine, and appears to have jettisoned (or to be in the process of jettisoning) the principle-based approach.

My contention is that the Supreme Court committed a *Dworkinian* mistake when they installed a principle-based fiduciary construct in the core of Crown/Aboriginal Law. Recall from the introductory chapter that Dworkin analogizes judicial adjudication to a “chain novel” where each common-law judgment is to be the “next best chapter” in an ever-expanding legal novel of sorts. In describing the dynamics of the binding nature of legal precedent (*i.e.* previous chapters in the chain novel), he explains that in “hard cases” (*i.e.* those where no clear doctrinal rule is seen to govern the dispute at issue), a judge undertakes a process of creative, but constrained, interpretation. That is, they search for possible interpretations of the applicable chain novel to date that fit the “bulk of the text” and that could count as, again, the “next best chapter” which, of course, is for Dworkin the “right answer” in such cases.

Furthermore, he notes that when more than one possible interpretation aligns with “the bulk of the text” in such cases, the judge is then permitted (indeed mandated) to have recourse to “substantive aesthetic judgments, about the importance or insight or realism or beauty of different ideas the novel might be taken to express,” and to choose as the superior interpretation, or “right answer,” that with the most substantive appeal to the *novel* as a whole.

Furthermore, and most pointedly for present purposes, Dworkin explains that a judge makes a “mistake” if his chapter “leaves unexplained some major structural aspect of the text, a subplot treated as having great dramatic importance or a dominant and repeated metaphor” and that such mistakes are to effectively be “disqualified” by future judges.

Against this sketch of applicable tenets of the rights thesis, my argument for the Supreme Court’s Crown/Aboriginal fiduciary doctrine constituting a Dworkinian mistake is advanced on two conceptual bases:

- 1) *The technical mistake*: The principle-based approach to fiduciary accountability that they created was entirely novel and did not “fit the bulk of the text” (*i.e.* it was not consistent with applicable precedent as fiduciary accountability was conventionally a rule based construct; rather, it was constituted “starting anew”). Moreover, Dickson J. in *Guerin* and Dickson J. and La Forest J. in *Sparrow* left entirely “unexplained” the *rule-based* fundamentals of the conventional doctrine (*i.e.* this “major structural aspect of the text, a subplot treated as having great dramatic importance or a dominant and repeated metaphor” was ignored). On these bases alone, the development of the principle-based, *sui generis* fiduciary doctrine in the Crown/Aboriginal context was a classic Dworkinian mistake.
- 2) *The subjective mistake*: Even if it could be argued that the Supreme Court’s principle-based approach fit enough of the previous “text” to be seen as an “eligible interpretation” in the *Guerin* and *Sparrow* “hard cases,” (which is doubtful in light of the powerful arguments in support of the technical mistake<sup>449</sup>) there were surely other “eligible interpretations” available to them (*e.g.* one is the interpretation that they eventually articulated in *Haida Nation*; framing Crown/Aboriginal Law around Crown honour

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<sup>449</sup> See, generally, Flannigan, “The Boundaries of Fiduciary Accountability,” *supra* note 37.

accountability instead of Crown fiduciary accountability<sup>450</sup>). The fact that there was more than one “eligible interpretation” meant that the Court, in each instance, was permitted to have broad recourse to subjective factors in crafting their “next best chapter.” Ultimately, my (subjective) contention is that in choosing the fiduciary concept to centrally conceptualize the legal regulation of Crown/Aboriginal relationships in Canada, they took up an interpretation with repugnant aesthetics and, in so doing, arguably committed a second type of Dworkinian mistake.

I will comment a bit further on each of these two bases in turn.

### *The Technical Mistake*

The primary technical mistake the Supreme Court made, principally in *Sparrow*, was conceiving fiduciary doctrine as capable of operating as a Dworkinian abstract principle; that is, as capable of legally mandating a generalized form of conduct (*i.e.* honourable behaviour), enforced through specific, off-shoot *concrete obligations*, tailored to context. As demonstrated in the first part of this chapter, and mindful of some conflicting precedent to the contrary, it is relatively clear that a conventional fiduciary obligation is itself a mere concrete obligation that seeks to regulate a singular type of behaviour in a circumscribed type of factual context (*i.e.* to singularly prohibit self-interested behaviour when one has undertaken to act selflessly in the managing of another’s applicable interests). This is to say that conventional fiduciary doctrine follows a rule-based approach. Further, the unique potential for (and incentive for) concealed opportunistic behaviour in such circumscribed contexts (*i.e.* where one had such unmonitored control over the assets of another) is the basis for the historical “draconian,” strict relief that developed to attend this type of transgression.<sup>451</sup>

Furthermore, on the facts of *Guerin*, Dickson J. was evidently of the (mistaken) view that once a fiduciary obligation triggers, an interpreting judge is then empowered with broad, flexible discretion to “monitor” the entirety of the exercise of that discretion, instead of singularly (and strictly) mandating that he or she not act in a self-interested manner within the context of the

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<sup>450</sup> In *Sparrow*, for example, in articulating the “general guiding principle” that the Crown was always to “act in a fiduciary capacity” in its dealings with Aboriginal people, Dickson J. and La Forest J. exclusively cited the honour of the Crown concept in support of that finding. That is, it was *right there at their fingertips*.

<sup>451</sup> *Supra* note 286 and 287 and the text surrounding each.

exercise of that discretion. This was the primary “conceptual error” that Flannigan pointed out in his critique of Crown/Aboriginal fiduciary doctrine in 2004, noted at the outset of this project.<sup>452</sup>

Furthermore, a general, fundamental mistake the Supreme Court made in its pre-*Haida Nation* Crown/Aboriginal fiduciary doctrine was interpreting it as capable of mandating one party to act in the best interests of another party. This is not a conventional fiduciary obligation; rather, it was an original doctrinal fundamental recognized in the Crown/Aboriginal context “by assertion rather than analysis.”<sup>453</sup> Quite to the contrary, and reflecting this mistake, an undertaking to “act in one’s best interests” is, as noted earlier in this chapter, an essential precondition for the creation of fiduciary accountability under the Supreme Court’s prevailing, conventional rule-based test.<sup>454</sup>

Put another way, it is to read conventional doctrine *backwards* to view a mandate to act in the best interests of another as a fiduciary obligation. As explained by Brennan C.J. of the High Court of Australia:

It would be to stand established principle on its head to reason that because equity considers the defendant to be a fiduciary, therefore the defendant has a legal obligation to act in the interest of the plaintiff so that failure to fulfill that positive obligation represents a breach of fiduciary duty.<sup>455</sup>

As Conaglen recently put it, while “fiduciaries owe a duty to act in the best interests of their principals, that is not in itself a fiduciary duty. Contrary to the approach taken in some decisions in Canada, Anglo-Australian law contains ‘no proper foundation for the imposition upon fiduciaries in general of a quasi-tortious duty to act solely in the best interest of their principals.’”<sup>456</sup>

Furthermore, it was noted above that the Supreme Court struggled badly to actually apply their principle-based approach consistently. The various types of “hard cases” that arose, forced them

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<sup>452</sup> Flannigan, “The Boundaries of Fiduciary Accountability,” *supra* note 37 at 63.

<sup>453</sup> *Breen v Williams*, [1996] HCA 57; (1996) 186 C.L.R. 71 (Aust. H.C.) [cited to C.L.R.] at 95.

<sup>454</sup> *Supra* note 344 and surrounding text.

<sup>455</sup> *Breen v Williams*, *supra* note 452 at 137-38, cited in Conaglen, *Fiduciary Loyalty*, *supra* note 258 at 56.

<sup>456</sup> *Fiduciary Loyalty*, *supra* note 258 at 57, citing *Breen v. Williams*, *supra* note 452.

to vary the doctrinal fundamentals based on the circumstances of each particular case, thus leaving a demonstrably unresolved jurisprudence. As noted, they at times interpreted the mandate as a fundamental obligation on the Crown to act *exclusively* in an applicable Aboriginal group's interests, while at other times they interpreted it as a mandate to honourably incorporate Aboriginal interests in whatever regulatory initiative they happened to be proposing. The latter interpretation clearly contemplates fiduciary accountability owed as part of an exercise of balancing Aboriginal and non-Aboriginal interests, which obviously meant the Crown was not to be held strictly liable for acting in furtherance of such *conflicting* interests.

The resulting confusion is unsurprising. That is, for instance, it was never made explicit that the non-conventional approach to fiduciary doctrine taken here was to be restricted to the Crown/Aboriginal context.<sup>457</sup> Further, there was no direction on how the conventional approach was to intersect with this new non-conventional approach. Recall that in neither of the cases that effectively incubated the principle-based approach was judicial authority cited or distinguished, which is to say (again) that the *Guerin* and *Sparrow* Courts left these dynamics entirely "unexplained," something that they were not permitted to do in accordance with the Dworkinian account. And subsequent courts, therefore, had no direction on what to do when conventional fiduciary authority was cited in the context of this non-conventional framework; and hence the dysfunction and doctrinal paralysis that ensued.

Furthermore, Flannigan essentially argued that the use of the non-conventional was fundamentally ill-suited for use in the context of generally regulating Crown conduct in Aboriginal Law; that fiduciary doctrine is simply not configured to do what was being asked of it here. To this end, he stated that:

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<sup>457</sup> Dickson J. did refer to Crown/Aboriginal fiduciary accountability in *Guerin* as *sui generis*: *Guerin*, *supra* note 27 at 388 ("I repeat, the fiduciary obligation which is owed to the Indians by the Crown is *sui generis*. Given the unique character both of the Indians' interest in land and of their historical relationship with the Crown, the fact that this is so should occasion no surprise." However, he did not acknowledge that he was fundamentally altering the doctrinal fundamentals. Again, the *application* of fiduciary doctrine is arguably always *sui generis* in the context of each relationship category to which it is applied (*i.e.* while the doctrine's fundamentals remain static), and although Dickson J. may well have intended his analysis to be restricted to context, he left much room here for misinterpretation (a fact clearly evidenced by subsequent adoption of his analysis in other contexts). In *Guerin*, the fundamentals were themselves altered, but Dickson J. never acknowledged that fact.

The main substantive concern with that analytical move [effectively, bringing in the principle-based approach that they did] is that the fiduciary concept *per se* has no developed capacity to resolve conflict or adjust political claims. Its function is robustly unilateral – to discipline those who exploit their limited access for personal gain. Furthermore, the effect of the move is to privilege, by the extension of fiduciary status, one political claim over others. Whether such a political privilege is warranted, it is not usefully framed as an issue of fiduciary responsibility. There is no connection with conventional fiduciary policy. The incorporation of the justification test [*i.e.* the *Sparrow* justification test] (which is really only an invitation to justify) starkly evidences that fact. What remains is a fiduciary analysis in name only.<sup>458</sup>

Finally, and as noted at the outset, while *Haida Nation* effectively constitutes the Supreme Court conceding their initial error (that is, by fundamentally “disqualifying” Crown fiduciary accountability as the doctrinal core of Crown/Aboriginal Law and replacing it with Crown honour accountability), they so far have explicitly maintained, as part of their new Crown-honour based framework, some ongoing, limited role for the application of a non-conventional Crown/Aboriginal fiduciary obligation.

To this, Flannigan warned that the potential for application of both the conventional and non-conventional approaches to fiduciary doctrine in the Crown/Aboriginal context would prove challenging. He noted specifically that in this context:

the conventional form of fiduciary obligation continues to apply to augment the [non-conventional approach]... That means certain “fiduciary” obligations of the Crown [*i.e.* of the non-conventional varietal] will be suspended if the Crown is able to satisfy the [*Sparrow*] justification test. Other fiduciary obligations (conventional fiduciary obligations), however, are strict, and no justification will

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<sup>458</sup> Flannigan, “The Boundaries of Fiduciary Accountability,” *supra* note 37 at 65.

be permitted. That will plainly exacerbate the confusion. In the end, it is unclear how all of this can amount to a tractable regulation.<sup>459</sup>

The Supreme Court's decision in *Manitoba Metis Federation* nakedly manifests these dynamics warned of by Flannigan. As noted above, it brings into stark relief the ongoing incongruence in the applicable doctrinal fundamentals; the co-existence of the conventional and non-conventional explicitly directed by Chief Justice McLachlin in that case (*i.e.* the direction that both the conventional and non-conventional tests can bring about Crown fiduciary accountability in the Aboriginal context) is circular and surely untenable. Again, the Crown mandate to act exclusively in the best interests of an applicable Aboriginal community is the pre-condition in the conventional test and the actual fiduciary obligation in the non-conventional.

### *The Subjective Mistake*

Again, assuming for the moment that the technical mistake was not fatal in accordance with the Dworkinian account (*i.e.* that the Supreme Court's Crown/Aboriginal fiduciary doctrine is not effectively "disqualified" on that technical basis), we then move to the second part of the analysis, that where the court was permitted to have recourse to subjective, aesthetic judgments about "the importance or insight or realism or beauty of different ideas the novel might be taken to express." And here the question becomes: was their choice of the fiduciary concept a good fit for Crown/Aboriginal Law, thinking in terms of the various historical and cross-cultural realities at play in Crown/Aboriginal relationships in Canada? Or might there have been other, preferable "eligible" interpretations?

Rotman, for his part, suggests that a virtue of the central use of fiduciary regulation in the context of Crown/Aboriginal relationships is that it provides a "new way of thinking about ... the [Crown/Aboriginal] relationship."<sup>460</sup> He describes fiduciary doctrine as "wonderfully enigmatic" and as having much in the way of untapped potential. I agree that adoption of fiduciary concepts here did provide a new way of conceptualizing Crown/Aboriginal relationships; and indeed

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<sup>459</sup> *Ibid* at 66.

<sup>460</sup> Leonard I. Rotman, "Wewaykum: A New Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples" (2004) 37 U.B.C. L. Rev. 219 at (Q.L.) para 7.

reference to Crown/Aboriginal relationships as fundamentally fiduciary in nature became ubiquitous. However, I disagree with there being virtue in that conception.

My *subjective, personal feeling* about the use of fiduciary doctrine to centrally regulate Crown/Aboriginal relationships (*i.e.* since subjective, aesthetic assessment is precisely the Dworkinian task of the Supreme Court in this scenario presented) was always unease. It is clear that one of the disasters of Canada's colonial history is indeed that Crown/Aboriginal relationships have come to *resemble* a classic fiduciary relationship, one where one party is uniquely "at the mercy" of the other; where the Crown continues to be in the paternalistic role of *protecting* Aboriginal peoples from non-Aboriginal peoples (*e.g.* in accordance with legal frameworks that preclude Aboriginal peoples from deciding to act in their own best interests in dealing with their land and property interests).<sup>461</sup> And I always felt it immoral to bring in a legal framework that could in any way legitimize or reinforce that power imbalance.

Furthermore, in the formative years of the development of the Supreme Court's non-conventional Crown/Aboriginal fiduciary doctrine, some leading commentators expressed similar concerns. Professor Patrick Macklem, for instance, was particularly critical of the Supreme Court's invocation of the fiduciary concept as their central tool for governing Crown conduct in the Aboriginal context, arguing effectively that it would be counterproductive in terms of generally empowering Aboriginal communities.<sup>462</sup> Specifically, he argued that the use of the fiduciary concept here "reproduces [Aboriginal] dependency in a new form" and that it "frustrates rather than facilitates the quest for a greater degree of self-government for Canada's First Nations."<sup>463</sup> And he noted that its use is evidence of the fact that the Supreme Court is not

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<sup>461</sup> Slattery has pointed out that, initially, it was likely a wise tactical manoeuvre for Aboriginal peoples to align themselves with the Crown in this type of arrangement: Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. B. Rev. 727 at 753:

The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.

<sup>462</sup> Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J.

<sup>463</sup> *Ibid* at 412. See also, Stevenson and Peeling, "Probing the Parameters of Canada's Crown-Aboriginal Fiduciary Relationship," *supra* note 51 at 7: "We don't particularly like the language associated with the concepts used to address legal problems in the field of Canadian Crown/Aboriginal Law. The language, while perhaps precise in a legal context, does not accurately fit the Crown-Aboriginal relationship. For example, the language associated with the fiduciary relationship speaks of power and discretion on the one hand and vulnerability on the other. These

willing to move away from a “hierarchical” conceptualization of the Crown/Aboriginal relationship.<sup>464</sup>

Likewise, Professor Gordon Christie predicted that the use of fiduciary concepts here “may ultimately work against the best interests of Aboriginal peoples.”<sup>465</sup> Christie’s concern was specifically that the Crown should not be entrusted with discretion to determine what is in the best interests of Aboriginal peoples. He conceptualized “a radical divide between fundamental conceptions of legal interests” as between the Crown and an applicable Aboriginal group (*i.e.* as what counts as something being in the best interests of that Aboriginal group). And he argued that fact alone “renders the use of fiduciary doctrine hopelessly inappropriate” in the Crown/Aboriginal context.<sup>466</sup>

Moreover, and mindful of the fact that weighing one person’s subjective assessment against another’s is inherently unscientific (suggesting, for example, that Macklem’s, Christie’s, or my own subjective interpretation is superior to a given Supreme Court of Canada Justice), evidence that at least one superior “eligible interpretation” was available to both Dickson J. in *Guerin* and Dickson J. and La Forest J. in *Sparrow* thus confirming their initial, chosen interpretations as *wrong answers* in each instance (recall the “right answer” for Dworkin in such “hard cases” is the superior interpretation), lies in the fact that the Supreme Court has now effectively “disqualified” their initial interpretation and instead installed Crown honour accountability in its place at the core of Canadian Crown/Aboriginal Law.

It would be helpful, in terms of continuing the project of mending their dysfunctional doctrine, for them to go one step further and explicitly acknowledge their error,<sup>467</sup> and fully jettison – or at

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words, typically used to describe the Crown-Aboriginal relationship, do not speak to a relationship of equality but of one party under the protection and the discretion of another.”

<sup>464</sup> Macklem, *Ibid* at 411-412.

<sup>465</sup> Gordon Christie, “Considering the Future of the Crown-Aboriginal Relationship,” in *In Whom We Trust: A Forum on Fiduciary Relationships*, *supra* note 49 at 269.

<sup>466</sup> *Ibid* at 288.

<sup>467</sup> Deschamps J. hinted at such a concession in her minority decision in *Little Salmon/Carmacks*, *supra* note 14 at 105 where she stated:

This Court has, over time, substituted the principle of the honour of the Crown for a concept — the fiduciary duty — that, in addition to being limited to certain types of relations that did not always concern the constitutional rights of Aboriginal peoples, had paternalistic overtones ...

least fully theorize – those residual aspects of Crown/Aboriginal Law that are based on the flawed, non-conventional (principle-based) approach to fiduciary doctrine.

**ii. The Residual Doctrinal Space for the Regulation of Fiduciary  
Accountability in Crown/Aboriginal Contexts *Post Haida Nation***

Finally, then, in order to conceptualize the residual role for fiduciary regulation in Crown/Aboriginal contexts *post Haida Nation*, I will proceed, again, by ordering my analysis around the three primary incidents of fiduciary regulation: (1) its function, (2) its content, and (3) the contexts in which it arises, drawing from observations made in the first two parts of this chapter.

As noted above, the Supreme Court has been essentially silent on the question of what *function* their fundamentally modified (but still non-conventional) Crown/Aboriginal fiduciary obligation articulated in *Haida Nation* is to serve. Crown honour accountability is now clearly intended to serve the function previously served by the Supreme Court’s non-conventional Crown fiduciary accountability (*i.e.* fundamentally regulating the mischief of dishonourable Crown conduct in applicable Aboriginal contexts). Yet, and now *within* Crown honour accountability, there is to be some left-over role for a particularized Crown fiduciary obligation: an obligation, which only arises in limited circumstances, to act with reference to the best interests of an Aboriginal group. Again, the purported function of this residual Crown obligation is entirely unclear.

I noted in my examination of *conventional* fiduciary doctrine that, while there remains some uncertainty, the Supreme Court’s prevailing doctrine appears to effectively function to prohibit the singular mischief of self-interested conduct in trust or trust-like contexts. Materially, it is to function as a proscriptive type of legal regulation in that “it tells the fiduciary what he must *not* do. It does not tell him what he ought to do.”<sup>468</sup> Ultimately, if the Supreme Court envisions a function for its (*post Haida Nation*) non-conventional Crown/Aboriginal fiduciary obligation that is distinct from the doctrinal function of its conventional fiduciary law, it needs to clarify what

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<sup>468</sup> *Attorney-General v. Blake*, [1998] Ch. 439 (C.A.) at 455, cited in Conaglen, *Fiduciary Loyalty*, *supra* note 258 at 202.

that is. My contention, of course, is that there is no apparent residual function for a non-conventional Crown/Aboriginal fiduciary obligation here.

In terms of the *content* of the non-conventional *Haida Nation*-framed Crown/Aboriginal fiduciary obligation, it is explicitly a prescriptive (*i.e.* as opposed to proscriptive) obligation which, once triggered, mandates the Crown to act “with reference to the best interests” of an applicable Aboriginal community. I noted earlier in this chapter that while there are at least three possible ways in which to interpret this mandate,<sup>469</sup> by far the most likely is that the Supreme Court intended this mandate to be a *rule* that the Crown must act *exclusively* in the best interests of the Aboriginal community in applicable scenarios.

Finally, in terms of the *contexts* in which this non-conventional fiduciary obligation arises, recall from the discussion above that although the Supreme Court held in *Manitoba Metis Federation* that fiduciary accountability may arise in either the conventional or non-conventional manner in Crown/Aboriginal contexts, I contended that this arrangement was circular and very likely untenable. Again, it makes little sense to maintain a doctrine where a litigant may literally plead an *act exclusively in my best interests* concept as both the pre-condition to fiduciary accountability and as fiduciary accountability itself.

However, what also seems evident here is that the Supreme Court’s non-conventional test for when fiduciary accountability arises in the Crown/Aboriginal context is starting to align with its conventional test. That is, the *undertaking to act in one’s best interest* precondition in the conventional test is close if not effectively the same as the applicable *having assumed a type of discretion akin to direct administration of one’s interests* precondition in the (Crown/Aboriginal) non-conventional test. Moreover, the two tests are now each effectively essentialist tests, meaning they specify essential facts which, if present, give rise to fiduciary accountability. And, arguably, the essential facts specified in each are effectively the same.

This conclusion, if valid, clearly demonstrates that the non-conventional *Haida Nation*-framed Crown fiduciary obligation to, effectively, act exclusively in an applicable Aboriginal group’s best interests is doctrinally unsound; it is hopelessly circular since the pre-condition is effectively

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<sup>469</sup> *Supra* notes 410-412 and text surrounding each.

the same as the potential accountability itself. Put another way, if fiduciary accountability only arises in particular Crown/Aboriginal contexts where it can first be demonstrated that, effectively, the Crown has undertaken to act exclusively in the best interests of an Aboriginal community in relation to particular interests, the resultant fiduciary accountability in such circumstances, self-evidently, cannot (also) be an obligation to act exclusively in the best interests of that Aboriginal community in relation to those interests.

So where does this leave us? First, we have some emerging clarity around the *contexts* in which Crown/Aboriginal fiduciary accountability will arise, going forward. It is likely to arise in, effectively, the same doctrinal manner it does in the prevailing, conventional doctrine; where the Crown assumes discretion over cognizable interests of an Aboriginal community in a situation where they have demonstrably undertaken to act exclusively in the best interests of that community in relation to those interests. Second, we then have an empty *content* incident in the Crown/Aboriginal context; that is, the duty to act exclusively in the best interest of an Aboriginal community, since it is effectively the precondition to the creation of Crown fiduciary accountability, may no longer (again) be the applicable *content* of that accountability as well (contrary to the clear indication in *Haida Nation* that this is the case).

I indicated at the outset of this project that the Supreme Court appears to have effectively cornered itself into ultimately releasing the last residual vestige of its non-conventional approach to fiduciary accountability from Crown/Aboriginal Law in Canada. Unless they are going to use effectively the same doctrinal test to give rise to a fundamentally distinct (and as-yet unknown) type of legal obligation, and particularly taking into account the various ways in which Crown honour accountability regulates in this area, it appears irresistible to conclude that the Supreme Court will align its content incident in the Crown/Aboriginal context with that of its prevailing conventional doctrine.

Turning then to the content incident in the conventional context (again, pursuant to the Supreme Court's prevailing, recently-repaired doctrine), a conventional fiduciary obligation in Canada is, essentially, a proscriptive *rule* against "abuse of power" (or "abuse of trust," presumably synonymous terms). Regarding the meaning of the term "abuse of power" (or "abuse of trust"), Chief Justice McLachlin stated the "emphasis [is on] disloyalty and promotion of one's own or

others' interest at the expense of the beneficiary's interests."<sup>470</sup> The trend is clearly towards a full-dress return to their conventional prohibition against, specifically, self-interested conduct. And so we may speculate as to how that prohibition may apply in the Crown/Aboriginal context moving forward.

First, note that the application of the fundamental, conventional prohibition would be tailored to the various circumstances of Crown/Aboriginal relationships. In that sense, and in that sense only, it would be *sui generis*, as it is in each various relationship category in which fiduciary accountability arises (*i.e.* its application would be *sui generis* but not the fundamental nature of the rule itself). Second, it would apply only in limited factual circumstances. Overviewing the various types of situations in which Crown liability has been alleged in Aboriginal contexts, two emerge as clear examples of where conventional fiduciary accountability would arise: *Guerin*-like facts (*i.e.* where the Crown is statutorily mandated to act exclusively in the interests of a First Nation in relation to land interests that have been tactically surrendered to the Crown by that First Nation for a particular purpose) and *Ermineskin*-like facts (*i.e.* where the Crown is statutorily mandated to manage financial assets of a First Nation, exclusively for their benefit).

The obvious, final question to then pose here in terms of my attempt to conceptualize the residual role for fiduciary regulation in the Crown/Aboriginal context moving forward is: what type of Crown conduct would constitute a conventional *breach* of Crown/Aboriginal fiduciary accountability in these types of situations?

The conventional fiduciary prohibition would be breached in Crown/Aboriginal contexts where an individual Crown agent or some collective Crown entity put its own *self*-interest in conflict with the interests of an Aboriginal group it has undertaken to manage (*i.e.* where the undertaking is to manage exclusively in the interests of the Aboriginal group). So in the *Guerin*-like situation, for instance, if one of the Crown agents involved in negotiating the land transaction in *Guerin* had had a direct, personal, and undisclosed interest in the private golf course project (*i.e.* the use to which the leased Musqueam lands were to be, and ultimately were, put), that would have constituted a prohibited conflict of interest, a classic breach of the conventional fiduciary prohibition. Likewise, if the provincial Crown had had an undisclosed interest in the private golf

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<sup>470</sup> *KLB*, *supra* note 59 at para 33.

course project (*e.g.* if a Crown corporation owned part of the project, unbeknownst to the Musqueam), that would also have constituted a classic fiduciary breach.

The *Ermineskin*-like situation, for its part, is straight-forward. The facts in *Ermineskin* were such that an express legal trust was clearly created. As such, the application of conventional doctrine can simply follow conventional precedent. Crown trustees entrusted with the management of a First Nation's financial interests may not put their own interests, or appear to put their own interests, in conflict with the entrusted interests of the First Nation. Put simply, they can't steal the First Nation's money. That is the effect of applying the conventional fiduciary prohibition in this context.

Viewed as such, it is unlikely that Crown breaches of fiduciary accountability in Aboriginal contexts will arise often in light of the various regulatory controls in place to guard against such conduct. Rather, Crown honour accountability would now purport to regulate the majority of instances where Crown misconduct is alleged in constitutional, Aboriginal-related contexts. Moreover, note that, in accordance with this account presented, neither the impugned Crown conduct in *Guerin* nor *Ermineskin* would have constituted a breach of conventional Crown fiduciary accountability. Further, if Crown conduct like that which took place in *Guerin*, for instance, were to take place today, the applicable First Nation may well have a meritorious claim in Crown honour accountability (*i.e.* and not Crown fiduciary accountability), perhaps under some new specific "off shoot" Crown honour-based obligation, perhaps one largely replicating the doctrine set out in *Guerin*.

Crown breaches of fiduciary accountability are, likewise, rare in non-Aboriginal contexts, though they do arise from time to time.<sup>471</sup> It should be noted here that Crown fiduciary accountability is owed to the electorate *writ large* with respect to general public assets (*e.g.* the public purse) and is, therefore, also (indirectly) owed to Aboriginal individuals in this manner. That is, Aboriginal individuals are part of the Crown, of each applicable electorate, and so part of a broader collective to whom fiduciary accountability is owed. Moreover, elected leaders of Aboriginal communities themselves also clearly owe conventional fiduciary accountability to their electorates.

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<sup>471</sup> See, generally, *supra* note 335.



#### IV. CONCLUSION

*This Court has, over time, substituted the principle of the honour of the Crown for a concept — the fiduciary duty — that, in addition to being limited to certain types of relations that did not always concern the constitutional rights of Aboriginal peoples, had paternalistic overtones ...*

- Justice Deschamps<sup>472</sup>

In this project, I set out to theorize the emergent Crown honour-based “essential legal framework” which now constitutes the doctrinal “core” of Crown liability doctrine in Crown/Aboriginal Law in Canada. In doing so, I was of course compelled to examine the fiduciary-based legal framework that came before it.

In Chapter Two, then, I began by mining the historical jurisprudence in order to conceptualize the jurisprudential roots of the “honour of the Crown” concept and concluded that prior to *Haida Nation* it was little more than a (seldom-invoked) *principle of interpretation* which dates back centuries and which was used in both statute and treaty contexts to essentially regulate against interpretations that would ignoble the Crown.

After detailing the manner in which the honour of the Crown principle was re-oriented in *Haida Nation* (indeed effectively morphed into something fundamentally distinct from its predecessor), I then attempted to conceptualize, through the lens of Dworkin’s rights thesis, the main doctrinal components of Crown honour accountability in present-day Canadian Crown/Aboriginal Law. Ultimately, my account posits the “honour of the Crown” concept as an *abstract principle* which centrally organizes and informs Crown liability doctrine in Crown/Aboriginal (constitutional) contexts in Canada, and which is directly enforceable through off-shoot *concrete obligations* (*i.e.* discreet causes of action) which bind the Crown to particularized types of Crown honour.

This doctrinal framework supports the over-arching *policy goal* of reconciling “the pre-existence of aboriginal societies with the [*de facto*] sovereignty of the Crown.” This reconciliation mandate is not enforced by the judicial branch of government *per se*. Rather, judges are only to enforce

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<sup>472</sup> *Little Salmon/Carmacks*, *supra* note 14 at 105.

Crown honour, and they do so, in applicable scenarios, in order to facilitate and protect the constitutional reconciliation process that was centrally mandated by section 35 of the *Constitution Act, 1982*, and which is to be principally discharged by the executive and legislative branches of government. Judges enforce particularized rights in instances where corresponding Crown honour-based obligations have been breached. They do not directly enforce broader community policy objectives such as the Crown/Aboriginal reconciliation mandate.

Viewed as such, Crown honour accountability in Crown/Aboriginal Law in Canada has demonstrable conceptual boundaries; its doctrinal fundamentals have come into view and appear capable of consistent application (the form that such application will take is obviously to differ depending on context). The main two (*i.e.* of three) concrete obligations that have been developed to date by the Supreme Court of Canada as effective off-shoots of the honour of the Crown principle each take classic Dworkinian *rule form*. That is, they each constitute a rule; they specify facts which, if established, necessitate liability in Crown dishonour.

The first, that the Crown must *honourably* consult (and, where applicable, accommodate) Aboriginal peoples before initiating conduct that could potentially impact Aboriginal or treaty rights, has now been substantially fleshed out through a series of decisions subsequent to *Haida Nation*.<sup>473</sup> The second, that the Crown must *honourably* discharge constitutional obligations by bringing a demonstrably purposive and diligent approach to the undertaking, is new and requires substantial fleshing out. Nonetheless, it is articulated in Dworkinian rule form.

The third applicable concrete obligation here (*i.e.* a particularized Crown/Aboriginal fiduciary duty), ostensibly also an off-shoot of the honour of the Crown principle, was one of the main focuses of Chapter Three. In Chapter Three, I examined the non-conventional use to which the Supreme Court has put fiduciary doctrine in the Crown/Aboriginal context in Canada, and I ultimately concluded that it has been an ill-conceived doctrinal “experiment,” and one demonstrably on its *last legs*.

A key conclusion of Chapter Three is that for *all* meaningful intents and purposes, Crown honour accountability has been “substituted” in for (the Supreme Court’s non-conventional) Crown

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<sup>473</sup> See, generally, *supra* note 156.

fiduciary accountability. Lamentably, however, the Supreme Court has effected this doctrinal substitution while, at the same time, both (a) rejecting the non-conventional approach in other contexts as doctrinally unsound<sup>474</sup> (*i.e.* I explained how the non-conventional approach to fiduciary doctrine recognized in Crown/Aboriginal Law was temporarily, and confusedly, adopted by the Supreme Court as part of its conventional doctrine), and (b) explicitly retaining for Crown/Aboriginal Law a fundamentally modified and fundamentally unresolved version of their non-conventional varietal of fiduciary accountability.

Ultimately, I have contended that the third doctrinal off-shoot of the honour of the Crown principle – that the Crown owes a (non-conventional) fiduciary duty to act with reference to the best interests of an Aboriginal group in circumstances where it has assumed sufficient discretion over critical interests of that group – is an untenable residue of the Supreme Court’s demonstrably flawed, non-conventional Crown/Aboriginal fiduciary doctrine. Such a duty is duplicative of other existing Crown-honour based (and statutory) obligations, and its retention in this area is a source of considerable ongoing doctrinal confusion. Furthermore, I explained that there is now little else for the Supreme Court to do but to fully excise this residue, leaving only doctrinal space for the independent operation of conventional fiduciary accountability in Crown/Aboriginal contexts (*i.e.* a rule, unlikely to often be invoked, that strictly prohibits against opportunistic Crown conduct, such as when a Crown agent translates his access to Aboriginal interests into personal gain).

I conclude, then, with a return to the eclipse metaphor I invoked at the outset. The Supreme Court has ultimately orchestrated a type of theoretical eclipse in moving the honour of the Crown principle to the “core” of the regulation of Crown conduct in the Aboriginal context. Early signs of the impending eclipse appeared in cases like *Marshall No. 1* and *Wewaykum* where Justice Binnie began to use the Crown honour principle to obscure the (misconceived) non-conventional fiduciary-based legal construct, which had been formed principally through *Guerin*, *Sparrow*, and *Delgamuukw*. Then, in *Haida Nation*, the eclipse came into full view. In the language of astronomy an eclipse is annular when the moon moves in front of the sun but does not completely obscure it; a total eclipse, in contrast, occurs where the sun is no longer visible. Effectively, a type of *annular* eclipse began in Crown/Aboriginal Law in cases such as *Marshall*

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<sup>474</sup> See, *e.g.*, *supra* notes 321-322 and 409-410 and the text surrounding each.

*No. 1* and *Wewaykum*, and a *total* (or near total) eclipse effectively came into view through the *Haida Nation* and *Manitoba Metis Federation* decisions. The non-conventional type of fiduciary regulation developed by the Supreme Court in the Crown/Aboriginal context has become nearly imperceptible. And, at least from the standpoint of doctrinal functionality, this is a good thing.

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