CANADIAN ABORIGINAL LAW: CREATING CERTAINTY IN RESOURCE DEVELOPMENT

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1. Introduction[1]

Canada's law accepts that aboriginal peoples have occupied its territory. That territory has been the subject of European settlement for over 400 years. Its institutional history runs back in an unbroken line to the medieval constitution of England. A flurry of constitutional change occurred in Canada just over two decades ago. Part of that change, driven by early litigation relating to aboriginal rights, was the decision to recognize and affirm aboriginal and treaty rights in the Constitution of Canada.

In doing so, Canada, knowingly or otherwise, accepted that its law would differ relating to the legal position of aboriginal peoples from that in Australia or the United States of America. In both those common-law jurisdictions, there continues the common-law regime that had existed in Canada before aboriginal and treaty rights were "recognized and affirmed"[2] constitutionally. The essence of that regime is that the sovereign authority can extinguish such rights as aboriginal people have in order to deal with situations in which such rights may interfere with due governance by the sovereign authority.

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[1] This paper represents a second edition of the paper by the same authors presented at the joint meeting of the Rocky Mountain Mineral Law Foundation and the Section on Energy and Natural Resources Law of the International Bar Association held in Lima, Peru in April 2003. Along with some other revisions of text, it contains new references to several decisions rendered since April 2003, changes the order of discussion of the Crown's fiduciary duty and impact and benefit agreements, and adds a slightly edited version of the passage on the relationship between aboriginal title and private property rights first published in Thomas Isaac, *Aboriginal Law: Commentary, Cases and Materials*, 3d ed., (Saskatoon, Purich, 2004) at 14-18.

[2] *Constitution Act, 1982*, s. 35(1), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Fortunately, the era of greatest uncertainty in respect of these issues for Canada is largely past. After more than twenty years of all sides claiming more than any rational system of law would grant to them, the Canadian courts have drawn upon established legal roots to create a complex but understandable regime to dealing with the interplay between development and existing aboriginal and treaty rights. The case law confirms that the law relating to this regime is not a unique growth but is a development of principles of law and equity applied to the unique situation of the relationship between the Crown and a particular class of the Crown's subjects.

Canada's constitutional "recognition and affirmation" of aboriginal and treaty rights on April 17, 1982 was both unprecedented and vague.[3] It has taken a cycle of judicial "victory" and "defeat" between aboriginal and non-aboriginal litigants to fashion this constitutional fact into intelligible law that potentially allows fair and certain treatment of all stakeholders in Canadian natural resource development. This law serves as the basis for a working resolution between aboriginal people and other Canadians that is still growing in clarity, but already gaining general acceptance.

Canada's natural resource industries are becoming increasingly comfortable with new legal doctrines developed in the courts to give certainty to what in 1982 was unclear. Aboriginal people also have increasing comfort with these doctrines, although suspicion remains that a system ostensibly based on fair procedures, fair decisions, and negotiated agreements dealing with the impacts and benefits of development, in fact may not operate fairly in respect of the aboriginal participants.

Probably the least developed appreciation that an issue of enormous importance to Canadian resource development is fundamentally resolved resides with the federal and most of the thirteen provincial and territorial governments of Canada. However, some of these governments are beginning to adopt guidelines that recognize that government is the key actor in

[3] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, Proclaimed in force 17 April 1982, S.I./82-97, C.Gaz. 1982.II.1808.

bringing legal and practical certainty to resource development in circumstances in which conflicting aboriginal or treaty rights are an issue.[4]

This paper seeks to describe the *corpus* of Canadian law uniquely developed to deal with the fair resolution of issues arising from the conflict between aboriginal and treaty rights and the rights of natural resource developers. It will first review key concepts in Canadian aboriginal law. It will then explain the three principal legal developments which are fundamental to introducing certainty into resolution of such conflict, namely: (a) the doctrine of the Crown's duty to consult aboriginal people, (b) the judicial clarification of the related doctrine of the Crown's fiduciary relationship with aboriginal people, and (c) the practice of regulating relations between resource developers and their aboriginal neighbours in contractual documents. It will end with an explanation of how existing case law elucidates the not yet fully resolved question of the relationship between existing private property and aboriginal rights.

2. Background—Canadian Aboriginal Law

It is not possible to understand how Canada has dealt with the question of conflict between the interests of natural resource developers and neighbouring aboriginal communities without understanding the basic concepts of Canadian law relating to aboriginal people.

2.1. Division of Powers

The constitutional division of powers between the federal and provincial levels of government influences aboriginal law in Canada. The Constitution of Canada divides the constitutional authority to enact legislation between the federal Parliament and the ten provincial legislatures. The division of federal and provincial powers is primarily found in the *Constitution Act, 1867*,[5] specifically in s. 91 (Powers of the Parliament) and s. 92 (Exclusive Powers of Provincial

[4] The Government of British Columbia published consultation guidelines relating to consultation with aboriginal people in British Columbia in 1998. These guidelines were amended in order to bring them more closely in line with judicial developments in 2002: British Columbia, *Provincial Policy for Consultation with First Nations*, (N.p., 2002), online: Province of British Columbia <http://www.srmwww.gov.bc.ca/clrg/alrb/cabinet/ConsultationPolicyFN.pdf>. No other Canadian jurisdiction has yet published such guidelines, but at the time of writing, Alberta is working on developing similar consultation guidelines: *2002-03 Government of Alberta Annual Report* (N.p., [2003]), online: Alberta Finance – Home Page – Provincial Government of Alberta, Canada <http://www.finance.gov.ab.ca/publications/measuring/measup03/measup03.pdf>.

[5] (U.K.), 30 & 31 Vict., c. 3.

Legislatures). Canada is a constitutional monarchy. It is normal to refer to the federal Government of Canada as the "Crown in Right of Canada" and the provincial Governments within Canada as the "Crown in Right of" the relevant province. In this paper, they will be referred to together as "the Crown".

There are three territories in northern Canada that are distinct from provinces: the Yukon Territory, the Northwest Territories, and Nunavut. Territorial governments, while similar in function to provincial governments in having a Premier, cabinet and elected legislature: (a) are jurisdictionally subject to Parliament, (b) do not have distinct constitutional status, and (c) have more limited authority than the provinces. Aboriginal people form a majority of the residents in much of the large area of northern Canada included in these three territories.

Parliament has exclusive authority to legislate in relation to: (a) "Indians", and (b) "lands reserved for the Indians".[6] For the purposes of s. 91(24) of the *Constitution Act, 1867*, the Inuit of Canada's far north are also included within the definition of "Indian" and, therefore, come within Parliament's jurisdiction.[7] Recently, the Metis, "aboriginal people" of varied aboriginal and non-aboriginal ancestry, have also been included among Canadians protected by the 1982 constitutional changes.[8]

Canada's *Indian Act*[9] defines the term "Indian" for the purposes of the Act and establishes a register to record the names of individuals qualified to be registered as "Indians". Registered Indians may live on Indian reserves and possess other privileges set out in the Act. Persons of Indian, Inuit, and Metis ancestry not registered under the Act are not "Indians" for

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[6] *Constitution Act, 1867, ibid.*, s. 91(24). "Indian" is a term that designates those aboriginal people coming within Parliament's authority. "Indians" are also sometimes referred to as "first nations peoples", "aboriginal people", or "native peoples".

[7] *Reference Re British North America Act, 1867 (U.K.), s. 91*, [1939] S.C.R. 104, (*sub nom. Re Eskimos*) [1939] 2 D.L.R. 417.

[8] *R. v. Powley*, [2003] 2 S.C.R. 207, 230 D.L.R. (4th) 1. Taken in conjunction with Canadian law as developed to September 2003, when this decision was announced, it was not surprising to find that while s. 35(1) does not encompass all individuals of mixed Indian and European ancestry, it does encompass such people who have developed their own customs and a recognizable group identity separate from their Indian or Inuit and European forebears. Subsection 35(1) will protect features of distinctive Metis communities that persist in the present day as integral elements of their culture. See also *R. v. Blais*, [2003] 2 S.C.R. 236, 230 D.L.R. (4th) 22, in which the Supreme Court of Canada refused to take so broad a view of the term "Indian" as to include a Metis person seeking rights expressly provided to "Indians" under a transfer agreement.

[9] R.S.C. 1985, c. I-5.

purposes of the Act. Indian reserve lands are lands held by Canada for the "use and benefit"[10] of Indians and do not fall under the jurisdiction of the Provincial Legislatures. Canada's Department of Indian Affairs and Northern Development oversees Canada's responsibilities with respect to Indians, administers the Act, and plays a considerable role in the management of the three northern territories.

With some limited exceptions, the Provinces own the underlying legal title to land within their geographic boundaries. Each province exercises powers related to, *inter alia*, property and civil rights,[11] as well as local works and undertakings,[12] matters of a generally local or private nature,[13] and natural resources,[14] in the province. Normally, provincial legislation only applies to Indians or Indian reserve lands if it (a) is of a general nature, (b) does not deal specifically with Indians or lands reserved for the Indians, and (c) there is no federal legislation dealing with Indians or Indian reserves that would conflict with the provincial legislation. Provincial legislation is also subject to other limitations in this regard including aboriginal and treaty rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.[15]

2.2. Pre-1982 Law

Until the express recognition and affirmation of existing aboriginal and treaty rights in s. 35(1), their legal status in Canada had been fluid and vulnerable. Although aboriginal rights existed at common law prior to 1982, they were subject to extensive restriction by the Crown and the Crown could extinguish them unilaterally if a clear and plain intention to extinguish could be demonstrated. Jurisprudence after 1982 has shown that key elements of aboriginal law not much examined before 1982 did exist before 1982. Clearly, "the honour of the Crown" had existed from at least 1763 and aboriginal people have been recompensed for breaches of the Crown's fiduciary duty to them that happened before 1982.[16] The Supreme Court of Canada succinctly

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[10] *Indian Act*, *ibid.*, s. 2(1) "reserve" (b).
[11] *Constitution Act, 1867*, *supra* note 5, s. 92(13).
[12] *Ibid.*, s. 92(10).
[13] *Ibid.*, s. 92(16).
[14] *Ibid.*, s. 92A.
[15] *Supra* note 2.
[16] George R., Proclamation, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. II, No. 1; see also the Supreme Court of Canada decisions named in §5.3 below, all of which deal with events before 1982 which evidenced real or alleged breaches of the Court's fiduciary duty to aboriginal people.

stated Canadian law prior to 1982 respecting treaty rights and their vulnerability in *R. v. Moosehunter*: "The Government of Canada can alter the rights of Indians granted under treaties. . . . Provinces cannot."[17]

2.3. *Constitution Act, 1982*

Aboriginal and treaty rights not extinguished prior to April 17, 1982 are deemed to be "existing" under Canada's 1982 constitutional amendments.[18] The *Constitution Act, 1982* defines "aboriginal people of Canada" as including the Indian, Inuit, and Metis peoples of Canada.

"Aboriginal rights" are those rights held by aboriginal people that relate to activities that are an element of a practice, custom, or tradition integral to the distinctive culture of the aboriginal group claiming such rights. They may include rights related to activities which of necessity take place on land or relate to land such as hunting, fishing and trapping, and aboriginal title.[19] "Aboriginal title" is (a) a sub-category of aboriginal rights, (b) a right to the land itself, and (c) the special legal interest that some aboriginal people may possess in specific lands not covered by treaties or not otherwise extinguished. Aboriginal title is an encumbrance on the Crown's underlying title to land.[20]

"Treaty rights" are those rights that are contained in written agreements usually known as "treaties" entered into between the Crown and aboriginal people.[21] Some Canadian treaties date back to the seventeenth century and deal with specific rights, such as those related to hunting, fishing and trapping in specified territories in return for peace but do not contemplate any cession of lands.[22] Other Canadian historic treaties entered into in the nineteenth to early twentieth centuries are brief documents that contain provisions for cession, release and surrender of aboriginal rights and title in return for specified rights set out in the treaty such as hunting, fishing and trapping, and the reservation of lands to establish Indian reserves. Modern treaties or

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[17] *R. v. Moosehunter*, [1981] 1 S.C.R. 282 at 293, 123 D.L.R. (3d) 95, Dickson J..
[18] Subsection 35(1) of the *Constitution Act, 1982*, *supra* note 2 states that the "existing aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed".
[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.].
[20] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 [*Delgamuukw* cited to S.C.R.].
[21] *R. v. Badger*, [1996] 1 S.C.R. 771, 133 D.L.R. (4th) 324 [*Badger* cited to S.C.R.].
[22] Thomas Isaac, *Aboriginal and Treaty Rights in the Maritimes: The Marshall Decision and Beyond* (Saskatoon: Purich, 2001).

"land claim agreements" have been concluded during the past twenty-five years in areas not formerly subject to one of the older treaties.

Land claims agreements are more complex than the historic treaties, and can be hundreds of pages in length. Land claims agreements typically provide for some form of cession of aboriginal rights and title or other type of certainty in return for defined rights that include hunting, fishing, and trapping, co-management of resource areas, financial components, land use and regulatory authorities and settlement land, among others.

Although the Constitution protects existing aboriginal and treaty rights, they are not absolute.[23] The Courts may hold legislation and administrative decisions that interfere with or "infringe" aboriginal and treaty rights to be of no effect. However, Parliament and the Provincial Legislatures may continue to enact legislation and representatives of the Crown may continue to make decisions and act within their respective jurisdictional areas that infringe aboriginal and treaty rights, if such infringements can be "justified".

The Supreme Court of Canada set out the test to determine infringements of existing aboriginal rights and treaty rights in *Sparrow*[24] (as applying to aboriginal rights); the Court affirmed it in *Badger*[25] (as applying to treaty rights) and *Delgamuukw*,[26] (as applying to aboriginal title). Once an aboriginal right has been proven to exist by the group or person claiming the right, the first question to be asked to determine whether an infringement has occurred under s. 35(1) is "whether the governmental action in question has the effect of interfering with an existing aboriginal right. If it does, . . . it represents a *prima facie* infringement of s. 35(1)."[27]

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[23] Through a series of decisions including *R v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [*Sparrow* cited to S.C.R.], *Badger*, *supra* note 21, *Van der Peet*, *supra* note 19, *Delgamuukw*, *supra* note 20, *R. v. Marshall*, [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513 [*Marshall* cited to S.C.R.], and *R. v. Marshall*, [1999] 3 S.C.R. 533, 179 D.L.R. (4th) 193 [*Marshall* (reconsideration) cited to S.C.R.] (reconsideration refused), the SCC has attempted to provide an understanding of the meaning of aboriginal and treaty rights as recognized and affirmed in Canada's Constitution.

[24] *Sparrow*, *ibid.*

[25] *Supra* note 21.

[26] *Supra* note 20.

[27] *Sparrow*, *supra* note 23 at 1111, Dickson C.J.C. and La Forest J. See also *Delgamuukw*, *supra* note 20 at para. 160, Lamer C.J.C.

Other questions to be asked to determine interference and infringement are: (a) whether the limitation is unreasonable, (b) whether the infringing act imposes undue hardship on the aboriginal group claiming the right, (c) whether the infringing act denies the holders of the right their preferred means of exercising that right, and (d) whether the infringing act unnecessarily infringes the interests protected by the right.[28] The onus to prove an infringement of aboriginal rights and treaty rights rests with the group or person challenging the purportedly infringing governmental action.[29]

If a *prima facie* infringement is found, the next step of the analysis is justification; that is, determining whether the governmental infringement of an existing aboriginal or treaty right can be justified,[30] including whether the Crown's challenged action has a valid legislative objective. The Supreme Court of Canada has recognized that "the range of legislative objectives that can justify the infringement . . . is fairly broad."[31] The legislation must advance "important general public objectives"[32] or be in furtherance of a "compelling and substantial"[33] objective, such as "where the objectives furthered . . . are of sufficient importance to the broader community as a whole".[34] The Court has recognized such specific valid objectives as conserving and managing a natural resource[35] and "the development of agriculture, forestry, mining, and hydroelectric power, . . . general economic development, . . . protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations"[36]. The list is not closed.[37]

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[28] *Ibid.* at 1112, Dickson C.J.C. and La Forest J.
[29] *Ibid.*; see also *R. v. Gladstone*, [1996] 2 S.C.R. 723 at para. 39, 137 D.L.R. (4th) 648, Lamer C.J.C. [*Gladstone* cited to S.C.R.].
[30] *Sparrow*, *supra* note 23 at 1113, Dickson C.J.C. and La Forest J.; *Badger*, *supra* note 21 at paras. 82-96, Cory J.; and *Delgamuukw*, *supra* note 20 at para. 161, Lamer C.J.C.
[31] *Delgamuukw*, *ibid.* at para. 165, Lamer C.J.C.
[32] *Badger*, *supra* note 21 at para. 80, Cory J.
[33] *Sparrow*, *supra* note 23 at 1113, Dickson C.J.C. and La Forest J.; *Delgamuukw*, *supra* note 20 at para. 161, Lamer C.J.C.
[34] *Gladstone*, *supra* note 29 at para. 73, Lamer C.J.C.
[35] *Sparrow*, *supra* note 23 at 1113, Dickson C.J.C. and La Forest J.; *Gladstone*, *ibid.* at para. 74, Lamer C.J.C.; *Delgamuukw*, *supra* note 20 at para. 161, Lamer C.J.C.
[36] *Delgamuukw*, *ibid.* at para. 165, Lamer C.J.C.
[37] *Marshall* (reconsideration), *supra* note 23 at paras. 21 ("conservation or other purposes") and 26 ("conservation or other public purposes").

If a valid legislative objective is found to justify an infringement, the justification test proceeds to the second stage of analysis that deals with the "honour of the Crown".[38] The special trust relationship and, in appropriate circumstances, *sui generis* fiduciary duty owed by the Crown to aboriginal people "must be the first consideration" to determine whether infringing governmental action is justified.[39] The appropriate questions to be addressed in order to determine if an action of the Crown is compatible with the Crown's honour include "whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted."[40]

In *Marshall*, the Supreme Court of Canada affirmed that the *Sparrow* analysis applies to treaty rights cases.[41]

With this overview of the key concepts of Canadian aboriginal law, we can move on to a detailed discussion of three developments in Canadian law that provide the foundations for a growing certainty for natural resource developers in circumstances in which their projects may have an impact upon the rights of aboriginal people.

3. The Crown's Duty to Consult Aboriginal People

3.1. Introduction

The most important legal doctrine developed in Canadian law that assists in providing certainty for natural resource development in the face of constitutionally protected aboriginal rights is the Crown's duty to consult aboriginal people. The critical component of any justification of an infringement of such rights is the Crown being able to demonstrate that it has appropriately "consulted" with affected aboriginal groups. Crown/aboriginal consultation constitutes a relatively complex doctrine of Canadian law that is even yet not fully developed and understood.

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[38] *Sparrow*, *supra* note 23 at 1114, Dickson C.J.C. and La Forest J.; *Gladstone*, *supra* note 29 at para. 54, Lamer C.J.C.; *Delgamuukw*, *supra* note 20 at para. 162, Lamer C.J.C.

[39] *Sparrow*, *ibid.*

[40] *Sparrow*, *ibid.* at 1119, Dickson C.J.C. and La Forest J.

[41] *Marshall*, *supra* note 23 at para. 7, Binnie J.: "treaty rights within the meaning of s. 35 of the *Constitution Act, 1982*, and are subject to regulations that can be justified under the *Badger* test."; see also *Badger*, *supra* note 21 at paras. 96-97, Cory J.; *Marshall* (reconsideration), *supra* note 23 at para. 32.

However, the study of the applicable case law and the demonstrable relationship between the judicial commentary on Crown consultation with aboriginal people and the doctrines of general administrative law provide a basis for understanding what the doctrine of Crown/aboriginal consultation means in practice and where future developments of the doctrine appear to be going.[42]

The duty of the Crown to consult aboriginal people arises when governmental actions infringe existing aboriginal or treaty rights. The Supreme Court of Canada in *Sparrow*,[43] *Delgamuukw*[44] and other decisions[45] confirmed that the Crown's duty to consult aboriginal people requires a fundamental shift in the way the Crown has traditionally dealt with aboriginal people. Because of those decisions, some governments have attempted to enhance their consultation policies and mechanisms.[46] However, these attempts by the Crown to create working consultation regimes have not yet finally resulted in such predictable stability with respect to justification of infringing actions as to create strong judicial deference for governmental action conforming to such regimes.

3.2. Source of the Crown's Duty to Consult Aboriginal People

The doctrine of the Crown's duty to consult aboriginal people has arisen from judicial analysis of justification of Crown infringements of aboriginal and treaty rights.[47] However, both case law in the aboriginal field and in Canadian law generally suggest at least three other sources for such duty: (a) the right of all persons under Canadian law to have the Crown deal with them in a manner that is, with few exceptions, procedurally fair, reasonable and in accordance with the procedural and substantive elements of administrative law; (b) the Crown being required as a fiduciary to consult with and consider the views of its aboriginal beneficiaries in circumstances

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[42] Thomas Isaac and Anthony Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41 Alta. L. Rev. 49.
[43] *Supra* note 23 at 1113, 1119, Dickson C.J.C. and La Forest J.
[44] *Supra* note 20 at para. 168, Lamer C.J.C.
[45] *Marshall* (reconsideration), *supra* note 23 at paras. 43-44, *R. v. Nikal*, [1996] 1 S.C.R. 1013 at para. 110, 133 D.L.R. (4th) 658, Cory J., *Van der Peet*, *supra* note 19 at para. 311, M°Lachlin J., dissenting, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2001), 214 F.T.R. 48 at para. 130, [2002] 1 C.N.L.R. 169 (F.C.T.D), Hansen J., rev'd [2004] F.C.J. No. 277 (F.C.A.), leave to appeal to S.C.C. requested, and *Makivik Corp. v. Canada (Minister of Canadian Heritage)* (1998), [1999] 1 F.C. 38 at paras. 107-109, (*sub nom. Nunavik Inuit v. Canada (Minister of Canadian Heritage)*) 164 D.L.R. (4th) 463 (F.C.T.D.), Richard A.C.J.
[46] See supra note 4.
[47] *Sparrow*, *supra* note 23.

in which it can be shown that such fiduciary relationship exists;[48] and (c) the "honour of the Crown" can only be properly served in any circumstance in which the Crown considers the point of view of the aboriginal group and demonstrably addresses such point of view by acting honourably in any Crown decision making.

3.3. Nature of the Crown's Duty to Consult Aboriginal People

In *Delgamuukw*,[49] Lamer C.J.C. stressed the importance of consultation by the Crown with aboriginal people regarding decisions, actions, and legislation of the Crown that may infringe aboriginal title:

> There is always a duty of consultation. . . . The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal people whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. 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.[50]

That quotation is the only authoritative discussion, by the Supreme Court of Canada, of the Crown's duty to consult. It sets out that there are three general categories of consultation with aboriginal people emerging. There is the narrow category of "occasional", "rare", or "mere consultation" which must occur with the intention to address aboriginal concerns respecting an aboriginal or treaty right. "Mere consultation" would seem to be, in its least technical meaning, talking together for mutual understanding. "Mere consultation" implies discussion between Crown servants or agents and affected aboriginal people, with the Crown responding appropriately to concerns raised. In most cases, however, something "significantly deeper than mere consultation" will be required. The Supreme Court of Canada has provided little guidance is provided as to what this broadest category means. While it involves aboriginal participation by way of input in the decision-making process, it clearly does not extend into the third described level of consultation, which seems to resemble negotiations requiring the consent of both parties

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[48] *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 220 D.L.R. (4th) 1, aff'g (1999), 247 N.R. 350, [2000] 3 C.N.L.R. 303 (F.C.A.), aff'g (1995), (*sub nom. Roberts v. Canada*) 99 F.T.R. 1 (F.C.T.D.) [*Wewaykum*].
[49] *Supra* note 20.
[50] *Ibid.* at para. 168, Lamer C.J.C.

or, perhaps, adjudication. This broad middle ground of Crown consultation with aboriginal people seems primarily concerned with a duty on the Crown to accommodate the interests of aboriginal people. At the polar opposite of the consultation spectrum from "mere consultation", is consultation requiring the "consent" of the aboriginal group involved. It is not clear yet under what circumstances such "consent" would be required.

These three categories in the doctrine of Crown/aboriginal consultation correspond closely with the spectrum of categories of possible fair procedures in the doctrine of procedural fairness in general Anglo-Canadian administrative law. Like Lamer C.J.C. in *Delgamuukw*, de Smith in his text, *Judicial Review of Administrative Action*,[51] states that "mere consultation" is at the lower end of the context of fair procedures.[52] In a striking parallel to Lamer C.J.C., de Smith notes that a full hearing is at the other end of the general administrative law consultation spectrum. Between these familiar poles, once again, is the bulk of the content of the doctrine of procedural fairness including the entitlement to make written and oral representations and to have such representations meaningfully considered. In Crown/aboriginal consultations, meaningful consideration includes attempting accommodation of aboriginal people's interests including such measures as mitigating the negative aspects of justifiable infringements on existing aboriginal and treaty rights and attempting negotiated solutions, where appropriate.

In *Marshall* (reconsideration), the Supreme Court of Canada suggested that agreements between aboriginal people and the Crown could satisfy the requirement to maintain the principles associated with the special trust relationship between them.[53] This is consistent with the Crown acting "honourably" which is another touchstone of appropriate consultation. In *Sparrow*,[54] the Supreme Court of Canada affirmed its general approach regarding the Crown's fiduciary obligations to aboriginal people first outlined in *Guerin v. The Queen*,[55] by stating that

[51] S.A. de Smith, *Judicial Review of Administrative Action*, 5th ed. by The Rt. Hon. The Lord Woolf & Jeffrey Jowell (London: Sweet & Maxwell, 1995) at 377-384.
[52] *Ibid.* at 431.
[53] *Marshall* (reconsideration), *supra* note 23 at para 43.
[54] *Supra* note 23.
[55] [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [*Guerin* cited to S.C.R.].

the scrutiny to be applied to federal and provincial legislative authority under s. 35(1) is in keeping with "the concept of holding the Crown to a high standard of honourable dealing."[56]

It is fairly clear that consultation in the aboriginal context is different from the consultation in the context of general administrative law in that it responds to the peculiar Crown/aboriginal relationship by requiring that adequate Crown/aboriginal consultation possess both a *procedural* and a *substantive* element.

Procedurally, if their constitutional rights are to be infringed, aboriginal people must be given an opportunity to have their views heard and considered in a manner entirely analogous to that required by general administrative law in the doctrine of procedural fairness. In effect, bad procedure can render unenforceable a correct decision.[57]

Substantively, aboriginal people must have their rights accommodated which can include mitigation of harmful impacts on aboriginal rights, minimal impairment of aboriginal rights or *attempting* negotiated solutions, as the case may be. If consultation does not produce a Crown decision that the affected aboriginal people accept as an appropriate basis for justifiable infringement, the adequacy of such Crown's justification may be litigated in the Courts according to the justification test noted above.[58] In effect, the "consent" of *Delgamuukw* and the "judicial hearing" of de Smith seem to be closely related. Only correct procedures and substantively correct decisions will render the justification of an infringement resulting from a Crown/aboriginal consultation enforceable in the Courts. The standard of reasonableness, rather than correctness, is the appropriate standard to be applied to such consultation.

3.4. Engagement of the Crown's Duty to Consult

Case law consistent with *Sparrow*[59] has confirmed that the right of aboriginal people to be consulted by the Crown does not exist independent of an aboriginal or treaty right. In

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[56] *Sparrow, supra* note 23 at 1109, Dickson C.J.C. and La Forest J.
[57] *Nunavut Tunngavick Inc. v. Canada (Minister of Fisheries and Oceans)* (1999), 176 F.T.R. 44, [2000] 3 C.N.L.R. 136 (F.C.T.D.), aff'd (2000), 262 N.R. 219 (F.C.A.).
[58] *Marshall* (reconsideration), *supra* note 23 at para. 43.
[59] *Supra* note 23 at 1109, Dickson C.J.C. and La Forest J.

TransCanada Pipelines Ltd. v. Beardmore (Township),[60] the Ontario Court of Appeal held that consultation is not an independent right held by aboriginal people but attaches to already *existing* aboriginal and treaty rights.[61]

However, the British Columbia Court of Appeal in both *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*[62] and *Haida Nation v. British Columbia (Minister of Forests)*,[63] has held that the duty to consult can arise absent of a *proven* aboriginal right. Both decisions affirmed that the duty to consult could be engaged in cases where an aboriginal right only *prima facie* appears to be existing and such purported right is imperilled by infringement. These decisions are currently under appeal to the Supreme Court of Canada.[64]

The logic of this position is that in order for the Crown's consultation with aboriginal people to be meaningful, it should precede, not follow, an infringement. No aboriginal group has yet judicially proven aboriginal title and they have proven few aboriginal rights. Such proof entails almost prohibitive legal expense. Therefore, in most foreseeable cases, Crown/aboriginal consultation must, to be meaningful, occur *prior* to any reasonable ability by the aboriginal group judicially to prove their claimed aboriginal rights or title.[65] The British Columbia Court of Appeal has held that the duty to consult and to accommodate does not arise solely from the s. 35(1) justification test, but that it also arises from the "broader fiduciary footing of the Crown's relationship with the Indian peoples who are under its protection".[66] However, in light of the Supreme Court of Canada decision in *Wewaykum*,[67] the British Columbia Court of Appeal conclusion likely needs modification to read "honour of the Crown" and not "fiduciary", because

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[60] (2000), 186 D.L.R. (4th) 403, 137 O.A.C. 201 (C.A.) [*TransCanada Pipelines* cited to D.L.R.].
[61] *Ibid.* at para. 112, Borins J.A.
[62] (2002) 211 D.L.R. (4th) 89, (*sub nom. Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*) [2002] 4 W.W.R. 19 (B.C.C.A.), leave to appeal to S.C.C. granted, [2002] S.C.C.A. No. 148 (QL). See also *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107, 4 C.E.L.R. (3d) 214 (C.A.).
[63] [2002] 6 W.W.R. 243, 164 B.C.A.C. 217 (C.A.), leave to appeal to S.C.C. granted, [2002] S.C.C.A. No. 417 (QL) [*Haida* cited to W.W.R.].
[64] Both were heard together on 24-25 March 2004.
[65] *Haida*, *supra* note 63 at paras. 41-42, Lambert J.A.
[66] *Ibid.* at para. 55, Lambert J.A.
[67] *Supra* note 48.

Wewaykum clearly dispels any notion of a "universal" Crown/aboriginal *sui generis* fiduciary relationship.[68]

Engagement of Crown/aboriginal consultation based on the honour of the Crown resembles the general but not universal duty of the Crown to treat all its subjects fairly when acting or determining issues likely to have an impact upon them. It diverges from such general administrative law duty in being apparently a universal attribute of Crown/aboriginal relations.

Until finally determined by the Supreme Court of Canada, Canadian governments are well advised to adopt a broad approach when fulfilling their duty to consult aboriginal people in order to ensure that potentially infringing Crown actions can withstand judicial scrutiny under s. 35(1). In *R. v. Côté*,[69] the Supreme Court of Canada stated that "[s]ection 35(1) only lays down the constitutional minimums that governments must meet in their relations with aboriginal peoples with respect to aboriginal and treaty rights. Subject to constitutional constraints, governments may choose to go beyond the standard set by s. 35(1)."[70] Clearly, in determining the appropriate content of Crown/aboriginal consultation, the Crown must look to the Courts for guidance but is free to improvise more expansively fair procedures in the spirit of that general guidance. To ensure that Crown decisions can withstand judicial scrutiny under s. 35(1), the Crown may have to go beyond the minimum standards set by s. 35(1) and the general guidance of the Courts relating to Crown/aboriginal consultation, as the appropriate standard will vary along the spectrum noted above according to the circumstances.

3.5. Application of the Crown's Duty to Consult

The nature of the rights created by s. 35(1) requires a case-by-case analysis and, in many respects, a subjective approach both to when consultation and to what kind of consultation is appropriate. This is one aspect of what makes consultation with aboriginal people particularly difficult for large institutions in a vast, multi-jurisdictional country like Canada.

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[68] This development is dealt with more thoroughly in §4 below.
[69] [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385 [cited to S.C.R.].
[70] *Ibid.* at para. 83, Lamer C.J.C.

Neither "mere consultation" in the Crown/aboriginal context, nor the broad middle ground of the Crown/aboriginal consultation procedural spectrum, requires *agreement* between the Crown and the consulted aboriginal group in order to be "adequate" to support the justification of an infringement. Rather, each consultation in the broad spectrum of Crown/aboriginal consultation must be "adequate" in light of the specific circumstances of each case in order to justify infringement. Litigation is, too often, the resort to which the parties to a Crown/aboriginal consultation turn to determine if their consultation has been "adequate".

"Consultation" in its general administrative law sense is a normal component of the conduct of Canadian governmental affairs. When administrative action may infringe the peculiar constitutional rights of aboriginal people, "consultation" takes on a meaning more complicated than that in general administrative law and becomes the key component in justifying an infringement of such rights. It is not surprising that the Supreme Court of Canada decisions give guidance, but no bright-line test for "adequate" Crown/aboriginal consultation. Adequate Crown/aboriginal consultation depends on case-by-case analysis consistent procedurally with the general administrative law of both procedural fairness and the substantive integrity of decision-making. Taken together, these are the constituent elements of the doctrine of Crown/aboriginal consultation and constitute a novel combination of legal tests each of which is well known independently in general administrative law.

Based on the case law, application of the Crown's duty to consult aboriginal people also appears to require procedurally that: (a) no unreasonable timelines be imposed, considering the relevant circumstances; (b) government positions or decisions are properly explained; (c) the aboriginal concern is genuinely considered and addressed; (d) the Crown deals with aboriginal people reasonably and takes their rights seriously; (e) there is no "sharp dealing"; and (f) *bona fide* attempts are made to accommodate the interests of aboriginal people made in the face of interference with aboriginal and treaty rights.

The critical issue for the Crown is the extent to which the Crown is prepared in any particular circumstances to satisfy its consultation duties with respect to aboriginal and treaty rights. Addressing this issue is not an easy task. In order to accomplish most appropriately

consultation with aboriginal people, all Canadian governments should establish consistent and thorough intergovernmental and intra-governmental standards and policies. As of mid-2004, this is not yet the case. The relatively plain language of the Courts is too often obscured in a profound lack of institutional clarity of approach by the many faces of the Crown. This failure of uniform standards and policies is particularly evident in the Canadian arctic where, depending upon the territory involved, up to a dozen federal, territorial, and aboriginal authorities may have important roles in effecting decisions upon the permitting and licensing of natural resource projects. Constant standards and policies could eventually establish a level of judicial deference to the results of consultations following uniform standards so as to finally end the myth that an unsolvable "aboriginal problem" burdens Canada's natural resource base. If it were known that honouring established consultation guidelines would be accepted by the Courts as the appropriate measure of justification, the level of litigation relating to infringement of aboriginal and treaty rights would fall to that normal in general administrative law, based on the standard of reasonableness.

A further component to a successful consultation regime is not only ensuring that proper policies are put in place, but also that the consultation guidelines or policies are applied *consistently* from case to case with materially the same degree of expertise and professionalism over a wide range of circumstances. Many Canadian governments yet view aboriginal consultation as a secondary adjunct to their dealings with aboriginal people. Another aspect of institutional clarity is proper communication and lines of authority within and between each governmental organization engaged in Crown/aboriginal consultation so as to allow effective, efficient, and consistent decision-making.

The decisions of the Supreme Court of Canada strongly suggest that the legal duty of the Crown to consult with aboriginal people rests solely with the Crown[71] and not with private interests such as companies involved in mining, energy, and other industries. It rests ultimately only with the Crown to account for and consider aboriginal interests that its actions may affect. Such consideration must be in good faith and transparent. It is common in important resource development situations for the Crown to delegate execution of the procedural aspects of its duty

[71] *Delgamuukw*, *supra* note 20 at para. 168, Lamer C.J.C.; *Marshall* (reconsideration), *supra* note 23 at para. 43.

to consult with neighbouring aboriginal people to the industry proponents seeking a particular development. This is particularly true for environmental assessment processes. Such delegation in the context of an otherwise demonstrably fair process has been held to be reasonable in order to effect an appropriate consultation. The Crown cannot delegate the substantive part of a consultation.

Unfortunately in some situations of resource developers dealing with their aboriginal neighbours, both federal and provincial governments have stood aloof from involvement in Crown/aboriginal consultation and left industry to negotiate critical relationships between industry and its aboriginal neighbours in respect of access to natural resources with a minimum of guidance. Such absence of the Crown's involvement means an absence of appropriate consultation and results in a lack of certainty. Even the fairest negotiated agreement relating to an infringement of s. 35(1) made without benefit of Crown consultation, procedurally fair and substantively correct, may be set aside by the Courts.

3.6. Accommodation[72]

It is clear from the foregoing that one element of some consultation between the Crown and its aboriginal subjects is accommodation, a word of broad meaning that the Courts are willing to stretch to include any tool that might effect a fair result in the course of justifying an interference with aboriginal or treaty rights. That said, it is not apparently a necessary component of any appropriate consultative process that a *mutually agreed* accommodation has to be worked out with the aboriginal group. Rather, appropriate accommodation is circumstance driven along with the rest of the consultation process. Thus, being sure that a resource developer has reached an agreement with its aboriginal neighbours on a range of subjects seen as essential to justification of the interference with such neighbours' rights is a normal part of consultations relating to major resource developments that may have an impact upon aboriginal or treaty rights. We will examine below the theory and practice of the so-called "Impact and Benefit Agreement" but here it is necessary to realize that such agreements fit into the whole consultation structure.

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[72] For a fuller discussion of this topic, see Thomas Isaac, "The Crown's Duty to Consult and Accommodate Aboriginal People" (2003) 61 The Advocate 865 at 865, 880.

3.7. Duty to Consult—Conclusion

"Consultation", in the aboriginal context, while related, is not exactly the same as "consultation" in general administrative law insofar as it possesses both procedural and substantive elements. The peculiar nature of aboriginal and treaty rights has resulted in the development of a separate aboriginal law doctrine of the Crown's duty to consult aboriginal people. Such duty to consult did not emerge, fully formed. It has developed slowly for resource developers and aboriginal people but unusually quickly in common-law terms by judicial reasoning since *Sparrow*.[73] The same judiciary that provided judicial acceptance of the duty of procedural fairness in general administrative law developed it. The coincidence of the underlying principles and the described structures of both duties are not surprising. Such coincidence makes the well-developed jurisprudence of the duty of fairness and proper substantive decision making a helpful guide to what the Courts will accept as an appropriate measure of the exercise of the duty to consult.

An understanding of the Crown's duty to consult is critical to achieving a lasting harmony among aboriginal people, industry, and governments. It is almost axiomatic in Canada today that resource industries generally do a good job of fostering working relationships with the aboriginal neighbours who have or allege that they have rights that natural resource development have affected. However, the diplomacy and generosity of industry are insufficient to make those working relationships certain for the life of a project subject to aboriginal rights. Certainty involves engagement by the Crown in the process of relationship building and, to the extent that such relationships require infringement of aboriginal or treaty rights, it will be necessary for the Crown at the right time and in the right way to exercise its duty to consult.

The next topic to be discussed is the much-invoked doctrine of the Crown's fiduciary relationship with aboriginal people which is connected, in appropriate circumstances, with the duty to consult. Certainly, where such a fiduciary duty exists, the Crown must carefully attend to the accommodation of aboriginal interests.

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[73] *Supra* note 23.

4. The Crown's Fiduciary Relationship with Aboriginal People

4.1. Introduction

The second factor in creating the developing certainty for natural resource developers in Canada is judicial clarification of the Crown's *sui generis* fiduciary relationship with aboriginal people. Such fiduciary relationship with aboriginal people has not been a direct issue in respect of resource development except in circumstances in which aboriginal people have sought and obtained redress for inappropriate use allowed by the Crown of aboriginal resources. That said, proof of a fiduciary duty of the Crown in respect of specific resource development circumstances would clearly push the consultation with respect to any infringement of aboriginal or treaty rights higher up the consultation spectrum. It is clearly in the interest of resource developers that it be clarified (a) if such high duty is a universal attribute of Crown/aboriginal relations and, if it is not, (b) when such a duty exists and when it does not.

The Supreme Court of Canada's clarification of such fiduciary relationship demonstrates how the Court has taken a very broad and uncertain concept, the *sui generis* fiduciary duty of the Crown, and fashioned it into a finite legal doctrine. Such action by the Supreme Court of Canada seems to demonstrate the developing view of the Court in respect of the interpretation of aboriginal rights towards increased certainty in such interpretation. By defining such fiduciary relationship, the Supreme Court of Canada has removed the uncertainty inherent in a powerful doctrine that, until recently, has lacked effective limits and has been invoked to widen the liability of the Crown in respect of Crown/aboriginal relations.

The Crown's acceptance of its special relationship with the original occupants of Canada has fundamentally characterized the history of the relationship between Canada's aboriginal people and successive governments of Canada. This fundamental historical and legal linkage between the Crown and aboriginal people manifests itself in all aspects of the interrelationship among Crown/aboriginal people and resource developers.

For many years, the Crown/aboriginal fiduciary relationship has formed a key component of much aboriginal litigation. It has been used successfully to expand the notion of aboriginal

rights. The Supreme Court of Canada decision in *Wewaykum* has clarified the key indicia of the Crown/aboriginal relationship in both affirming the existence of the Crown's fiduciary relationship with aboriginal people and limiting it to appropriate circumstances by placing such relationship clearly within the realm of general Canadian law. Without expressly stating it, the Supreme Court of Canada has implied that the Crown/aboriginal relationship is more complex than previously enunciated because while it seems that the Crown must treat aboriginal people honourably, the existence in any particular circumstances of the Crown/aboriginal fiduciary relationship is based on specific circumstances and is guided by the general law relating to fiduciaries. As such, it is not a unique and all-encompassing protection to be invoked outside the indicia of a fiduciary relationship in the general law. The Court's willingness to define it in traditional legal terms is indicative of a judicial approach that has rejected the overture of speculative doctrine based on the fanciful legal constraints when dealing with aboriginal rights.

4.2. Source of the Crown's Fiduciary Relationship with Aboriginal People

It is generally understood that, in equity, where a person deals with the property of another, that person becomes, in conscience, subject to duties to the owner of the property that are not known in the common-law relationship between such parties. Such duties are referred to as "fiduciary" and arising under a constructive trust because they reflect a duty to act in *bona fides*, as judged by the Courts in equity where the relationship of fiduciary and beneficiary is not subject to an express and clearly defined trust.[74]

4.3. Nature of the Crown's Fiduciary Relationship with Aboriginal People

The Supreme Court of Canada has discussed the fiduciary relationship between the Crown and aboriginal people in a number of decisions: *Guerin*,[75] *Sparrow*,[76] *R. v. Adams*,[77] *Delgamuukw*,[78] *Osoyoos Indian Band v. Oliver (Town)*,[79] and *Wewaykum*.[80] While the historic and primary

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[74] Harold Greville Hanbury & Ronald Harling Maudlsey, *Modern Equity*, 13th ed. (London: Stevens & Sons, 1989) at 280. In *Guerin, supra* note 55 at 386-387, Dickson J., while denying a constructive trustee role for the Crown, first enunciated the *sui generis* trust-like relationship of Crown and aboriginal people in such circumstances.
[75] *Supra* note 55.
[76] *Supra* note 23.
[77] [1996] 3 S.C.R. 101, 138 D.L.R. (4th) 657.
[78] *Supra* note 20.
[79] [2001] 3 S.C.R. 746, 206 D.L.R. (4th) 385 [*Osoyoos* cited to S.C.R.].

relationship with aboriginal people has been with the federal Crown, the provincial Crowns also have a fiduciary relationship with aboriginal people.[81]

The first substantive Supreme Court of Canada decision to deal with the Crown's fiduciary relationship with aboriginal people is *Guerin*[82] in 1984. The facts in *Guerin* are that in October 1957, the Musqueam Indian Band of British Columbia surrendered 162 acres of reserve land situated in the City of Vancouver to the federal Crown. The surrender enabled the Musqueam to secure a lease with a golf club. The terms and conditions of the lease were not part of the surrender, but rather were the result of discussions between federal officials and the Musqueam at band meetings. The Crown executed the lease on terms that were not as favourable as the terms originally agreed upon orally with the Musqueam. The Crown did not receive the Musqueam's permission to change the terms of the lease, nor did it provide a copy of the lease to the Musqueam until 1970. The Musqueam instituted an action against the Crown for breach of trust. A majority of the Supreme Court of Canada held that the Crown has a fiduciary duty respecting Indians lands:

> [T]he 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. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.[83]

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[80] *Supra* note 48.

[81] For example, in *Smith v. The Queen*, [1983] 1 S.C.R. 554, 147 D.L.R. (3d) 237 [cited to S.C.R.], Estey J., for the majority, was considering a band's release of its interests in land and how such a release could give rise to differences between the parties to the release. Estey J. quotes (at 565) with approval Street J. in *Ontario Mining Co. v. Seybold* (1900), 32 O.R. 301 at 303-304 (Div. Ct.), aff'd (1901), (*sub nom. Ontario Mining Company v. Seybold*) 32 S.C.R. 1, aff'd (1902), (*sub nom. Ontario Mining Company, Limited v. Seybold*) [1903] A.C. 73 (P.C.) (where Lord Davey quoted (at 81) the same passage with approval): "The surrender was undoubtedly burdened with the obligation imposed by the treaty to select and lay aside special portions of the tract . . . for the special use and benefit of the Indians. The Provincial Government could not without plain disregard of justice take advantage of the surrender and refuse to perform the condition attached to it." See also *Cree Regional Authority v. Canada (Federal Administrator)* (1991), [1992] 1 F.C. 440 at 470, 84 D.L.R. (4th) 51 (T.D.) and *Ontario (A.G.) v. Bear Island Foundation*, [1991] 2 S.C.R. 570 at 575, 83 D.L.R. (4th) 381 [*Bear Island* cited to S.C.R.]. In *Bear Island*, the Supreme Court of Canada noted "that the Crown has failed to comply with some of its obligations . . . and thereby breached its fiduciary obligations to the Indians". What is interesting in *Bear Island* is that the federal Crown was not the subject of the litigation, but rather it was the provincial Crown of Ontario.

[82] *Supra* note 55. For commentary see John Hurley, "The Crown's Fiduciary Duty and Indian Title: *Guerin* v. *The Queen*" (1985) 30 *McGill L.J.* 559.

[83] *Guerin*, *ibid.* at 376, Dickson J.

In *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*,[84] the Supreme Court of Canada held that the federal government breached its fiduciary duties to an Indian band resulting from the surrender of two parcels of reserve land and related mineral rights. The Court held that the federal Crown failed to exercise its statutory power, which in this case, would have mitigated the Indian band's loss. As a trustee of the Indian band's land, the Crown was under a fiduciary obligation to deal with the land and surrender in the "best interests" of the Indian band. Finally, the Indian band was entitled to receive compensation based on what a reasonable price would have been for the land, rather than placing an obligation on the Crown to secure the best possible price for the land.

In *Sparrow*, Dickson C.J.C. and La Forest J. stated that "the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."[85] The *Sparrow* statement on the fiduciary relationship is significant in that it signifies a burden on the ability of federal, provincial, and territorial governments to exercise their legislative authority. In *Van der Peet*, the Supreme Court of Canada stated:

> The Crown has a fiduciary obligation to aboriginal people with the result that in dealings between the government and aboriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implications of the honour of the Crown, treaties, s. 35(1) [of the *Constitution Act, 1982*], and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation.[86]

Thus, legislation, treaties, and constitutional provisions, including s. 35(1), must be interpreted generously and liberally when considering the rights of aboriginal people.

In *Osoyoos*,[87] the Supreme Court of Canada considered the fiduciary duty of the Crown when lands are removed from their reserve status. The Court noted that the fiduciary duty of the Crown is not restricted to issues regarding the surrender of reserve land but is also imposed upon the Crown "to expropriate or grant only the minimum interest required in order to fulfil that

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[84] [1995] 4 S.C.R. 344, 130 D.L.R. (4th) 193.
[85] *Supra* note 23 at 1108.
[86] *Supra* note 19 at para. 24, Lamer C.J.C.
[87] *Supra* note 79.

public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band".[88] Commenting further on this fiduciary duty with respect to issues of expropriation of reserve land, the Court stated that the Crown acts in the public interest when determining whether an expropriation involving Indian reserve land is necessary in order to fulfil some public purpose. At this stage, the Court noted that no fiduciary duty to the aboriginal inhabitants of the reserve exists. However, the Court also stated that once the decision to expropriate has been made, the fiduciary duty of the Crown is raised and requires the Crown to expropriate any interest that will fulfil the public purpose in a manner that preserves the Indian interest in the reserve land to the greatest extent practicable:[89] "The duty to impair minimally Indian interests in reserve land not only serves to balance the public interest and the Indian interest, it is also consistent with the policy behind the rule of general inalienable ability in the *Indian Act* which is to prevent the erosion of the native land base."[90]

The Supreme Court of Canada concluded in *Osoyoos* that the Crown's fiduciary duty must be to protect the use and enjoyment of Indian interest in expropriated reserve lands to the greatest extent practicable and includes the duty to protect the Indian interest to such an extent that it preserves an Indian band's jurisdiction to tax the land pursuant to the Act.[91]

The single most important decision on the Crown's fiduciary relationship with aboriginal people is the Supreme Court of Canada's 2002 decision in *Wewaykum*.[92] In *Wewaykum*, a unanimous panel of Supreme Court of Canada expressly affirmed that the general principles relating to fiduciary relationships in Canadian law were both the origin of, and imposed a limit upon, the doctrine of the Crown's fiduciary duty to aboriginal people. By so doing, the Court made clearer than ever before that it would interpret the Crown's relationship with its aboriginal peoples, while subject to important unique issues based upon the aboriginal peoples' historic occupation of Canadian lands, by adaptation of the doctrines of general Canadian law applicable to the circumstances of each case.

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[88] *Ibid.* at para. 52, Iacobucci J.
[89] *Ibid.* at para. 53, Iacobucci J.
[90] *Ibid.* at para. 54, Iacobucci J. See also *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119 at para. 52, 147 D.L.R. (4th) 1.
[91] *Ibid.* at para. 55, Iacobucci J.
[92] *Supra* note 48.

Unlike the earlier cases in which the Supreme Court of Canada dealt with the Crown's fiduciary duty to aboriginal people, most of which contemplated material damages to aboriginal people due to Crown errors in dealing with their property, *Wewaykum* dealt with a minor clerical error made long ago by a Crown servant which was without any material adverse effect upon the aboriginal people involved in the case. In effect, the case law before *Wewaykum* had led to an inflated expectation of what the Crown's *sui generis* fiduciary duty to aboriginal people entails.

In *Wewaykum*, the Supreme Court of Canada clearly confirmed the existence of such a fiduciary duty in appropriate circumstances but clarified that such a duty is not an attribute of the relationship between the Crown and aboriginal people in all circumstances. *Wewaykum* and other recent Supreme Court of Canada decisions respecting aboriginal and treaty rights stand for:

(a) placing reasonable limits on the exercise and interpretation of aboriginal and treaty rights;

(b) placing limits on the application of the Crown's fiduciary duty to aboriginal people, akin to the standards normally applicable under general Canadian fiduciary law, namely that not every duty in a fiduciary relationship is fiduciary in nature;

(c) a clearer definition of the Crown's fiduciary relationship with aboriginal people;

(d) the proposition that the Crown's fiduciary duty to aboriginal people is best used in the case of exploitative bargains and with the administrative responsibilities of the Crown in dealing with reserve land and band assets; and

(e) holding aboriginal groups to a reasonable standard more consistent with the rules governing Canadian law, in this case, the application of limitation periods.

Although *Wewaykum* does not deal expressly with the linkage of the honour of the Crown with specific fiduciary obligations, *Wewaykum* clearly confirms that the general law of Canada provides the legal basis to such an important component of the Crown/aboriginal relationship and thus adds greater clarity to an area of potential confusion relating to the relationship between Crown, aboriginal peoples and natural resource development proponents seeking to deal with the Crown for access to natural resources on or under land subject to aboriginal interests.

4.4. Fiduciary Duty—Conclusion

This discussion of the fiduciary relationship between the Crown and aboriginal people demonstrates that a crucial element of the Crown/aboriginal relationship is dependent upon well-known principles of Canadian law. This is an important development because it demonstrates that the Supreme Court of Canada is moving away from defining aboriginal and treaty rights in an expansive way. The uncertainty of the Crown's initially expansive approach has been materially reduced by making clear that the rules of established Canadian law are the measure of the Crown/aboriginal fiduciary duty and promises to be the measure of future Canadian jurisprudence in the aboriginal law field generally. In effect, the doctrine has admirably provided equitable relief to some of the worst circumstances of historic abuse in the Crown/aboriginal relationship. However, it is now shown to be limited to circumstances in which the normal indicia of duties in equity can be found. In an earlier decision of the Supreme Court of Canada dealing with another *sui generis* concept in Canadian law, Binnie J. said that "[r]eference to anything as "*sui generis*" tends to create a *frisson* of apprehension or uncertainty amongst lawyers until the jurisprudence about a particular subject matter is further developed."[93] It seems fair to say that *Wewaykum* has abated the apprehension or uncertainty associated with both the *sui generis* fiduciary duty of the Crown to aboriginal people and the apprehension or uncertainty so often initially associated with doctrines developed since 1982 to explain aboriginal and treaty rights.

5. Agreements between Resource Developers and Aboriginal People

5.1. Introduction

A third important factor in the development of certainty in Canadian natural resource development, where that development has an impact upon aboriginal or treaty rights, has its origins in common sense business practice but has developed some complexity in repeated practice. Agreements between resource developers and neighbouring aboriginal communities that set out the relationship, opportunities, and understandings between the two in a mutual search for certainty are becoming increasingly common in all parts of Canada. While such

[93] *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 at para. 28, 167 D.L.R. (4th) 577.

agreements vary in the size, scope, and complexity, they share one common theme: better and more certain relationships between aboriginal communities and industry.

Governments in Canada support creation of such agreements not only for their practical usefulness in furthering good community relations and providing some economic benefits to aboriginal communities within their jurisdictions, but also because, in some circumstances, such agreements form an adjunct to Crown/aboriginal consultation.

5.2. Impact and Benefit Agreements

It is now normal for aboriginal communities to become involved in the development of resource projects having an impact upon their communities. Impact and Benefit Agreements ("IBAs") (also variously known as contracts, agreements, letters of understanding, memoranda of understanding and access agreements) between resource developers and aboriginal communities[94] are pursued in order to address the impacts of projects on aboriginal communities. They also allow the members of such communities to participate in such projects so as to realize benefits from such projects. The general objective of IBAs is to establish the foundation for a relationship between project proponents and aboriginal communities.

Governments in Canada typically promote IBAs because they can provide aboriginal communities with some benefits resulting from neighbouring resource development and some degree of stability between such communities and project proponents. IBAs can exist without any Crown involvement, although increasingly they form an integral part of appropriate Crown consultation. IBAs do not focus solely on economic issues. They can also address community-based matters. Relationship building between resource project proponents and affected aboriginal groups has become a necessary component to move forward projects where interaction with aboriginal neighbours will occur.

IBAs take many forms and are highly dependent upon (a) the specific features of the project, including the nature of the resource to be developed, the location of the proposed

[94] See Steven A. Kennett, *A Guide to Impact and Benefit Agreements* (Calgary: Canadian Institute of Resources Law, 1999).

development and its stage of exploration or development; (b) the legal status of the land and/or the resources at issue, including claims, rights and interests of the aboriginal groups in relation thereto; and (c) the applicable statutory requirements, government policies and procedures and other political circumstances prevailing (both with respect to the federal, provincial or territorial governments involved, and with respect to any aboriginal communities and institutions involved).

While the contents of IBAs differ according to circumstances, they may, but do not necessarily, address one or more of the following matters: (a) aboriginal education, training and employment opportunities, and workplace conditions; (b) aboriginal economic development and business opportunities; (c) social, cultural and community support; (d) environmental monitoring and management; and (e) financial provisions, such as resource revenue sharing and compensation provisions.

Typically, the term "IBA" refers to an agreement involving a major project, such as the 17 September 1997 Ulu Inuit Impact Benefit Agreement between Echo Bay Mines and the Kitikmeot Inuit Association. In that case, the 1993 *Nunavut Land Claims Agreement*,[95] which is the comprehensive land claim settlement agreement between the Government of Canada and the Inuit of the Nunavut Settlement Area, required the signing of an IBA. Article 26 of the *Nunavut Land Claims Agreement* requires that proponents of major development projects in Nunavut negotiate an IBA with the affected Inuit, before a project can proceed.

However, there are other forms of IBAs that, while not associated with a major project, are useful in relationship building between resource developers and aboriginal communities. Such IBAs can exist in the form of memoranda, letters of understanding, or contracts, and usually focus more on a few specific items in the developer/aboriginal relationship.

Some even more limited IBAs typically focus on specific properties and/or projects and typically involve some agreement with respect to employment and other contract opportunities.

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[95] Parliament, "Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada" in *Sessional Papers*, No. 343-4/39 (1993), ratified, given effect and declared valid by the *Nunavut Land Claims Agreement Act*, S.C. 1993, c. 29, s. 4.

In exchange for employment and contract opportunities, the resource developers typically seek (a) certainty with respect to communications with the aboriginal community involved, and (b) certainty respecting the peaceful use and enjoyment of the project property.

5.3. Negotiating Impact and Benefit Agreements

The track record for governments in Canada playing an active role in the development, understanding, and implementation of agreement between resource developers and aboriginal people has been mixed. While some governments have taken a proactive stance to place such agreements within the proper legal and policy environment, other governments have taken a more *laissez-faire* approach and have placed the bulk, and, in some cases, all of the burden on the resource developer.

The problem with such a *laissez-faire* approach is that if questions arise about the adequacy of the consultation in respect of a particular project, the Courts will look to the Crown for an appropriate level of Crown engagement that makes the IBA part of appropriate consultation. Such engagement in resource developer-aboriginal negotiations need not be intrusive. On the contrary, the Crown can play a proactive role simply by being present and ensuring that the requirements of consultation are met in particular circumstances. What is essential is that, at the end of the day, all parties can look to the Crown as having been adequately involved in the negotiation, preparation and implementation of the resulting IBA because, subject to the unresolved issue in *Haida*,[96] noted above, it is only the Crown that ultimately holds the duty to consult and thereby accommodate. The role of industry in such consultation and accommodation is to facilitate the practical application of the Crown's duty to consult aboriginal people.

The second essential component in negotiating an effective IBA is ensuring that, at least on the industry side, experienced negotiators in dealing with aboriginal legal and policy matters are employed from the outset. Negotiations with aboriginal people in Canada typically involve much technical expertise and business acumen. Obtaining optimum results requires that such expertise and acumen be coupled with practical experience and sensitivity in dealing with

[96] *Supra* note 63.

aboriginal communities across Canada. The art of negotiating with aboriginal people is not a skill that has been widely developed across Canada and, therefore, resource developers are well advised to ensure that they are satisfied that their representatives have the proper degree of technical expertise coupled with the necessary experience and sensitivity to deal with aboriginal issues.

Some resource developments become the subject of litigation as well as subject to various forms of consultation and related negotiation involving government, industry, and aboriginal people. While litigation tends to be slow and unsatisfactory as a means to resolve differences between governments, resource developers and aboriginal people, negotiations can result in agreements that may satisfy the requirements of certainty for government and industry.

5.4. Impact and Benefit Agreements—Conclusion

IBAs make good business sense from the perspective of relationship building between the project proponent and its aboriginal neighbours. IBAs also can ensure that the legal requirements of the Crown have been adequately considered within the context of a particular project and in light of the potential aboriginal interests in the area affected by such project. The existence of an IBA with terms considered fair by both parties to it is of fundamental importance in obtaining certainty in respect of natural resource developments in areas subject to aboriginal interests.

6. Aboriginal Title and Private Property[97]

6.1. Introduction

One as yet not fully resolved aspect of aboriginal law in Canada is the status of private real property held by non-aboriginal individuals or corporations that is the same as land that is or may be subject to aboriginal title. The impact of aboriginal title on private land is a matter of great interest to resource developers seeking certainty in private land transactions. This is particularly the case in British Columbia, where there are still few treaties with aboriginal people. Some aboriginal people have argued that aboriginal title is an encumbrance on fee simple title that could result in possession by the aboriginal group concerned. However, the nature of aboriginal

[97] This section is substantially taken from Isaac *supra* note 1.

title is inconsistent with the essential attributes of fee simple title, thereby likely excluding the possible remedy of possession in the face of an aboriginal title claim.

6.2. The Fee Simple Estate

The fee simple estate is as close to absolute ownership in respect of land as is possible in Anglo-Canadian common law. Theoretically, the only higher form of land ownership would be the sovereign, absolute, or underlying title held by the Crown, which supports all land title in Canada. Oosterhoff and Rayner describe fee simple title as follows:

> The estate in fee simple is the largest estate or interest known in law and is the most absolute in terms of the rights which it confers. It permits the owner to exercise every conceivable act of ownership upon it or with respect to it. . . . While technically the owner holds of the Crown under the doctrine of tenure, in practice his ownership is the equivalent of the absolute dominion a person may have of a chattel.[98]

6.3. The *Delgamuukw* Analysis

In *Delgamuukw*, Lamer C.J.C. noted "that aboriginal title encompasses the right to exclusive use and occupation",[99] a description that, on its face, directly contradicts the attributes associated with fee simple title in Canadian law. His Lordship also noted that aboriginal title can only be alienated to the Crown and is inalienable to third parties.[100]

The Supreme Court of Canada has expressly stated that aboriginal title is an encumbrance on the Crown's underlying title to land to which aboriginal title applies.[101] Because of the inalienable nature of aboriginal title, it cannot shift from being a burden on the Crown's underlying title to other titleholders, such as those holding fee simple title.

In *Delgamuukw*, the Supreme Court of Canada set out an implicitly clear and reasonable legal analysis on how to deal with the apparent conflict between aboriginal title and fee simple title:

(a) The Crown's grant of a fee simple title is a justifiable infringement of aboriginal title.

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[98] A.H. Oosterhoff & W.B. Rayner, eds., *Anger and Honsberger Law of Real Property*, 2d ed. (Aurora: Canada Law Book, 1985) at 98-99.
[99] *Delgamuukw*, *supra* note 20 at para. 117.
[100] *Ibid.* at para. 113.
[101] *Ibid.* at para. 145, Lamer C.J.C.

(b) The fee simple titleholder acquires "good title" from the Crown insofar as the encumbrance of aboriginal title does not attach to the fee simple title, but rather remains with the Crown's underlying title.

(c) The Court confirmed that the Crown could infringe aboriginal title, whether justified or unjustified.

(d) The Court has confirmed that the appropriate remedy for breach of aboriginal title is compensation from the Crown.[102]

(e) The issue of whether the Crown can justify an infringement of aboriginal title, that is, the granting of a fee simple interest, is relevant with respect to the amount of compensation payable by the Crown to the aboriginal group holding such aboriginal title.

(f) On the issue of justification, the Court expressly set out a broad array of valid legislative objectives that could justify an infringement of aboriginal title which include: the development of agriculture, forestry, mining, hydroelectric development, general economic development, protection of the environment or endangered species, building of infrastructure, and settlement of foreign populations.[103] The settlement of foreign populations is akin to the homesteading practices of the early history of Canada's development.

(g) With respect to consultation, the Court expressly stated that the degree of consultation that has occurred will have a direct impact upon the extent of compensation that is payable by the Crown as a result of the infringement.[104]

(h) The Crown likely has limited duties to consult aboriginal people respecting aboriginal title on land held by fee simple title because the granting of the fee simple interest has already infringed the aboriginal title. The aboriginal group cannot obtain any possessory remedy or accommodation of the type that can be sought prior to infringement. The limited nature of the Crown's duty to consult on private property likely extends to adjacent Crown land or downstream effects, as the case may be.

6.4. Visible Incompatible Use

The law respecting the application of aboriginal rights on private property is likely consistent with the jurisprudence respecting private property and existing treaty rights. The Supreme Court of Canada considered the relationship between existing treaty rights and private property in

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[102] *Ibid.*; see also *Chippewas of Sarnia Band v. Canada (A.G.)* (2000), 51 O.R. (3d) 641, 195 D.L.R (4th) 135 (C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 63 (QL) [*Chippewas* cited to O.R.].
[103] *Delgamuukw, supra* note 20 at para. 165.
[104] *Ibid.* at para. 169.

Badger,[105] applying the "visible incompatible use" test. This test provides that where private property is put to a use visibly incompatible with the exercise of treaty rights, then such private property may not be used to exercise treaty rights, such as hunting. Conversely, where private property is not put to a visible incompatible use, then aboriginal people may utilize such property in the exercise of their existing treaty rights. The Court stated:

> Where lands are privately owned, it must be determined on a case-by-case basis whether they are "other lands" to which Indians had a "right of access" under the Treaty. If the lands are occupied, that is, put to visible use which is incompatible with hunting, Indians will not have a right of access. Conversely, if privately owned land is unoccupied and not put to visible use, Indians, pursuant to Treaty No. 8, will have a right of access in order to hunt for food.[106]

In *R. v. Alphonse*,[107] the British Columbia Court of Appeal considered an appeal by an Indian charged under the *Wildlife Act*.[108] One issue confronting the Court was whether exercising aboriginal rights on private lands and whether provisions allowing hunting on what is essentially unoccupied private land as set out in the *Trespass Act*[109] and *Wildlife Act*[110] were applicable. Macfarlane J.A. stated:

> The land on which Mr. Alphonse was hunting was not cultivated land. It was not subject to a Crown granted grazing lease, and it was not occupied by livestock. . . .
> [T]he land in question was not "enclosed land". . . .
> Applying the *Trespass Act* to the circumstances of this case, there was no prohibition with respect to hunting on the lands in question. That being so, it was not unlawful to hunt on those lands. Thus, it was not unlawful to exercise an aboriginal right on those lands.[111]

When read together, *Badger* and *Alphonse* confirm that existing aboriginal and treaty rights may be exercised on unoccupied private land; where private property is occupied and visibly used, aboriginal people may not have access to it in order to exercise their treaty rights. The existence of treaty rights cannot be used to prevent private landowners from lawfully using their land. Once private property is put to a visible, incompatible use, treaty rights and very probably, by analogy, aboriginal rights including aboriginal title are no longer exercisable on private property.

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[105] *Supra* note 21.
[106] *Ibid.* at para. 66, Cory J.
[107] [1993] 5 W.W.R. 401, 80 B.C.L.R. (2d) 17 (C.A.).
[108] R.S.B.C. 1996, c. 488, ss. 26(1)(c), 33(2).
[109] R.S.B.C. 1996, c. 462, ss. 1, 4(1).
[110] *Supra* note 108.
[111] *Alphonse, supra* note 107 at paras. 36-37, 45.

6.5. No Right is Absolute

The Ontario Court of Appeal decision in *Chippewas* supports this analysis.[112] The Court considered a claim by the Chippewas of Sarnia Band of ownership of a parcel of land located in Sarnia, Ontario. Malcolm Cameron purchased the land in question (approximately ten square kilometres) from the Band in 1839. The Crown conveyed the lands to Cameron by patent in 1853. The present occupants of the land traced their title back to the patent. The Band claimed that their ancestors never surrendered the disputed lands and, therefore, they continue to hold aboriginal title to the land.

The Court confirmed the need to follow certain procedures in order to effect a proper surrender of aboriginal title. The Crown believed a surrender of the lands had occurred but, in fact, no legal surrender took place. Cameron, with the approval of the Crown, negotiated the transaction with three chiefs of the Chippewas and reached an agreement, approved by the Crown. However, the Chippewas as a group were not asked to approve the surrender to the Crown. Consequently, the formal surrender process was not followed. In the twenty years following the transaction, those Chippewas affected by the agreement acknowledged and accepted the transaction and regarded the lands as no longer part of their reserve. The repudiation of the patent by the Chippewas and their claim that they retained interests and rights in the lands occurred some 140 years after the Cameron transaction when it was discovered that there was no documentation confirming the surrender of the lands by the Chippewas to the Crown.

The Court noted that members of the public rely upon the apparently valid acts of public officials in planning their affairs and take official documents at face value.[113] In this case, a Crown patent that apparently grants fee simple title to land provides a good example of innocent third parties relying on an official act. The Court noted that it "would plainly be wrong" to deny a remedy that would support a claim for aboriginal title on the grounds that the affirmation of such a claim might be "troublesome" to others.[114] However, the Court confirmed that aboriginal

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[112] See *Chippewas, supra* note 102; see Paul M. Perell & James I. Cowan, "In Defence of *Chippewas of Sarnia Band v. Canada (Attorney General)*" (2002) 81 *Can. Bar Rev.* 727.
[113] *Chippewas, ibid.* at para. 258.
[114] *Ibid.* at para. 262.

rights are part of the broader Canadian legal landscape and do not exist in a vacuum: "In the Canadian legal tradition, no right is absolute, not even constitutionally protected aboriginal rights."[115]

The Court concluded that the interests of innocent third parties who have relied upon the apparent validity of the patent must prevail over any remedy that would set aside the patent. This conclusion, however, does not preclude or limit the right of the Band to proceed with a claim for damages against the Crown.

Chippewas provides insight into the Court's comfort with balancing the rights of aboriginal people with the rights of innocent third parties. The Supreme Court of Canada affirmed this approach in *Marshall*,[116] where the Court reinforced its earlier decisions that stressed the need for a balanced approach to interpret existing aboriginal and treaty rights with the rights of other Canadians.

Chippewas confirms that where a surrender has not occurred, the appropriate remedy is at the discretion of the Court and the Court must balance it with competing interests: those of aboriginal title itself, as confirmed in *Delgamuukw*,[117] and those of the innocent third party purchaser, as discussed in *Chippewas*. *Chippewas* is also consistent with the British Columbia Court of Appeal decision in *Skeetchestn Indian Band v. British Columbia (Registrar, Kamloops Land Title District)*,[118] which affirmed a decision of the Registrar of Land Titles to refuse to register a certificate of pending litigation on fee simple title. The Court held that a claim of aboriginal title is not a registrable interest under the *Land Title Act*.

6.6. Aboriginal Rights and Private Property—Conclusion

While not finally settled in the Courts, there seems to be little doubt that the Courts have a useful roadmap to deal with conflicts between private property and aboriginal rights in the Supreme

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[115] *Ibid.* at para. 263.
[116] *Supra* note 23.
[117] *Supra* note 20.
[118] [2000] 10 W.W.R. 222, 80 B.C.L.R. (3d) 233 (B.C.C.A.), aff'g [2000] 2 C.N.L.R. 330, 30 R.P.R. (3d) 272 (B.C.S.C.).

Court of Canada's (a) discussion of the nature of aboriginal title which admits fee simple title as a justifiable infringement of aboriginal title, (b) establishment of the importance of visible and incompatible uses of private property in relation the treaty rights, and (c) its acceptance that no right is absolute in the context of a dispute relating to a defective patent of fee simple land claimed to be subject to aboriginal title.

7. Conclusion—Aboriginal Law as Part of General Canadian Law

"The *Constitution Act, 1982* ushered in a new chapter but it did not start a new book."[119]

Although he did not write it for the majority in *Mitchell*, the above comment by Binnie J. is indicative of how the Supreme Court of Canada has reconciled the emerging law related to the rights of aboriginal people with the general law of Canada. The constitutional protection of aboriginal rights in s. 35(1) fundamentally altered Canada's constitutional make-up by creating a body of constitutional rights peculiar to only one part of the Canadian population, subjecting federal and provincial action infringing such rights to judicial scrutiny, and allowing for the justifiable infringement of such rights.

Canadian aboriginal law continues to develop. In slightly less than two decades, s. 35(1) has gone from having some refer to it as an "empty box",[120] to a provision that recognizes and affirms existing relatively clearly defined aboriginal and treaty rights, including aboriginal title, in the Constitution of Canada. The fact that, prior to 1982, such rights were subject to unilateral modification or extinguishment by the federal Crown throws the profoundly changed status of such rights into sharp relief.

Although *Sparrow* maintained that s. 35(1) would not produce a negative impact upon Canadian sovereignty, s. 35(1) did mean that federal and provincial areas of legislative jurisdiction would come under close scrutiny and could be deemed, when unjustifiably infringing

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[119] *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at para 115, 199 D.L.R. (4th) 385, Binnie J. [*Mitchell*].

[120] See Bryan Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada, 1982-1984* (Kingston: Institute of Intergovernmental Relations, [1985]) and David C. Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Kingston: Institute of Intergovernmental Relations, 1989).

aboriginal and treaty rights, to be of no force or effect.[121] However, the Supreme Court of Canada also noted in *Sparrow* that the rights protected in s. 35(1) are not absolute. Rather, these rights must be balanced with the exercise of federal and provincial legislative authority, and federal and provincial governments can justify infringements of such rights.[122]

Sparrow was followed by a series of Supreme Court of Canada decisions that further elaborated upon the scope and meaning of aboriginal and treaty rights, including: *Adams*[123] (aboriginal right to fish for food); *Gladstone*[124] (aboriginal right to exchange and trade in herring spawn on kelp on a commercial basis); *Badger*[125] (constitutional affirmation of treaty rights); and *Delgamuukw*[126] (existence and meaning of aboriginal title). Each of these decisions represents a significant step forward in understanding aboriginal and treaty rights in Canadian law. In each decision, the scope and interpretive approach used in relation to aboriginal and treaty rights were, generally speaking, liberal and expansive. This is not to suggest that there has been no criticism of these decisions as not having gone far enough to protect aboriginal peoples' rights, but it is suggested that overall, these decisions were seen as generally supportive of aboriginal interests.

The Canadian Courts are drawing upon well-established legal doctrines to develop new doctrines of law that allow Canada to balance the interests of resource development and aboriginal and treaty rights. The perception of many Canadians and most non-Canadians is that Canada has in s. 35(1) an important encumbrance on natural resource development that has not yet been removed. In Canada, the cycle of "victory" and "defeat" between aboriginal and non-aboriginal people that has gone on for centuries is coming to an end. The Supreme Court of Canada, in its development of the doctrine of Crown/aboriginal consultation and clear definition of the Crown's fiduciary duty to aboriginal people has contributed most to this development. In addition, the wide practical application of Impact and Benefit Agreements has changed, very

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[121] See *Constitution Act, 1982*, *supra* note 2, s. 52(1), which provides that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect".

[122] See *Sparrow*, *supra* note 23 at 1113, Dickson C.J.C. and La Forest J.; *Adams*, *supra* note 77 at paras. 56-57, Lamer C.J.C.; *Delgamuukw*, *supra* note 20 at para. 161, Lamer C.J.C.; and *Marshall* (reconsideration), *supra* note 23 at paras. 21, 26.

[123] *Supra* note 77.

[124] *Supra* note 29.

[125] *Supra* note 21.

[126] *Supra* note 20.

much for the better, the nature of relationships between project proponents and neighbouring aboriginal communities.

Finally, Canadian law has developed sufficiently in dealing with the inter-relationship of aboriginal rights and the rights of other Canadians to suggest the probable relationship between aboriginal rights and private property rights. We believe that what was a conundrum has become explicable in terms of the Crown's special relationship with aboriginal peoples fitting into the range of legal relationships that create private property in land and fundamentally placing the Crown as obligee to its aboriginal subjects where it has granted fee simple rights in infringement of aboriginal and treaty rights.

In the decades of the development of the Canadian judicial solution to the questions raised by making aboriginal and treaty rights constitutionally protected rights, there has been a tendency among legal practitioners in the seemingly endless Court battles fought over issues of infringement and justification to treat the development of law relating to these issues as fundamentally different from general Canadian law. It is becoming clear that that is not so. The Courts have drawn guidance, with more or less clarity, from existing legal doctrines and increasingly refer litigants to general Canadian law for guidance in how to deal with the peculiar issues arising from aboriginal issues.

The historical roots of administrative law and the law relating to fiduciary relationships closely parallel the doctrines of Canadian law developed to deal with the question of aboriginal and treaty rights because administrative law deals primarily with judicial review of the relationship between the Crown's servants carrying out their official duties and the Crown's subjects. Much of Canadian aboriginal law deals with the carrying out of such duties between the Crown and aboriginal peoples.

Recognizing that aboriginal law is part of broader Canadian law provides guidance in respect of future issues in the relationship of the Crown with aboriginal people. Knowledge of the common law and equity roots of aboriginal law familiarizes the practitioner with the sort of legal landscape that the practitioner operates in when dealing with the rights of aboriginal

peoples. Broader recognition that the working out of the law to render fair the process of infringement and justification are only extensions of the legal doctrines that protect all Canadians should go a long way toward ending the suspicion that the Courts treat aboriginal people differently from other Canadians.

While areas of uncertainty remain in Canadian aboriginal law, there is a well-established body of law that provides a basis for certainty respecting aboriginal and treaty rights. There is also a growing body of experience among all stakeholders in dealing effectively and fairly with aboriginal issues. The combination of such law with such experience means that aboriginal issues need not be a black hole when working on natural resource development in Canada.