The Crown's Fidnciary Dnty and Indian Title: *Guerin* v. *The Queen*

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The Supreme Court of Canada's recently rendered judgment, *Guerin* v. *The Queen*, establishes that the Crown has a fiduciary duty to deal with surrendered Indian lands for the benefit of the surrendering Indians that is founded both on the concept of Indian title itself and the statutory framework governing the title. Despite a consensus as to the existence of this fiduciary duty, the decision was not a unanimous one as regards its bases. The author examines the source, scope, nature and effects of this fiduciary duty, relates it to the American guardianship doctrine and speculate as to its future applications in Canada.

La Cour suprême du Canada a récemment décidé dans l'arrêt *Guerin* c. *La Reine* que, à titre de fiduciaire des terres cédées par les Indiens, la Couronne a le devoir d'administrer ces terres au profit de la bande cédante. La Cour fonde sa décision sur la nature même du titre indien ainsi que sur la structure statutaire le régissant. En dépit du consensus au sein de la Cour quant à l'existence de l'obligation de fiduciaire, les motifs diffèrent quant à son fondement. L'auteur étudie la source, l'étendue, la nature et les effets de l'obligation de fiduciaire, fait le lien entre celle-ci et la doctrine américaine de « guardianship » et s'interroge quant à son application future au Canada.

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I. Introdnction

In its recent judgment in *Guerin* v. *The Queen,*[1] the Supreme Court of Canada established that the Crown is under a fiduciary duty to deal with surrendered Indian lands for the benefit of the surrendering Indians. This is an equitable duty, enforceable in the courts. It gives rise to damages, measured by actual loss sustained at the time of trial, in the event of breach. It proceeds both from the nature of Indian land title itself, and from the statutory framework governing such title.

In establishing these propositions, *Guerin* marks a significant advance over earlier Canadian authorities. When they have recognized the Crown's fiduciary duty towards Indians, these authorities have generally characterized it as a political or moral, and not as a legal one.[2] The case is also important for the additional light it sheds on the concept of Indian or aboriginal title.

This article examines the source, scope, nature and effects of the Crown's fiduciary duty towards Indians as discussed in *Guerin*. It analyses in some depth the concept of Indian title upon which the Supreme Court founds,

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[1](1984), [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [hereinafter cited to S.C.R.].

[2]See, *e.g., St Catharines Milling & Lumber Co.* v. *The Queen* (1887), 13 S.C.R. 577 at 649, aff'd (*sub nom. St Catherine's Milling and Lumber Co.* v. *The Queen*) (1888), 14 A.C. 46, 60 L.T.R. 197 (P.C.) [hereinafter cited to S.C.R. as *St Catharines*] per Taschereau J.:

> The Indians must in the future ... be treated with the same consideration for their just claims and demands that they have received in the past, *but, as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the State must be free from judicial control.* [emphasis added]

See also, *A.G. Ontario* v. *A.G. Canada (Re Indian Claims)* (1895), 25 S.C.R. 434, aff'd (1896), [1897] A.C. 199 (H.L.) [hereinafter citcd to S.C.R. as *Re Indian Claims*]; *Cayuga Indian Case* (1926), 6 R. Int'l Arb. Awards 173, 177, 187; *The Queen* v. *Guerin* (1982), [1983] 2 F.C. 656, 143 D.L.R. (3d) 416 at 467-71, [1983] 2 W.W.R. 686, 45 N.R. 181, 13 E.T.R. 245, [1983] 1 C.N.L.R. 20 (F.C.A.) [hereinafter cited to F.C.] *per* Le Dain J.; and L.C. Green, "Trusteeship and Canada's Indians" (1976) 3 Dalhousie L.J. 104.

in part, the Crown's fiduciary duty. It attempts to relate the Court's treatment of this duty to the guardianship doctrine developed by the United States Supreme Court, and it speculates as to future applications of the doctrine of Crown fiduciary duty in Canada.

A. Facts

In October 1957, the Musqueam Indian Band surrendered, pursuant to sections 37 to 41 of the *Indian Act*,[3] 162 acres of valuable reserve land, located within the City of Vancouver, to the federal Crown for lease to a golf club on certain oral terms and conditions. These oral terms had been discussed with federal officials at band meetings, but were not specified in the surrender document. By this document, the band surrendered the land to the Crown on the following terms:

> TO HAVE AND TO HOLD the same unto Her said Majesty the Queen, her Heirs and Successors forever in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people.
>
> AND upon the further condition that all monies received from the leasing thereof, shall be credited to our revenue trust account at Ottawa.
>
> AND WE, the said Chief and Councillors of the said Musqueam Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the leasing thereof.[4]

The Crown subsequently executed a lease of the surrendered land on terms much less favourable than the oral terms approved by the band. The lease provided for renewal periods of fifteen rather than ten years and stipulated a maximum rent increase of fifteen per cent for the second fifteen year period. It also gave the golf club the right to remove buildings and improvements at any time until six months after the termination of the lease.

The Crown did not seek the band's consent to the changed terms before executing the lease, nor did it provide the band with a copy of the lease until 1970, twelve years after its execution. In December 1975, the band sued the Crown for damages on the basis of breach of trust.

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[3]R.S.C. 1952, c. 149; now R.S.C. 1970, c. I-6.

[4]The terms of the surrender are given in *Guerin* v. *The Queen*, *supra*, note 1 at 346.

B. Federal Court Trial Division Judgment

Collier J. found the Crown in breach of trust.[5] In his view, the surrender constituted the Crown the trustee for the lease of the surrendered lands on the oral terms approved by the band. The Crown committed a breach of trust by executing the lease on different and less favourable terms, without the band's consent. Collier J. fixed the band's damages at $10,000,000. This sum represented a global evaluation of the band's actual loss at the time of trial, based on the assumption that the band and the golf club would not themselves have been able to agree upon mutually acceptable terms for a golf lease, and that the band would therefore have been free to put the land to the most advantageous use during the term of the unauthorized golf lease.

C. Federal Court of Appeal Judgment

Speaking for the Federal Court of Appeal, Le Dain J. allowed the Crown's appeal, set aside the Trial Division judgment, and dismissed the band's action.[6] He viewed the action as based primarily on a statutory trust alleged to have been created by section 18(1) of the *Indian Act*. This provision reads:

> Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.[7]

Le Dain J. held that this provision vested the Crown with a discretion incompatible with an equitable obligation enforceable by the Courts. It gave rise to a "political" rather than a "true" trust.

Le Dain J. also rejected the argument that the surrender document created a true trust. The words "in trust" used in that document merely conferred upon the Crown the authority to deal with the surrendered land for the band's benefit; they did not impose upon the Crown any enforceable equitable obligation to deal with the land in a certain manner. Even if a true trust had been created, it would have been defined by the broad discretionary terms of the surrender document and not by the oral terms contemplated by the band. The Crown was therefore held not to be liable for its failure to comply with these oral terms.

[5] *Guerin* v. *The Queen* (1981), [1982] 2 F.C. 385, 10 E.T.R. 61, [1982] 2 C.N.L.R. 83 (T.D.).
[6] *The Queen* v. *Guerin*, *supra*, note 2.
[7] *Supra*, note 3.

D. *Supreme Court of Canada Judgment*

Eight Justices participated in the judgment of the Supreme Court of Canada.[8] The judgment comprises three opinions, none of which commanded majority support. Dickson J. (as he then was) wrote reasons to which Beetz, Chouinard and Lamer JJ. subscribed. Wilson J. wrote reasons with which Ritchie and McIntyre JJ. concurred. Estey J. wrote his own opinion. This diversity of opinions makes the judgment's *ratio decidendi* less discernible than it might be. Nevertheless, a majority of the panel clearly viewed the Crown to be under a general fiduciary duty with regard to Indian lands.

II. Fiduciary Duty

A. *Existence*

Seven of the eight Supreme Court Justices held that the Crown is subject to a general fiduciary duty respecting Indian lands. According to Dickson J.,

> the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. 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.[9]

Wilson J. agrees that the Crown has a general fiduciary duty regarding Indian lands.[10] She adds, however, that in this case the surrender imposed an express trust upon the Crown to deal with the surrendered land for the benefit of the surrendering Indians.[11]

Only Estey J. declines to uphold the existence of the Crown's fiduciary duty. While agreeing in the result, he disposes of the case on the basis of agency rather than trust or fiduciary duty. In Estey J.'s view, the *Indian Act* creates a statutory agency between the Crown and Indians. That this agency is statutory rather than contractual in origin does not change its character.[12] Dickson J. disagrees:

> But just as the Crown is not a trustee for the Indians, neither is it their agent; not only does the Crown's authority to act on the Band's behalf lack a basis

[8]Former Chief Justice Laskin did not take part in the judgment.

[9]*Guerin* v. *The Queen, supra,* note 1 at 376.

[10]*Ibid.* at 348-9.

[11]*Ibid.* at 355.

[12]*Ibid.* at 391.

> in contract, but the Band is not a party to the ultimate sale or lease, as it would be if it were the Crown's principal.[13]

The nature of the relationship between the Crown and Indians respecting surrendered lands may depend more upon their relative independence than upon the statutory or contractual basis of their relationship or the identity of the principal parties to the lease. A fiduciary relationship is characterized by the discretion and independence with which the fiduciary acts for the beneficiary.[14] An agency relationship, on the other hand, is characterized by the relatively greater control and direction asserted by the principal over the agent. The degree of discretion and independence vested in the Crown with regard to surrendered Indian lands would appear to cast it more in the role of fiduciary than agent.[15]

In any event, Estey J. does not categorically exclude the possibility of a fiduciary relationship between the Crown and the Indians. He relies upon the law of agency rather than that of trusts or fiduciary duty as much for policy as for legal reasons:

> For these reasons, I would, with great respect to all who hold a contrary view, hesitate to resort to the more technical and far-reaching doctrines of the law of trusts and the concomitant law attaching to the fiduciary. The result is the same but, in my respectful view, the future application of the Act and the common law to native rights is much simpler under the doctrines of the law of agency.[16]

With respect, it is not clear that the legal results of agency and fiduciary relationships are the same. The fiduciary may, for example, be under a more stringent obligation to act positively for the welfare of his beneficiary than may be the agent towards his principal. Further, the causes and extent of liability may differ as between agency and fiduciary relationships. In light of these potential differences, the question arises whether administrative simplicity provides sufficient grounds for characterizing the relationship between the Crown and the Indians in respect of surrendered lands as one of agency rather than as one of trust or fiduciary duty.

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[13]*Ibid.* at 387.

[14]E.J. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1 at 7, cited by Dickson J. in *Guerin* v. *The Queen*, *ibid.* at 384.

[15]See *infra*, note 118 and accompanying text.

[16]*Supra*, note 1 at 394-5.

B. Source

1. General

Dickson and Wilson JJ. appear to agree that the Crown's fiduciary duty regarding Indian lands rests upon two bases. The first is the nature of Indian or aboriginal title. The second is the statutory framework established to protect and dispose of such title.

Dickson J.'s analysis of the source of the Crown's fiduciary duty is somewhat ambiguous. He begins by relating this duty to the two sources mentioned above:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians.[17]

In the next paragraph, Indian title is again cited as one source of the Crown's fiduciary duty. As for the second source, however, Dickson J. shifts emphasis from the general statutory framework regulating Indian title to the specific requirement that such title be surrendered to the Crown prior to alienation to third parties:

> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest is inalienable except upon surrender to the Crown.[18]

In the following paragraph, Dickson J. identifies the surrender requirement as a distinct source of fiduciary obligation for the Crown:

> An Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the Band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. It is still recognized in the surrender provisions of the *Indian Act*. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.[19]

Matters are further complicated when Dickson J. later advances, as another source of fiduciary obligation, the discretion conferred by section

[17] *Ibid.* at 376.
[18] *Ibid.*
[19] *Ibid.*

18(1) of the *Indian Act* upon the Crown respecting the management and disposition of reserve lands:

> Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interest in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.
>
> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one.[20]

In the result, while Dickson J. is clear upon Indian title as one source of the Crown's fiduciary duty, he designates the other variously as the statutory scheme governing Indian title, the surrender requirement characterizing such title, and the Crown's discretionary power to manage and dispose of such title. This ambiguity may be more apparent than real, since Dickson J. relates the Crown's discretion to the surrender requirement, and the latter both to Indian title itself and to the statutory framework governing such title. Of these elements, two, Indian title and the surrender requirement, seem most important.

According to Wilson J., the Crown's fiduciary duty regarding reserve lands derives from Indian title itself. It is given statutory recognition by section 18 of the *Indian Act*. Wilson J. writes:

> While I am in agreement that s. 18 does not *per se* create a fiduciary obligation in the Crown with respect to Indian reserves, I believe that it recognizes the existence of such an obligation. The obligation has its roots in the aboriginal title of Canada's Indians as discussed in *Calder* v. *Attorney General of British Columbia*... .[21]

An examination of the sources of the Crown's fiduciary duty towards Indians identified in *Guerin* follows.

2. Indian Title

In relating the Crown's fiduciary duty to Indian title, the *Guerin* case sheds important incidental light upon the latter. Since Indian title is the most basic and complex of the sources advanced in *Guerin* of the Crown's fiduciary duty, it will be considered in some detail. Attention is focussed here on the source, recognition, continuity and nature of Indian title.

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[20] *Ibid.* at 383-4.
[21] *Ibid.* at 348-9.

a. Source

Dickson J. relies upon *Calder* v. *A.G. British Columbia*[22] as authority for the proposition that Indian title derives from two independent sources. The first of these is the Indians' historical occupation and use of their lands. The second is the Royal Proclamation of 7 October 1763.

> In *Calder* v. *Attorney General British Columbia* ... this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. ... Judson and Hall JJ. were in agreement, however, that aboriginal title existed in Canada (at least where it had not been extinguished by appropriate legislative action) independently of the Royal Proclamation. Judson J. stated expressly that the Proclamation was not the "exclusive" source of Indian title ... . Hall J. said ... that "aboriginal Indian title does not depend on treaty, executive order or legislative enactment".[23]

This position, Dickson J. observes, differed from that taken by Lord Watson in the *locus classicus* of Canadian aboriginal title, *St Catherine's Milling and Lumber Co.* v. *The Queen*.[24]

> In recognizing that the Proclamation is not the sole source of Indian title the *Calder* decision went beyond the judgment of the Privy Council in *St Catherine's Milling and Lumber Co.* v. *The Queen* ... . In that case Lord Watson acknowledged the existence of aboriginal title but said it had its origin in the Royal Proclamation.[25]

The notion that aboriginal title flows from the Indians' own historical occupation of their lands is, Dickson J. argues, consistent with the views of Marshall C.J. in two early, and influential, United States Supreme Court cases, *Johnson* v. *McIntosh*[26] and *Worcester* v. *Georgia*.[27] He states that:

> In *Johnson* v. *McIntosh* Marshall C.J., although he acknowledged the Proclamation of 1763 as one basis for recognition of Indian title, was nonetheless of opinion that the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent. The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' rights in the land were obviously diminished; but their rights of occupancy and possession remained unaffected.[28]

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[22](1973), [1973] S.C.R. 313, 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1 [hereinafter cited to S.C.R. as *Calder*].

[23]*Supra*, note 1 at 376-7.

[24](1888), 14 A.C. 46, 60 L.T.R. 197 (P.C.), aff'g *St Catharines*, *supra*, note 2 [hereinafter cited to A.C. as *St Catherine's Milling*].

[25]*Supra*, note 1 at 377.

[26]21 U.S. 240, 8 Wheat. 543 (1823).

[27]31 U.S. 405, 6 Pet. 515 (1832).

[28]*Supra*, note 1 at 377-8.

Dickson J. reiterates the independent basis of aboriginal title when, echoing Hall J. in *Calder*,[29] he states that the Indians' "interest in their lands is a preexisting legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision".[30]

Wilson J. agrees that Indian title may have an independent legal basis. She states that "Indian title has an existence apart altogether from s. 18(1) of the *Indian Act*".[31] Unlike Dickson J., however, Wilson J. does not identify what constitutes the independent basis of Indian title.

b. Recognition

Jurisprudence is divided over the issue of whether the historical occupation of lands by Indians is of itself enough to constitute Indian title. One line of authority holds that formal recognition by treaty, executive order or legislative enactment is a prerequisite for the legal enforcement of aboriginal title.[32]

Dickson J. subscribes to the other line of authority. He does not view executive or legislative recognition as a precondition for the existence or legal enforceability of aboriginal title.[33] He makes this clear in the statement, already quoted, that the Indians' "interest in their lands is a pre-existing legal right not created by Royal Proclamation, by section 18(1) of the *Indian Act*, or by any other executive order or legislative provision".[34] This position must now be regarded as settled law in Canada.

Dickson J. goes beyond the affirmation of the independent basis of aboriginal title when he equates recognized with unrecognized Indian title:

> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal

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[29] *Supra*, note 22.

[30] *Supra*, note 1 at 379.

[31] *Ibid.* at 352.

[32] *St Catharines, supra*, note 2 at 643-5 *per* Taschereau J.; *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 at 277-9 (1955) *per* Reed J.; *Société de développement de la Baie James* v. *Kanatewat* (1974), [1975] C.A. 166 at 172 *per* Turgeon J.; *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980) [hereinafter cited as *Sioux Nation*].

[33] *Worcester* v. *Georgia*, 31 U.S. 405, 6 Pet. 515 at 543-5, 558-61 (1832) [hereinafter cited to Pet. as *Worcester*]; *Mitchel* v. *United States*, 34 U.S. 464, 9 Pet. 711 at 745-7 (1835) [hereinafter cited to Pet. as *Mitchel*]; *Minnesota* v. *Hitchcock*, 185 U.S. 373 at 388-9 (1902); *Cramer* v. *United States*, 261 U.S. 219 (1923); *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339 at 347 (1941); *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40 at 51-2 (1946); *Calder, supra*, note 22 at 322-3 and 328 *per* Judson J., at 390 *per* Hall J.; *Oneida Indian Nation of New York* v. *County of Oneida*, 414 U.S. 661 at 669 (1974); *Hamlet of Baker Lake* v. *Minister of Indian Affairs and Northern Development* (1979), [1980] 1 F.C. 518 at 556-7, [1980] 5 W.W.R. 193 (T.D.) [hereinafter cited to F.C. as *Baker Lake*].

[34] *Guerin* v. *The Queen, supra*, note 1 at 379.

title in traditional tribal lands. *The Indian interest in the land is the same in both cases*: see *Attorney-General for Quebec* v. *Attorney-General for Canada*, [1921] 1 A.C. 401, at pp. 410-11. (the "*Star Chrome*" case).[35]

This equation of unrecognized, "pure" aboriginal title with recognized, "reserve" aboriginal title is useful to the extent that it clarifies that the former is as enforceable in the courts as is the latter. It is unclear, however, whether the two forms of aboriginal title must always be identical in content.

Three situations come to mind. First, in the case of unrecognized aboriginal title, the indigenous people concerned base their rights in land exclusively upon their own traditional occupation, and not on any executive or legislative recognition. The only definition of unrecognized aboriginal title is that furnished by the case law; this definition is arguably broad enough to include the exclusive possession, use and benefit of all economic resources of the object lands.[36]

Second is the case of recognized aboriginal title. Such title generally arises where, by treaty, Indian peoples cede a portion of their traditional lands to the Crown and reserve a portion for themselves. The Crown recognizes the Indians' aboriginal title to the reserved land. The content of this aboriginal title may be the same as that of unrecognized aboriginal title or it may be restricted to certain defined elements. In addition, the Indian people concerned may retain or enjoy certain rights, usually of hunting, fishing and trapping, on the ceded lands.[37]

Crown grants form the third case. In some instances, such as the reserves purchased by the Crown in southern Canada for certain Indian bands after the American Revolutionary War, the Indian grantees may not have had any aboriginal title of occupation. In that event, their only title would be their grants from the Crown, and the rights comprised in such grants would vary from case to case.[38]

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[35]*Ibid.* at 379 [emphasis added].

[36]For reeent Canadian cases of unrecognized aboriginal title, see *Calder*, *supra*, note 22; *Baker Lake*, *supra*, note 33; *Ominayak* v. *Norcen Energy Resources* (1983), 29 Alta L.R. (2d) 151 (Q.B.), aff'd (11 January 1985), (C.A.), leave to appeal refused (14 March 1985), (S.C.C.) [unreported]; *MacMillan Bloedell Ltd* v. *Mullin* (27 March 1985), (B.C.C.A.) [unreported].

[37]See, *e.g.*, *St Catherine's Milling*, *supra*, note 24; *R.* v. *Wesley* (1932), [1932] 4 D.L.R. 774, [1932] 2 W.W.R. 337 (Alta S.C. App. Div.); *R.* v. *Sikyea* (1964), 43 D.L.R. (2d) 150, 43 C.R. 83 (N.W.T.C.A.), aff'd (1964), [1964] S.C.R. 642, 50 D.L.R. (2d) 80; *Moosehunter* v. *The Queen* (1981), [1981] 1 S.C.R. 282; Treaty No. 3 of 3 October 1873, reprinted in P.A. Cumming & N.H. Mickenberg, eds, *Native Rights in Canada*, 2d ed. (1972) at 313ff.

[38]See Cumming & Mickenberg, *ibid.*, ch. 13; Personal communication J. O'Reilly to J. Hurley (1985) Montreal, Quebec as to three-fold distinction in Indian tenure.

These three cases suggest that the content of Indian land title may have to be determined on an individual basis. Such a conclusion is in keeping with Dickson J.'s caution in *Kruger* v. *The Queen* that:

> Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis.[39]

c. Continuity

The principle of continuity of property rights is akin to that of acquired rights. It provides that property rights, once established, continue unaffected by a change of sovereignty unless positively modified or abrogated by the new sovereign. This principle has been held to apply to aboriginal title.[40]

Dickson J. reaffirms the principle of continuity in relation to Indian title. He finds that in *Johnson* v. *McIntosh*,[41] Marshall C.J. was "of opinion that the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent".[42] He then refers to *Amodu Tijani* v. *Secretary, Southern Nigeria*[43] as authority for the "principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants".[44]

It should now be taken as settled law in Canada that the mere acquisition of sovereignty by European powers over aboriginal lands did not extinguish *ipso facto* the aboriginal title of the indigenous occupants. Absent express confiscation or subsequent expropriatory legislation by the new sovereign, aboriginal title is presumed to have survived the change of sovereignty unaffected.

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[39](1977), [1978] 1 S.C.R. 104 at 109, [1977] 4 W.W.R. 300.

[40]*Campbell* v. *Hall* (1774), 1 Cowp. 204, 98 E.R. 848 at 895-6 (K.B.); *Worcester, supra*, note 33 at 544 and 559; *Mitchel, supra*, note 33 at 734; *R.* v. *Symonds* (1847), [1840-1932] N.Z.P.C.C. 387 at 390 (S.C.); *Nireaha Tamaki* v. *Baker* (1901), [1901] A.C. 561 at 579 (P.C.); *Re Southern Rhodesia* (1918), [1919] A.C. 211 at 234 (P.C.); *Amodu Tijani* v. *Secretary, Southern Nigeria* (1921), [1921] 2 A.C. 399 at 407 (P.C.) [hereinafter *Amodu Tijani*]; *Okeyan* v. *Adele* (1957), [1957] All E.R. 785 (P.C.); *Calder, supra*, note 22 at 383-9 and 401-4 *per* Hall J.; D.P. O'Connell, *State Succession in Municipal Law and International Law*, vol. 1 (1967) ch. 10; B. Slattery, *The Land Rights of Indigenous Canadian Peoples* (1979) ch. 6.

[41]*Supra*, note 26.

[42]*Guerin* v. *The Queen, supra*, note 1 at 377-8.

[43]*Supra*, note 40.

[44]*Guerin* v. *The Queen, supra*, note 1 at 378.

d. Nature

In considering whether Indian title gives rise to a fiduciary or trust duty for the Crown, Dickson J. is called upon to examine the nature of such title. He notes that the case law has variously characterized Indian title as a "personal and usufructuary right" and as a "beneficial interest".[45] In Dickson J.'s view, while each of these characterizations possesses a core of truth, neither is entirely accurate.[46]

i. Personal and Usufructuary Right

As Dickson J. notes, the characterization of Indian title in Canada as a "personal and usufructuary right" dates back to the Privy Council's decision in *St Catherine's Milling and Lumber Co.* v. *The Queen.*[47] In that case, Lord Watson stated that the Crown had a "substantial and paramount estate" which underlied the Indian title and "which became a plenum dominium whenever that title was surrendered or otherwise extinguished."[48] On this view, Indian title was a mere burden upon the present proprietary estate of the Crown in the land.[49] The Privy Council reaffirmed this view in *A.G. Quebec* v. *A.G. Canada* (the *Star Chrome* case).[50]

"Personal"

As applied to Indian title, "personal" is not used in opposition to a "real" right in land. In *Star Chrome,*[51] the Privy Council interpreted "personal" to mean that Indian title was inalienable except to the Crown. The Privy Council did not state that Indian title was inherently inalienable; it merely restated the traditional doctrine of Crown pre-emption of Indian title.[52] The Privy Council therefore implicitly recognized that Indian title was capable of alienation, albeit only to the Crown.

Recent interpretations of the "personal" nature of Indian title have differed from that provided in *Star Chrome.* In *Smith* v. *The Queen,* Estey J., speaking for a unanimous Supreme Court of Canada, described Indian title as

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[45]*Ibid.* at 379-82.

[46]*Ibid.* at 382.

[47]*Supra,* note 24 at 54.

[48]*Ibid.* at 55.

[49]*Ibid.* at 58.

[50](1920), [1921] 1 A.C. 401 at 410-1, 56 D.L.R. 373 (P.C.) [hereinafter cited to A.C. as *Star Chrome*].

[51]*Ibid.*

[52]This doctrine is embodied in the Royal Proclamation of 1763, reprinted in R.S.C. 1970, App. 1.

> a personal right which by law must disappear upon surrender by the person holding it; such an ephemeral right cannot be transferred to a grantee, be it the Crown or an individual. The right disappears in the process of the release, and a release couched in terms inferring a transfer cannot operate effectively in law on the personal right any more than an express transfer could. In either process the right disappears.[53]

Here Estey J. suggests that Indian title is intrinsically incapable of alienation to anyone, whether to the Crown or to an individual. But this blanket assertion of the inalienability of Indian title does not appear to be supported by *Star Chrome*, for the latter judgment, as has been seen, recognized that Indian title was capable of alienation, even if only to the Crown.

In *Guerin*, Dickson J. widens the scope of the word "personal" still further. He finds that the *Smith* decision

> held that the Indian right in a reserve, being personal, could not be transferred to a grantee, whether an individual or the Crown. Upon surrender the right disappeared "in the process of release".[54]

Dickson J. infers from this supposed inalienability of Indian title that it does not constitute a property interest. This inference arises during his discussion of the absence of a trust imposed on the Crown with regard to Indian lands.[55] The *Smith* decision is again cited as authority for the proposition that "upon unconditional surrender the Indians' right in the land disappears".[56] From this proposition Dickson J. deduces that "[n]o property interest is transferred which could constitute the trust *res*".[57]

The three cases just mentioned reveal a progression in their treatment of personal Indian title. In *Star Chrome*, "personal" means that Indian title is inalienable except to the Crown. In *Smith*, it means that Indian title is inalienable to anyone, whether to an individual or to the Crown. And in *Guerin*, it means not only this general inalienability of Indian title, but its non-property character as well. Each of these cases purports to rely upon its predecessor. Careful analysis shows, however, that the progressive broadening of the term "personal", and the corresponding diminution of the content of Indian title, are not justifed by the authorities cited in these cases. Further, they are not in keeping with the basic reasons for the inalienability of Indian title. Dickson J. himself mentions two of these reasons.

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[53](1983), [1983] 1 S.C.R. 554 at 569, 147 D.L.R. (3d) 237 [hereinafter cited to S.C.R. as *Smith*].

[54]*Guerin* v. *The Queen*, *supra*, note 1 at 381.

[55]*Ibid.* at 386.

[56]*Ibid.* at 386.

[57]*Ibid.* at 386.

First, he notes that "the Privy Council's emphasis on the personal nature of aboriginal title stemmed in part from constitutional arrangements peculiar to Canada".[58] Under section 109 of the *Constitution Act, 1867*,[59] lands formerly belonging to the pre-Confederation provinces now belong to the corresponding post-Confederation provinces. So long as Indian title has not been extinguished, however, the provincial Crown's title in such lands is incomplete. According to the Privy Council in *St Catherine's Milling*, such lands "vested in the Crown, subject to 'an interest other than that of the Province in the same,' within the meaning of sect. 109".[60] Under section 91(24) of the *Constitution Act, 1867*,[61] only the Crown in right of Canada has jurisdiction to extinguish or to accept a surrender of Indian title. But the extinguishment of Indian title does not convey such title to Canada; its effect is to disencumber the Province's title of the burden of Indian title in the object lands. Thus, while a surrender of Indian title may be accepted only by Canada, it enures, if absolute, to the exclusive benefit of the Province.[62]

These peculiar constitutional arrangements mean that Indians may not *directly* transfer their title in land to any grantee. Such a direct transfer, either to individuals or to the Provinces, is prohibited by the Royal Proclamation of 1763,[63] section 37 *Indian Act*,[64] and section 91(24) of the *Constitution Act, 1867*.[65] Moreoever, a direct transfer to Canada is prohibited by section 109 *Constitution Act, 1867*.[66]

The constitutional impossibility of a *direct* transfer of Indian title to any grantee does not mean, however, that this title is intrinsically incapable of any transfer whatever, even indirect. The surrender process demonstrates just the opposite. Due to the constitutional arrangements outlined above, an absolute surrender does not convey Indian title to the Province directly, but it does convey such title to the Province indirectly, via the intermediary of Canada. The fact that only Canada is constitutionally competent to accept a surrender of Indian title for the benefit of the Province does not make such a surrender any the less a conveyance of a property interest to the

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[58]*Ibid.* at 380.
[59](U.K.), 30 & 31 Vict., c. 3.
[60]*Supra*, note 24 at 58.
[61]*Supra*, note 59.
[62]*Ontario Mining Co.* v. *Seybold* (1902), [1903] A.C. 73 (P.C.) [hereinafter cited to A.C. as *Ontario Mining*]; *Canada* v. *Ontario* (1910), [1910] A.C. 637 (P.C.); *Star Chrome*, *supra*, note 50; *Reference re Stony Plain Indian Reserve No. 135* (1981), 130 D.L.R. 636 (Alta C.A.) [hereinafter *Re Stony Plain*]; *Smith*, *supra*, note 53; J. O'Reilly, "La Loi constitutionnelle de 1982: droit des autochtones" (1984) 25 C. de D. 125 at 134.
[63]*Supra*, note 52.
[64]*Supra*, note 3.
[65]*Supra*, note 59.
[66]*Ibid.*

Province. It merely subjects this conveyance to the compulsory intervention and supervision of Canada as the guardian of the Indians' interest.

Contrary to Estey J.'s view in *Smith*,[67] therefore, Indian title does not disappear upon surrender in a magic puff of smoke. It passes to the Province through the intermediary of Canada. In *St Catherine's Milling*, Lord Watson referred to "the right of the Provinces to a beneficial interest in these [Indian] lands, *available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title*".[68] A surrender by Indians of their title to Canada accordingly has the effect of conveying the Indians' beneficial interest in the object lands to the Province concerned.

The fact that, under different constitutional arrangements, Indian title is capable of direct transfer to the Crown is attested to by the colonial record. The Royal Proclamation of 1763 is predicated on that premise. It codifies the British Crown's consistent practice throughout colonial North America of accepting direct conveyances from the Indians of their title. Both by its practice and by its legislation, therefore, the British Crown recognized that Indian title was a property interest in land identical to a fee simple in all respects save that, by virtue of the doctrine of Crown pre-emption, such title could only be alienated to the Crown.

The proprietary, alienable character of Indian title is also supported by a considerable body of American, British and Canadian case law.[69] In the *Guerin* case itself, Le Dain J. endorsed, on behalf of the Federal Court of Appeal, the view of Indian title as a right of property. He wrote:

> Professor K. Lysyk (now Mr. Justice Lysyk) in his article, "The Indian Title Question in Canada: An Appraisal in the Light of Calder" (1973), 51 Can. Bar Rev. 450 at p. 473, expressed the view that the Indian title amounts to a beneficial interest in the land. He drew this conclusion from the implication, in what was said in *St. Catherine's Milling* and subsequent decisions of the Privy Council, which I have cited, concerning the effect of the extinguishment of Indian title, that until such extinguishment the beneficial interest in the land was not available to the province and only passed or reverted to the province upon the extinguishment of the Indian title. There is in my opinion much force in this view. For the reasons suggested by Viscount Haldane in *Amodu Tijani*, to which Professor Lysyk also makes reference, *if the Indian title cannot be strictly characterized as a beneficial interest in the land it amounts to the same thing. It displaces the beneficial interest of the Crown. As such, it is a qualification of the title of the Crown of such content and substance as to partake,*

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[67] *Supra*, note 53.

[68] *Supra*, note 24 at 59 [emphasis added].

[69] *Worcester*, *supra*, note 33 at 544-5 and 559-61; *Mitchel*, *supra*, note 33 at 745-6, 749, 752 and 758; *St Catharines*, *supra*, note 2 at 608-16 *per* Strong J.; *Re Southern Rhodesia*, *supra*, note 40; *Amodu Tijani*, *supra*, note 40; *Calder*, *supra*, note 22 at 375-90 *per* Hall J.

> *in my opinion, of the nature of a right of property.* I am, therefore, of the opinion that it could be the subject of a trust.[70]

These authorities lead to the conclusion that, if Indian title in Canada is now incapable of direct transfer to the Crown, it is not because of the non-proprietary character of such title, but because of the constraints imposed by the *Constitution Act, 1867* in its division of jurisdictional and proprietary rights between Canada and the Provinces.

The second basic reason for the restriction upon alienation of Indian title was, as both Dickson and Estey JJ. point out, to protect the Indians' interest in dealings with third parties.[71] Abusive purchases of Indian lands by private settlers during the colonial period had resulted in unrest among certain Indian nations. In order to prevent these abuses, and to protect the Indians' title to their lands, the British Crown adopted the policy of exclusive Crown pre-emption. This policy, expressed most notably in the Royal Proclamation of 1763, prohibited private purchases of Indian lands and required that all purchases of Indian lands be made either by the Crown or by its representatives.[72]

Crown pre-emption was never intended to deny that Indian title was a property interest comprising the incidents of exclusive possession, occupation and use. On the contrary, its purpose in restricting the alienation of Indian title to the Crown was primarily to safeguard the Indians' property interest in their lands. This restriction necessarily assumed that Indian title was capable of alienation to the Crown.

It is therefore incorrect to suggest, as do Estey J. in *Smith* and Dickson J. in *Guerin*, that the Indians' personal title in land is somehow intrinsically incapable of alienation. If that were the case, the numerous treaties by which Indian peoples across Canada have ceded their title to the Crown would have had no object. By accepting the surrender of Indian title in these treaties, the Crown acknowledged that such title is a property interest capable of alienation against compensation. In these cases, the Crown derived its own title to the beneficial interest in the object lands from the Indians' cession.[73]

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[70]*The Queen* v. *Guerin*, *supra*, note 2 at 711 [emphasis added].

[71]*Guerin* v. *The Queen*, *supra*, note 1 at 382-3 and 392-3.

[72]See the Royal Proclamation, *supra*, note 52; *Mitchel*, *supra*, note 33 at 745-6 and 748-9; *St Catharines*, *supra*, note 2 at 608-10, 623-6 *per* Strong J.; *The King* v. *Lady McMaster* (1926), [1926] Ex. C.R. 68; *Easterbrook* v. *The King* (1930), [1931] S.C.R. 210, [1931] 1 D.L.R. 628; Cumming & Mickenberg, *supra*, note 37, ch. 4; Slattery, *supra*, note 40, chs 4 and 5.

[73]*Mitchel*, *ibid.* at 749; *R.* v. *White and Bob* (1965), 50 D.L.R. (2d) 613 at 617, 52 W.W.R. 193 (B.C.C.A.) *per* Davey J., aff'd (1965), [1965] S.C.R. vi, 52 D.L.R. (2d) 481; *Calder*, *supra*, note 22 at 390 and 394 *per* Hall J.

"Usufructuary"

The most recent assessment by the Supreme Court of Canada of the word "usufructuary" in relation to Indian title was provided by Estey J. in *Smith* v. *The Queen*.[74] Since Dickson J. refers with approval to this assessment in the *Guerin* case,[75] it may be useful here to consider its accuracy.

In the *Smith* case, Estey J. describes the Indians' usufructuary interest in land as "but the right of the Indians in question to enjoy the use of the land under federal legislative regulation".[76] A surrender of Indian title results in "the revival or restoration of the complete beneficial ownership in the Province without further burden *by reason* of s. 91(24)".[77] And again,

> [t]he effect of a complete release, therefore, would be the withdrawal of these lands from Indian use within the contemplation of s. 91(24) of the *Constitution Act*. As found in *St. Catherine's*, the title of the Province would be unencumbered by any operation of s. 91(24).[78]

Estey J. refers to the *Shorter Oxford English Dictionary* to define the word "usufruct" as

> 1. *Law*. The right of temporary possession, use, or enjoyment of the advantages of property belonging to another, so far as may be had without causing damage or prejudice to it.
>
> 2. Use, enjoyment, or profitable possession (of something) 1811.[79]

These considerations lead Estey J. to view Indian title as an ephemeral, personal right incapable of any transfer at all.[80]

These passages reveal an unorthodox approach to Indian title. Estey J. suggests that this title arises by operation of section 91(24) of the *Constitution Act, 1867*. He also suggests that the provincial Crown possesses an original title of complete beneficial ownership such that when the Indian title is extinguished, the Province's complete beneficial ownership is revived or restored without further burden by reason of section 91(24). Both these propositions appear, with deference, to be incorrect.

Section 91(24) of the *Constitution Act, 1867* confers exclusive jurisdiction upon the Parliament of Canada with respect to "Indians, and lands reserved for the Indians". Whereas it thereby empowers Canada to legislate with regard to Indian title and to accept surrenders of such title, it does not

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[74] *Supra*, note 53.
[75] *Guerin* v. *The Queen*, *supra*, note 1 at 381.
[76] *Supra*, note 53 at 564.
[77] *Ibid.* at 562 [emphasis added].
[78] *Ibid.* at 564.
[79] *Ibid.* at 569.
[80] *Ibid.*

create such title. As Dickson J. notes in *Guerin*, Indian title "is a preexisting legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision",[81] including, presumably, section 91(24) of the *Constitution Act, 1867.*

Second, for the surrender of Indian title to revive or restore complete beneficial ownership in the Province, the latter must first have had such ownership. It is by no means clear, however, that the Province ever had such complete beneficial ownership prior to the extinguishment of Indian title. Estey J. relies upon the Privy Council decision in *St Catherine's Milling* as authority for the proposition that it did. But, with respect, Lord Watson does not say this in *St Catherine's Milling.* What he does say is:

> It appears to them [their Lordships] to be sufficient for the purposes of this case that there had been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.[82]

Again, describing Indian and Crown land title before surrender, Lord Watson writes:

> The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the Province in the same," within the meaning of sect. 109; and must *now* belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.[83]

Lord Watson goes on to say:

> The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue *whenever the estate of the Crown is disencumbered of the Indian title.*[84]

These passages establish that surrender disencumbers the provincial Crown's title of Indian title. Although Lord Watson states that Indian title is subject to federal jurisdiction under section 91(24) of the *Constitution Act, 1867*, he does not, despite Estey J.'s assertion to the contrary, equate such title with a "burden by reason of s. 91(24)".

Moreover, the passages quoted above suggest that the Province's beneficial interest in Indian lands does not predate the surrender or extinguishment of Indian title. On the contrary, the Province's beneficial interest arises

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[81]*Guerin* v. *The Queen, supra,* note 1 at 379.
[82]*Supra,* note 24 at 55.
[83]*Ibid.* at 58-9 [emphasis added].
[84]*Ibid.* at 59 [emphasis added].

only upon such surrender or extinguishment. Until then, the Province has no more than a bare legal right to the land, subject to "an intercst other than that of the Province in the same", under section 109 of the *Constitution Act, 1867.* It is this "radical" or "ultimate" title which Lord Watson means by the Crown's "substantial and paramount estate, underlying the Indian title".[85]

This impression is strengthened when Lord Watson later observes that, following the Indians' surrender of their land title, Canada's retained jurisdiction over their hunting and fishing cannot empower her to dispose "of that beneficial interest in the timber *which has now passed to Ontario*".[86] The word "now" indicates that it is the surrender which conveys the beneficial interest to Ontario. In consequence, the Province did not have any prior beneficial interest in the land for the surrender to revive or restore. Its only beneficial interest was that first conveyed to it by the surrender of the Indians.

If neither Canada nor the Province had the beneficial interest in the land before the surrender of Indian title, who did? The only other candidate is the Indians themselves. It is precisely of this beneficial interest that the Indian title consists, and it is this beneficial interest which the surrender conveys, via Canada, to the Province.

It is true that Lord Watson does not expressly refer to the Indian title as a beneficial interest. Rather, he characterizes it as a "personal and usufructuary right". But no incompatibility arises between this right and a beneficial interest. Both rights comprise the substantive possession, use and enjoyment of property. Both include all the incidents of a right of property, save for the right to dispose freely of the thing itself. Both are themselves incapable of alienation. Both are dismemberments carved out of a complete right of property, leaving only a shell behind. The shell left behind the usufruct is the bare property; that left behind the beneficial interest is the legal or trust title. If, owing to their respective common and civil law origins, beneficial interest and usufruct are not precisely equivalent terms, Lord Watson does not use them in a technical or precise way. Rather, his intent seems to have been to distinguish between the substantive incidents of ownership on the one hand, and the legal title to property on the other. It is in this sense that he distinguishes between the Indian's "personal and usufructuary right" and the Crown's "paramount estate".

This interpretation is supported by other authorities. The Marshall Court decisions, to which the Privy Council was referred, distinguished, early in

[85] *Ibid.* at 55.
[86] *Ibid.* at 60 [emphasis added].

the nineteenth century, between, on the one hand, the Indians' exclusive possession, occupation and use, tantamount to beneficial ownership, and, on the other, the Europeans' ultimate title. The latter, the Marshall Court held, conferred merely contingent rights of property. It did not vest the Crown with immediate beneficial ownership, but entitled the Crown to acquire the beneficial ownership from the Indians. This the Crown could do by the exercise of rights incidental to its paramount or radical title: the right of pre-emption, or purchase upon voluntary sale, the right of eminent domain or expropriation, and the right of remainder or reversion upon voluntary abandonment by the Indians.[87]

This interpretation is also consistent with the opinion of Strong J. in *St Catharines Milling and Lumber Co.* v. *The Queen*,[88] cited with approval by Hall J. in *Calder* v. *A.G. British Columbia*.[89] Relying substantially upon the Marshall Court decisions, Strong J. discusses the British colonial policy of recognizing the Indians' usufructuary title. This policy, he argues,

> may be summarily stated as consisting in the recognition by the Crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested.[90]

This passage succinctly states the classical law on relative Crown and Indian land titles. Its treatment of the notion of personal and usufructuary Indian title and ultimate Crown title is more explicit than, but quite consistent with, the Privy Council's laconic approach to these issues. "Usufructuary" indicates the Indians' "absolute use and enjoyment of these lands". This title is tantamount to beneficial ownership. It is usufructuary because the Crown held the ultimate, or paramount, title prior to extinguishment. The chief practical consequence of ultimate title was that it gave the Crown the exclusive right to acquire, by purchase, the Indians' title. It therefore consisted, not of a present beneficial interest, but of a contingent right of ownership dependent for its realization upon the Crown's exercise of its right of pre-emption.

[87]See J. Hurley, "Aboriginal Rights, the Constitution and the Marshall Court" (1982-83) 17 R.J.T. 403.

[88]*Supra*, note 2 at 602-38. Strong J. dissented on other grounds.

[89]*Supra*, note 22 at 376 and 378-9.

[90]*St Catharines*, *supra*, note 2 at 608.

Expanding upon colonial policies towards the Indians' usufructuary title, Strong J. writes:

> It thus appears, that in the United States a traditional policy, derived from colonial times, relative to the Indians and their lands has ripened into well established rules of law, and that the result is that the lands in the possession of the Indians are, until surrendered, treated as their rightful though inalienable property, so far as the possession and enjoyment are eoncerned; in other words, that the *dominium utile* is recognized as belonging to or reserved for the Indians, though the *dominium directum* is considered to be in the United States.[91]

This policy, Strong J. notes, originated with the British colonial authorities and applies with as much force in Canada as in the United States.[92]

Strong J. summarizes the position in Canada as follows:

> [A]t the date of confederation the Indians, by the constant usage and practice of the crown, were considered to possess a certain proprietary interest in the unsurrendered lands which they occupied as hunting grounds; that this usage has either ripened into a rule of the common law as applicable to the American Colonies, or that such a rule had been derived from the law of nations and had in this way been imported into the Colonial laws as applied to Indian Nations; that such property of the Indians was usufructuary only and could not be alienated, except by surrender to the crown as the ultimate owner of the soil ... .[93]

The Indian usufructuary title, according to Strong J., constitutes a genuinely proprietary interest in land. This title is qualified by the adjectives "personal and usufructuary" to denote the consequences of the Crown's right of pre-emption attendant upon its ultimate sovereign title. It differs from an unqualified right of property, or fee simple, in the one sense that it can only be alienated to the Crown. Alienation is, however, possible to the Crown; the Crown's own beneficial ownership, or *dominium utile*, has no other source than the Indians' cession of their own beneficial interest.

The Privy Council again considered the relationship between usufructuary aboriginal title and radical or ultimate Crown title in *Amodu Tijani* v. *Secretary, Southern Nigeria*.[94] In so doing, it explicitly referred to its judgment in *St Catherine's Milling*. Viscount Haldane said in *Amodu Tijani* that:

> [A] very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified

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[91] *Ibid.* at 612.
[92] *Ibid.* at 612-3.
[93] *Ibid.* at 615-6.
[94] *Supra*, note 40.

> by a right of beneficial user [in favour of the aboriginies] which may not assume definite forms analagous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence. Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada. (*St. Catherine's Milling and Lumber Company* v. *The Queen* ... .[95]

Elaborating upon usufructuary title, Viscount Haldane went on to say:

> That title, as they [their Lordships have pointed out, is prima facie based, not on such individual ownership as English law has made familiar, but on a *communal usufructuary occupation, which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference.*[96]

Both these extracts were cited with approval by Hall J. in *Calder* v. *A.G. British Columbia.*[97]

These authorities suggest that the Indians' usufructuary title is quite consistent with a proprietary interest in land. This right is also capable of transfer, albeit only to the Crown. In view of the wealth of judicial interpretation of usufructuary aboriginal title, it is perplexing why, in the *Smith* case, Estey J. turned to the *Shorter Oxford English Dictionary* for a definition of such title. The cases indicate that Indian title is a good deal more solid than the ephemeral right to which Estey J. refers.

Estey J.'s treatment of usufructuary Indian title in *Smith* leads Dickson J. to conclude in *Guerin* that such title is not a property interest. With respect, this conclusion runs counter to the bulk of the authorities.

ii. Beneficial Interest

Dickson J. concedes that certain authorities have characterized Indian title as a beneficial interest in land.[98] No real conflict arises, in Dickson J.'s view, between this characterization and the view of Indian title as a personal and usufructuary right. Both contain a core of truth. However, because both are drawn from foreign legal traditions, neither is entirely accurate in describing Indian title. Dickson J. therefore concludes that Indian title "does not, strictly speaking, amount to beneficial ownership ...". He prefers the label "*sui generis* interest".[99]

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[95] *Ibid.*

[96] *Ibid.* at 409-10 [emphasis added].

[97] *Supra*, note 22 at 354 and 401.

[98] *Guerin* v. *The Queen*, *supra*, note 1 at 379-80.

[99] *Ibid.* at 382.

Wilson J., on the other hand, frankly acknowledges the beneficial interest of Indians, at least in their reserve lands:

> I think that when s. 18 mandates that reserves be held by the Crown for the use and benefit of the Bands for which they are set apart, this is more than just an administrative direction to the Crown. I think it is the acknowledgement of a historic reality, namely that *Indian Bands have a beneficial interest in their reserves* and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it. This is not to say that the Crown either historically or by s. 18 holds the land in trust for the Bands. The Bands do not have the fee in the lands; their interest is a limited one. But it is an interest which cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree.[100]

Clearly affirming Indian title as a beneficial interest, at least in reserve lands, Wilson J. appears on this point more in line with the bulk of the authorities, examined under the previous headings, than does Dickson J.

It should be noted, however, that Wilson J. addresses her remarks specifically to reserve lands. Unlike Dickson J., she does not treat of the distinction between recognized and unrecognized Indian title. It is unclear, therefore, whether Wilson J. views unrecognized Indian title in unsurrendered lands as comprising the same beneficial interest as recognized Indian title in reserve lands.

Wilson J. states that the Crown may not derogate from or interfere with Indian title unless the Indians agree. This stipulation of Indian consent as a precondition for extinguishment of Indian title marks an advance on much of earlier Canadian case law on the topic. In *St Catherine's Milling*, for example, Lord Watson stated that the Indians' tenure was "dependent upon the good will of the Sovereign".[101] In *Calder* v. *A.G. British Columbia*,[102] Judson J. apparently upheld the Crown's unfettered discretion to extinguish Indian title. By making this extinguishment of Indian title contingent upon Indian consent, Wilson J. concurs with such American authorities as *Minnesota* v. *Hitchcock*.[103]

iii. *Sui Generis* Right

Having concluded that Indian title partakes of both a personal and usufructuary right and a beneficial interest in land, Dickson J. calls it a *sui generis* interest:

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking,

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[100]*Ibid.* at 349 [emphasis added].
[101]*Supra*, note 24 at 54.
[102]*Supra*, note 22 at 333-5.
[103]*Supra*, note 33 at 388-9.

> amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.[104]

According to Dickson J., then, the two essential components of Indian title are, first, its general inalienability and, second, the fiduciary duty of the Crown to which it gives rise upon surrender. Although referring to the "general" inalienability of Indian title, Dickson J. makes it plain that this title was originally susceptible of alienation to the Crown. If it is no longer so alienable, this is not because of a defect inherent in Indian title, but because of the constitutional peculiarities discussed earlier.

Inalienability and fiduciary duty are important elements of Indian title. Yet it is unclear whether, as Dickson J. states, "[a]ny description of Indian title which goes beyond these two features is both unnecessary and potentially misleading."[105] A number of questions arise with regard to Indian title which cannot be reduced to these two features. For example, does Indian title comprise ownership of natural resources, surface and sub-surface, renewable and non-renewable? Or is it restricted to a right of hunting and fishing, as Mahoney J. suggests in *Hamlet of Baker Lake* v. *Minister of Indian Affairs and Northern Development*?[106] Is Indian title capable of dismemberment like other property interests? Is it a "real" right which inheres in the land despite conveyance to a third party? Does it remove Indian land, both unsurrendered and reserved, from provincial jurisdiction? The settlement of aboriginal land claims turns upon issues such as these. Parties to land claims negotiations may well require further clarification of relative Indian and Crown land titles than the Supreme Court of Canada provides in the *Guerin* decision.

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[104]*Guerin* v. *The Queen*, *supra*, note 1 at 382.
[105]*Ibid.* at 382.
[106]*Supra*, note 33 at 559 and 568.

3. Surrender Requirement

a. General

The Crown's fiduciary duty, as Dickson J. argues, does not proceed solely out of the Indians' interest in land. It is created by the combination of this interest with what may be called the "surrender requirement":

> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest is alienable except upon surrender to the Crown.[107]

Dickson J. later advances the surrender requirement as a separate source of fiduciary duty for the Crown.[108] Rather than a distinct source of fiduciary duty, however, the surrender requirement may more properly be seen as a feature of Indian title itself. From this perspective, the surrender requirement corresponds to the "personal" element of Indian title. This element, as has been seen, stipulates that Indian title is inalienable except to the Crown. From another perspective, the surrender requirement simply restates the doctrine of Crown pre-emption, reserving for the Crown the exclusive right to acquire Indian title.

b. Origin

The surrender requirement originated, Dickson J. argues, with the Royal Proclamation of 1763. Since then, it has been incorporated into colonial and federal legislation, including the current *Indian Act*, regulating Indian affairs. According to Dickson J.,

> [t]he Royal Proclamation of 1763 provided that no private person could purchase from the Indians any lands that the Proclamation had reserved to them, and provided further that all purchases had to be made by and in the name of the Crown, in a public assembly of the Indians held by the governor or commander-in-chief of the colony in which the lands in question lay. As Lord Watson pointed out in *St. Catherine's Milling*, ... this policy with respect to the sale or transfer of the Indians' interest in land has been continuously maintained by the British Crown, by the governments of the colonies when they became responsible for the administration of Indian affairs, and, after 1867, by the federal government of Canada. Successive federal statutes, predecessors to the present *Indian Act*, have all provided for the general inalienability of

[107] *Guerin* v. *The Queen*, *supra*, note 1 at 376.
[108] *Ibid.* at 376.

> Indian reserve land except upon surrender to the Crown, the relevant provisions in the present Act being ss. 37-41.[109]

c. Purpose

As already noted, the surrender requirement was ordained not so much to profit the Crown as to serve the Indians' best interests. Dickson J. observes that

> [t]he purpose of the surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with a declaration that "great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians ... ." Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.[110]

For Dickson J., the surrender requirement reflects the Crown's acknowledgement of the duty incumbent upon it, by virtue of its historical role as guardian of the Indians, to protect their title in land. But if this is so, the surrender requirement is not, contrary to Dickson J.'s earlier assertion, itself a source of fiduciary duty. Rather, it is a specific manifestation of a general fiduciary duty, and this duty in turn derives from the guardian relationship existing between the Crown and the Indians. This topic is examined further below.

d. Scope

The two extracts just quoted from Dickson J.'s reasons for judgment also establish that the inalienability of Indian title resulting from the surrender requirement is relative, not absolute, in scope. Dickson J. refers to the Royal Proclamation, which recites that many conveyances of Indian title occurred before 1763. The Proclamation purports to restrict, in favour of the Crown, but for the benefit of the Indians, the latter's capacity to alienate their lands in the future. It does not seek to abrogate that capacity entirely. On the contrary, it expressly contemplates the future purchase by the Crown of the Indians' title. The Royal Proclamation therefore evidences the Crown's recognition of Indian title as a proprietary interest capable of alienation. The Proclamation does not ordain the general inalienabilty of

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[109] *Ibid.* at 383.
[110] *Ibid.* at 383-4.

Indian title; it merely subjects, by way of prior surrender, transactions between the Indians and third parties to the scrutiny of the Crown in its capacity as intermediary and guardian of the Indians' interest.

e. Definition of "Surrender"

i. Release

As to the word "surrender" itself, Estey J. draws useful attention[111] to the confusion resulting from the two senses attributed to it by the *Indian Act*. In one sense "surrender" denotes "release". This meaning emerges from section 37 of the *Act*, which reads:

> 37. Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart.[112]

In this case, an Indian band surrenders its interest in land to the Crown as a prelude to the definitive alienation of that interest to a third party. The effect of such an absolute surrender is to purge the object land of the Indian title, and so to remove it from the category of "lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*.[113]

ii. Retention

In the other sense, "surrender" signifies the retention, albeit in a different form, of Indian title. This sense also emerges from section 37 of the *Act*. It applies in cases where a band "surrenders" its interest in land to the Crown so as to change the form of its use and benefit from direct to indirect, as in a lease to a third party.[114] Such a surrender, Estey J. observes, "effect[s] the proposed alternate use of the land for the benefit of the Indians". He goes on:

> The Act, in short, does not require the Indian to limit his interest in Indian lands to present and continuous occupation. The Band may vicariously occupy the lands, or part of such lands, through the medium of a lease or licence. ... This is not a release in the sense of that term in the general law. Indeed, it is

[111] *Guerin* v. *The Queen, supra*, note 1 at 392-3.

[112] *Supra*, note 3.

[113] See, *e.g.*, *St Catherine's Milling, supra*, note 24; *Ontario Mining, supra*, note 62; *A.G. Canada* v. *Giroux* (1916), 53 S.C.R. 172, 30 D.L.R. 123; *Star Chrome, supra*, note 50; *Re Stony Plain, supra*, note 62; *Smith, supra*, note 53.

[114] See, *e.g.*, *St Ann's Island Shooting and Fishing Club Ltd* v. *The King* (1950), [1950] S.C.R. 211, [1950] 2 D.L.R. 225 [hereinafter cited to S.C.R. as *St Ann's Island*]; *Corp. of Surrey* v. *Peace Arch Enterprises Ltd* (1970), 74 W.W.R. 380 (B.C.C.A.); *Western Industrial Contractors Ltd* v. *Sarcee Developments Ltd* (1979), 98 D.L.R. (3d) 424, [1979] 3 W.W.R. 631 (Alta C.A.).

> quite the opposite. It is a retention of interest and the exploitation of that interest in the manner and to the extent permitted by statute law. The Crown becomes the appointed agent of the Indians to develop and exploit, under the direction of the Indians and for their benefit, the usufructuary interest as described in *St. Catherine's*.[115]

This ambiguity of meaning of "surrender" is a source of practical problems for Indian bands, casting doubt upon the legal status of their lands. It would be helpful if the two senses of "surrender" were clearly distinguished by an amendment to the *Indian Act*.

4. Discretion

Dickson J. cites as a third source of fiduciary duty for the Crown the discretionary power vested in it by the *Indian Act*. He writes:

> Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.
>
> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one.

He continues:

> [W]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[116]

And again, "the nature of Indian title coupled with the discretion vested in the Crown are sufficient to give rise to a fiduciary obligation".[117]

The Crown's discretion does not of itself give rise to a fiduciary duty. But this discretion, when combined with the Crown's obligation to act for the benefit of the Indians, constitutes the Crown a fiduciary. Dickson J. seems to argue that the Crown has historically assumed a responsibility to act in the interest of the Indians. This obligation predates the *Indian Act*. Implicit in this finding is the notion that the Crown's fiduciary duty towards Indians exists independently of the *Indian Act*. In any event, the general economy of the *Indian Act* reflects the Crown's obligation to act for the

[115] *Guerin* v. *The Queen*, *supra*, note 1 at 392-3.
[116] *Ibid.* at 383-4.
[117] *Ibid.* at 386.

benefit of the Indians. The *Act* also confers upon the Crown a measure of discretion to assist it in the discharge of this obligation. It is this combination of obligation and discretion which gives rise to the Crown's fiduciary duty.

It is also this combination of obligation and discretion which distinguishes the Crown from a mere agent. As already seen, Estey J. classifies the Crown's relationship with the Indians as one of agency.[118] But, according to Halsbury, to which Estey J. himself refers, "[t]he essence of the agent's position is that he is *only an intermediary* between two other parties".[119] It may readily be admitted that the Crown acts, in one sense, as an intermediary between the Indians and third parties. But the Crown does not act *only* as an intermediary. It is not a disinterested broker acting between two equal parties. The Crown has a special, historical relationship with the Indians. This relationship, now formalized in the *Indian Act*, obliges the Crown to act positively for the benefit of Indians. It also vests the Crown with the discretion necessary to effect this aim. It therefore casts the Crown more in the light of a fiduciary than an agent *vis-à-vis* the Indians. Estey J. seems not to take this special relationship into account.

In the instant case, Dickson J. observes, both section 18(1) of the *Indian Act* and the surrender document confer broad discretion upon the Crown in dealing with the surrendered lands. But this discretion is not unfettered. It is limited both by the fiduciary relationship binding the Crown to the Indians and by the specific terms of the *Indian Act*. As to the former, Dickson J. states:

> When, as here, an Indian Band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf.[120]

As to the latter:

> The discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case. This is as true of the Crown's discretion *vis-à-vis* the Indians as it is of the discretion of trustees, agents, and other traditional categories of fiduciary. The *Indian Act* makes specific provision for such narrowing in ss. 18(1) and 38(2). A fiduciary obligation will not, of course, be eliminated by the imposition of conditions that have the effect of restricting the fiduciary's discretion. A failure to adhere to the imposed conditions will simply itself be a *prima facie* breach of the obligation.[121]

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[118] *Ibid.* at 391 and 393-4.

[119] *Halsbury's Laws of England*, vol. 1, 4th ed. (1973) para. 701 at 418 referred to by Estey J. in *Guerin* v. *The Queen*, *ibid.* at 394 [emphasis added].

[120] *Ibid.* at 385.

[121] *Ibid.* at 387.

Wilson J. also finds that the discretion conferred upon the Crown by section 18(1) of the *Indian Act* is limited and subject to the equitable jurisdiction of the courts:

> [W]hile I agree ... that s. 18 does not go so far as to create a trust of reserve lands ..., it does not in my opinion exclude the equitable jurisdiction of the courts. The discretion conferred on the Governor in Council is not an unfettered one to decide the use to which reserve lands may be put. It is to decide whether any use to which they are proposed to be put is "for the use and benefit of the band". This discretionary power must be exercised on proper principles and not in an arbitrary fashion. It is not, in my opinion, open to the Governor in Council to determine that a use of the land which defeats Indian title and affords the Band nothing in return is a "purpose" which could be "for the use and benefit of the band". To so interpret the concluding part of s. 18 is to deprive the opening part of any substance.[122]

Thus while discretion forms an essential element of the Crown's fiduciary duty, it is subject to such limits as are required to secure the purpose of that duty.

5. Guardianship

Although neither Dickson J. nor Wilson J. explores it in detail, both allude, in treating of the Crown's fiduciary duty, to its historical role as guardian of the Indians. Wilson J. writes:

> I think that when s. 18 mandates that reserves be held by the Crown for the use and benefit of the Bands for which they are set apart, this is more than just an administrative direction to the Crown. I think it is the acknowledgement of a historic reality, namely that Indian Bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it.[123]

This statement suggests that section 18 of the *Indian Act* is merely declarative of a fiduciary duty incumbent on the Crown by reason of its historical guardianship of the Indians. Dickson J. makes much the same point when he speaks of "the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties".[124]

[122] *Ibid.* at 350-1.
[123] *Ibid.* at 349.
[124] *Ibid.* at 383.

Both these passages implicitly refer to the guardianship which has historically characterized relations between the Crown and Indians.[125] This historical guardianship, it may be argued, provides a more logical basis for the Crown's fiduciary duty towards the Indians than such specifics as the surrender requirement or the Crown's discretionary power with regard to surrendered lands.

This view also appears more consistent with American authorities which have inferred the fiduciary duty of the United States *vis-à-vis* the Indians from the nature of the general legal relationship between the two. For over one hundred fifty years, the American courts have consistently characterized this relationship as one between guardians and ward. Chief Justice John Marshall first expressed the relationship in *Cherokee Nation* v. *Georgia*:

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may more correctly, perhaps, be dominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ccases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.[126]

Since then, the United States Supreme Court has often given legal effect to specific fiduciary duties arising out of this general guardian relationship.[127]

This inference of specific fiduciary duties from a general guardian relationship seems to recommend itself more than Dickson J.'s deduction of the Crown's fiduciary duty from incidents like the surrender requirement. In any event, having now affirmed the principle of the Crown's fiduciary duty towards the Indians, the Supreme Court of Canada has given Canadian

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[125]This historical guardianship was recognized in such Canadian authorities as *Re Indian Claims*, *supra*, note 2; *R.* v. *Morley* (1931), [1932] 4 D.L.R. 483 at 513, [1932] 2 W.W.R. 193 (B.C.C.A.); *Re Kane* (1939), [1940] 1 D.L.R. 390 at 397 (N.S. Co. Ct); *St Ann's Island*, *supra*, note 114 at 219.

[126]30 U.S. 9, 5 Pet. 1 at 17 (1831).

[127]See, *e.g.*, *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294 (1902); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903); *Choate* v. *Trapp*, 224 U.S. 665 (1912); *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *United States* v. *Creek Nation*, 295 U.S. 103 (1935); *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476 (1937); *United States* v. *Santa Fe Pacific Railroad Co.*, *supra*, note 33; *United States* v. *Alcea Band of Tillamooks*, *supra*, note 33; *United States* v. *Sioux Nations of Indians*, *supra*, note 32; *contra*, see *Beecher* v. *Wetherby*, 95 U.S. 517 (1877); *Seminole Nation* v. *United States*, 316 U.S. 286 (1942); see also *Elk* v. *Wilkens*, 112 U.S. 94 (1884); *United States* v. *Kagama*, 118 U.S. 375 (1886); *Choctaw Nation* v. *United States*, 119 U.S. 1 (1886); *United States* v. *Nice*, 241 U.S. 591 (1916); *United States* v. *Waller*, 243 U.S. 452 (1917).

courts the opportunity to profit from American judicial experience with regard to the practical consequences of that duty.

C. Scope

A question arises as to whether the Crown's fiduciary duty towards Indians is general in scope, or limited to the surrender of Indian lands. At first glance, the latter response seems indicated by Dickson J.'s repeated relation of the fiduciary duty to the surrender requirement.[128] It might be argued from this relation that Dickson J. intends the fiduciary duty to apply only to surrenders of Indian lands. The better course appears to be simply to acknowledge the awkwardness of Dickson J.'s inference of a general fiduciary duty from a specific item such as the surrender requirement. As already seen, it is the general guardian relationship between the Crown and the Indians, rather than the specific surrender requirement manifesting this relationship, which appears to form the true basis of the Crown's fiduciary duty. If so, this duty applies not only to surrenders of Indian lands but to relations in general between the Crown and the Indians.

Limited support for this view may be found in the recent judgment of the Federal Court of Appeal in *Kruger* v. *The Queen.*[129] There the federal government had expropriated, in 1941 and 1944, two parcels of land in the Penticton Indian Reserve No. 1 for the purposes of an airport. No surrender was obtained for the first parcel, while the second was only surrendered two years after the expropriation. The Appellant Indians claimed, among other things, that, by pursuing its own rather than their interest in expropriating their lands and by failing to compensate them adequately for this taking, the Crown had breached its fiduciary duty towards them. The Federal Court of Appeal was therefore called upon to consider the applicability of the

[128]*Guerin* v. *The Queen*, *supra*, note 1 at 376, 382-3 and 385.

> The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown. ... The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians. "Indian title" gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. ... The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. ... In the present appeal [the fiduciary duty's] relevance is based on the requirement of a "surrender" before Indian land can be alienated. ... When, as here, an Indian Band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf.

[129](18 March 1985), (F.C.A.D.) [unreported].

Crown's fiduciary duty, established in *Guerin*, to a case other than one of surrender.

All three members of the panel held that the Crown's fiduciary duty applied. While Urie J. rejected the Appellant's claim of breach of fiduciary duty, he agreed that the Crown was under the same fiduciary duty towards Indians when expropriating as when accepting a surrender of their lands:

> [I]t is clear that what was said by Dickson J., in the *Guerin* case was related to a fiduciary relationship in the context of that case, *i.e.*, where there was a surrender of Indian lands to the Crown on certain terms, which terms were changed by the Crown without consultation with or approval by the Indians. That is not the factual situation in the case at bar. Nevertheless, for the purposes of this appeal, I am prepared to accept that the principle propounded by Dickson J. applies. When the Crown expropriated reserve lands, being Parcels A and B, there would appear to have been created the same kind of fiduciary obligation, vis-à-vis the Indians, as would have been created if their lands had been surrendered.[130]

Stone J. subscribed to Urie J.'s reasons and added:

> The doctrine of fiduciary duty enunciated at the Supreme Court of Canada in *Dalbert Guerin et al.* v. *Her Majesty the Queen and The National Indian Brotherhood* (November 1, 1984) will, of course, require elaboration and refinement on a case-by-case basis. While the courts have not yet, to my knowledge, applied the doctrine in a case like the present one, I think it is applicable even though the circumstances are quite different from those of the *Guerin* case.[131]

Although he eventually dismissed the Appellants' claim as statute barred, Heald J. upheld the application of the *Guerin* doctrine of fiduciary duty to the present case of expropriation:

> I do not think, however, that what was said by Mr. Justice Dickson relative to the fiduciary relationship existing between the Crown and the Indians can be construed in such a way as to be authority for the proposition generally that the fiduciary relationship arises only where there is a surrender of Indian lands to the Crown. It is correct to note, as did Mr. Justice Urie, that those comments were made by the learned Justice in the context of the facts of that case which involved a surrender of Indian lands to the Crown upon certain terms. However, Mr. Justice Dickson made the following comments at pages 41 and 42:
>
>> While the existence of the fiduciary obligation which the Crown owes to the Indians is dependent on the nature of the surrender process, the standard of conduct which the obligation imports is more general and more exacting than the terms of any particular surrender. In the present case the relevant aspect of the required standard of conduct is defined by a principle analogous to that which underlies the doctrine of promissory or equitable estoppel. The Crown cannot promise the band that it will obtain a lease of the latter's

[130] *Ibid.* at 31 of Urie J.'s reasons.

[131] *Ibid.* at 3 of Stone J.'s separate opinion.

> land on certain stated terms, thereby inducing the band to alter its legal position by surrendering the land, and then simply ignore that promise to the band's detriment: see, e.g., *Central London Property Trust Ltd* v. *High Trees House Ltd*, [1947] 1 K.B. 130; *Robertson* v. *Minister of Pensions*, [1949] 1 K.B. 227 (C.A.).
>
> In obtaining without consultation a much less valuable lease than that promised, the Crown breached the fiduciary obligation it owed the band. It must make good the loss suffered in consequence.
>
> Accordingly, I think it clear that the fiduciary obligation and duty being discussed in *Guerin* would also apply to a case such as this as well and that on the facts in this case, such a fiduciary obligation and duty was a continuing one — that is, it arose as a consequence of the proposal to take Indian lands and continued throughout the negotiations leading to the expropriations and thereafter including the dealings between the Crown and the Indians with respect to the payment of the compensation to the Indians in respect to Parcels A and B.[132]

In these reasons, Urie and Stone JJ. state that the Crown's fiduciary duty applies to expropriation as well as to surrender of Indian lands, but they do not say why. Heald J. apparently founds this broadened application upon the surrender requirement and the promissory estoppel stemming from the surrender document in *Guerin* as well as upon the Crown's proposal, in the instant case, to take the Indians' land. These seem, with respect, rather precarious bases upon which to seat the broadened application of the Crown's fiduciary duty. A more secure basis may lie in the Crown's historical role of guardian towards the Indians. If this argument is sound, the Crown's fiduciary duty would apply to its relations in general with the Indians.

Other aspects of the scope of the Crown's fiduciary duty may be inferred from the *Guerin* and *Kruger* cases. As to lands, Wilson J. confines her remarks in *Guerin* to reserve lands. She suggests, however, that the Crown is under a fiduciary duty with regard not only to the surrender but to the management and disposition of reserve lands.[133] Moreover, in that she attributes the source of the Crown's fiduciary duty to aboriginal title,[134] that duty would seem to apply to "unrecognized", aboriginal lands as well as to "recognized", reserve lands. This inference appears corroborated by Dickson J., who says that the "Indian interest ... is the same in both" traditional tribal lands and reserve lands.[135]

As to types of transactions, *Kruger* establishes that the Crown's fiduciary duty applies to expropriations as well as to surrenders. No reason appears,

[132] *Ibid.* at 5-6 of Heald J.'s reasons.
[133] *Guerin* v. *The Queen*, *supra*, note 1 at 349-50.
[134] *Ibid.* at 349.
[135] *Ibid.* at 379.

however, why this duty should not embrace any type of transaction between the Crown and the Indians, at least with regard to lands.

As to parties, *Guerin* indicates that the fiduciary duty governs the Crown's dealings with third parites in relation to Indian lands. *Kruger* makes clear that it also governs the Crown in dealings directly with the Indians, even where third parties are not involved. Moreover, the Crown's fiduciary duty would appear to extend to all groups which are considered as Indians or aboriginal peoples for the purposes of the Constitution. These groups would include non-status Indians, Métis, and Inuit, in addition to registered Indians.[136] The question as to whether the Crown's fiduciary duty applies only to aboriginal collectivities, or to native individuals as well, must await determination by the courts. In principle, however, no reason appears why native individuals should not be able to invoke the Crown's fiduciary duty.jIt has been argued above that, since the Crown's fiduciary duty stems from its general guardianship of the Indians, it applies to the Crown's relations in general with the Indians. Fundamental implications flow from this proposition. For example, the Crown's fiduciary duty would require it, at a minimum, to give full effect to its undertakings under existing land claim agreements such as the James Bay and Northern Quebec Agreement. Again, the federal government would appear obligated to secure for native peoples an adequate standard of subsistence, housing, health and education. As to Canada's own role in aboriginal and treaty claims, the doctrine of fiduciary duty could be argued to compel the federal government both to negotiate with, and to provide the necessary resources to, native peoples in order to settle such claims. It would also seem to require the federal government not to remain passive but to act positively on behalf of native peoples to settle their aboriginal and treaty claims *vis-à-vis* recalcitrant provincial governments.

D. Nature

1. Trust v. Fiduciary Duty

In Dickson J.'s view, the Crown's fiduciary obligation towards the Indians does not give rise to either an express, an implied or a constructive trust. The principal impediment to the creation of an express or implied trust, he argues, is that Indian title is not a property interest "which could constitute the trust *res*, so that even if the other *indicia* of an express or implied trust could be made out, the basic requirement of a settlement of

[136]*Constitution Act, 1982*, s. 35(2), Schedule B, *Canada Act 1982* (U.K.), 1982, c. 11. *Reference as to Whether the Term "Indians" in Head 24 of Section 91 of the B.N.A. Act, 1867, Includes the Eskimo Inhabitants of the Province of Quebec* (1939), [1939] S.C.R. 104.

property has not been met".[137] Similarly, the absence of any unjust enrichment for the Crown in the present case prevents the creation of a constructive trust. In the result, "[t]he Crown's fiduciary obligation to the Indians is ... not a trust."[138]

Wilson J. agrees with Dickson J. as to the existence of a general fiduciary duty for the Crown arising out of Indian title and reflected in section 18 of the *Indian Act.*[139] Unlike him, however, she feels that the surrender document created an express trust for the Crown in the present case.[140] This divergence can probably be explained by the fact that, unlike Dickson J., Wilson J. feels that Indian title is a property or beneficial interest sufficient to constitute a trust *corpus.* For reasons explained earlier, Wilson J.'s view in this respect appears preferable to that of Dickson J.

2. "Political" v. "True" Trust

In his judgment for the Federal Court of Appeal in *Guerin,* Le Dain J. relied upon the English cases *Tito* v. *Waddell (No. 2)*[141] and *Kinloch* v. *Secretary of State for India*[142] to find that any trust-like obligation imposed on the Crown by section 18 of the *Indian Act* or by the surrender was not a "true" trust subject to the equitable jurisdiction of the courts but an unenforceable "political" trust.[143] Two major factors prompted this finding. First, Le Dain J. felt that the discretion conferred upon the Crown by section 18 was incompatible with an equitable obligation.[144] Second, the Crown's responsibility regarding reserves was more governmental or public than private in nature.[145]

Both Dickson and Wilson JJ. distinguish the present from the political trust cases on the basis of the independent nature of Indian title. Dickson J. observes that

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[137] *Guerin* v. *The Queen, supra,* note 1 at 386.
[138] *Ibid.* at 386.
[139] *Ibid.* at 349-50.
[140] *Ibid.* at 355.
[141] (1976), [1977] 3 All E.R. 129, [1977] 2 W.L.R. 496.
[142] (1882), 7 App. Cas. 619 (H.L.).
[143] The expression "political trust" had already been used by Rand J. in *St Ann's Island, supra,* note 114 at 219 to describe relations between the Crown and Indians in Canada. He wrote: "The language of the [*Indian Act*] embodies the accepted view that these aborigenes [*sic*] are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation." Rand J. did not, however, use the term "political trust" in opposition to a "true trust". He viewed the Crowns political trust towards the Indians as entailing legal consequences determinable in a court of law. For other references to the Crown's "political trust", see *supra,* note 2.
[144] *The Queen* v. *Guerin, supra,* note 2 at 718.
[145] *Ibid.* at 719.

> Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it. For this reason, *Kinloch* v. *Secretary of State for India in Council, supra*; *Tito* v. *Waddell (No.2), supra*, and the other "political trust" decisions are inapplicable to the present case. The "political trust" cases concerued essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision.[146]

Dickson J.'s reasoning seems to run along the following lines. The interests claimed in the political trust cases were entirely dependent on the governmental discretion embodied in the various instruments, whether treaty, statute or executive order, underlying such claims. It is difficult to found a true trust upon such a discretionary basis. In the present case, however, the Indians' claim rests in part upon their Indian title. Since this title is an independent legal right, and does not depend upon governmental discretion for its existence, it may well serve as the basis for an enforceable fiduciary duty.

Wilson J. expresses the same view:

> In all these [political trust] cases the funds at issue were the property of the Crown (or, at least, as in *Kinloch, supra,*in the possession of the Crown) and none of those laying claim to them as beneficiaries could show a right to share in the funds independent of the treaty, statute or other instrument alleged to give rise to an enforceable trust.
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> ...
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> It seems to me that the "political trust" line of authorities is clearly distinguishable from the present case because Indian title has an existence apart altogether from s. 18(1) of the *Indian Act*.[147]

In consequence, the independent legal character of the Indian title grounding the Appellants' claim renders the political trust cases inapplicable.

As to the discretion conferred by section 18(1) of the *Indian Act* upon the Crown, and held incompatible with an equitable obligation by Le Dain J., Dickson J. argues that "far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, [it] has the effect of transforming the Crown's obligation

[146] *Guerin* v. *The Queen, supra*, note 1 at 378-9.
[147] *Ibid.* at 351-2.

into a fiduciary one".[148] Moreover, he notes, the Crown's discretion is considerably narrowed by the conditions imposed in sections 18(1) and 38(2) of the *Indian Act*.[149] Wilson J. also draws attention to the qualifications set by section 18(1) upon the Crown's discretion.[150] The Crown must exercise this qualified discretion, not in an arbitrary way, but on proper principles so as to secure its purpose, namely the use and benefit of the band. This qualified discretion, she feels, is inconsistent with a mere political trust. The courts will ensure that it is exercised in a way compatible with the Crown's fiduciary duty.

As to the distinction between public and private law duties, Dickson J. again invokes the independent legal nature of Indian title to argue that the Crown's fiduciary duty is in the nature of a private law duty and thus enforceable by the courts.

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.[151]

With respect, it is not clear that, as Dickson J. says, the independent character of Indian title renders the Crown's responsibility in its regard in the nature of a private law duty. At first blush, this responsibility appears more public than private. It addresses, not private individuals, but whole groups or classes of persons. Further, it stems from essentially public relations between two categories of political society, Canada and the Indian peoples.

It may be that the distinctions drawn by Le Dain J. between public and private law duties and between "political" and "true" trusts compel Dickson J. to assimilate the Crown's responsibility towards the Indians and their lands to a private law duty. But these distinctions need not be hard and fast. As already seen, the American Supreme Court has long held the United

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[148] *Ibid.* at 384.
[149] *Ibid.* at 387.
[150] *Ibid.* at 349-50.
[151] *Ibid.* at 385.

States to be under a fiduciary duty towards the Indian nations within its borders. This duty, arising out of the peculiar political circumstances of the two classes, has been seen as governed by public law. Nevertheless, the Court has freely borrowed by analogy from the private law institution of trusts to give practical effect to the United States' public law fiduciary duty towards the Indians.[152] Rather than attempting to categorize the Crown's fiduciary duty towards Indians as one of either public or private law, it may prove more fruitful, and more faithful to the often anomalous nature of relations between these two sets of actors, to adopt this hybrid approach developed by the United States Supreme Court.

E. Effect

Although not a trust, strictly speaking, the Crown's fiduciary duty has the practical legal effect of one. Dickson J. notes that "[t]his obligation does not amount to a trust in the private law sense. ... 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.[153] He continues:

> The Crown's fiduciary obligation to the Indians is therefore not a trust. To say as much is not to deny that the obligation is trust-like in character. As would be the case with a trust, the Crown must hold surrendered land for the use and benefit of the surrendering Band. The obligation is thus subject to principles very similar to those which govern the law of trusts concerning, for example, the measure of damages for breach.[154]

Thus the conditions of breach and the quantum of damages will be the same for the Crown's fiduciary duty as for a private law trust.

Wilson J. does not express any opinion on the legal effect of the Crown's fiduciary duty towards Indians and their lands, since, although she upholds the principle of this duty, she finds the Crown in breach of a specific trust created by the surrender document.[155] Nevertheless, Wilson J.'s determination that the Crown's fiduciary duty is an equitable obligation enforceable by the courts suggests that its effects are to be defined by analogy with the law of trusts.

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[152] *Sioux Nation, supra,* note 32.
[153] *Guerin* v. *The Queen, supra,* note 1 at 376.
[154] *Ibid.* at 386-7.
[155] *Ibid.* at 348-9, 354 and 362.

III. Conclusion

A. Conflict of Interest

It may be asked whether the same rules of conflict of interest govern the Crown's fiduciary duty towards Indians as those which govern a trust. The recent Federal Court of Appeal judgment in *Kruger* v. *The Queen*[156] suggests an affirmative response. In that case, the federal government, acting on the recommendation of the Department of Transport, expropriated two parcels of the Penticton Indian Reserve No. 1 for the purposes of an airport. The Appellants argued that the Crown was in conflict of interest since its interest in expropriating the reserve lands ran counter to its fiduciary duty to secure adequate compensation for the Penticton Indian Band in respect of the expropriated lands.

The *Kruger* case squarely poses the question of the potential conflict between the Crown's special duty to the Indians and its general duty to the public at large. This question arises with peculiar force in land claims negotiations where Canada assumes a dual role of protector of the native peoples' special interest and custodian of the public's general interest.

In his majority reasons in *Kruger*, Urie J. "[a]ssum[ed], without deciding, that the rules applying to conflicts of interest between trustees and their *cestuis que trust* apply to fiduciaries".[157] He then rejected the Appellants' claim of conflict of interest for two reasons. First, the Indian Affairs Branch officials concerned had, in their dealings with the Department of Transport, vigourously advocated the views of the Penticton Indians.[158] Second, "the Transport officials, too, owed a duty in the performance of their functions, not a direct duty to the Indians, but a duty to the people of Canada as a whole, including the Indians, not to improvidently expend their moneys".[159] Urie J. conceded that the Crown had "competing obligations" to the Indians and to the general public.[160] Nevertheless, he felt that no conflict of interest arose because "the Crown was in the position that it was obliged to ensure that the best interests of all for whom its officials had responsibility were protected. The Governor in Council became the final arbiter".[161]

Urie J.'s reasoning invites criticism on two grounds. First, the fiduciary duty towards Indians and their lands is incumbent on the Crown as a whole, not on any specific department or agency. The question of conflict of interest

[156]*Supra*, note 129.
[157]*Ibid.* at 33 of Urie J.'s reasons.
[158]*Ibid.* at 33-4.
[159]*Ibid.* at 34.
[160]*Ibid.* at 41-2.
[161]*Ibid.* at 42.

must therefore be decided with reference to the conduct, not of any one department, but of the entire federal government. Second, it seems difficult to share Urie J.'s confidence that the Crown can resolve its competing obligations towards the Indians and the general public without becoming embroiled in a conflict of interest. These competing obligations may force the Crown to choose, and such a choice is the essence of a conflict of interest.

These criticisms find support in the views of Heald J. in *Kruger*:

> Bearing in mind that it is the Crown which owes the fiduciary duty to the Indians, the facts of this case clearly raise the issue of conflict of interest, in my view. It seems evident that the two departments of the Government of Canada were in conflict concerning the manner in which the Indian occupants of Parcel A should be dealt with. The evidence seems to unquestionably establish that the officials of the Indian Affairs Branch were diligent in their efforts to represent the best interest of the Indian occupants. On the other hand, the Department of Transport was anxious to acquire the additional lands in the interests of air transport. This situation resulted in competing considerations. Accordingly, the Federal Crown was in a conflict of interest in respect of its fiduciary relationship with the Indians. The law is clear that "... one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside" and that "Equity fashioned the rule that no man may allow his duty to conflict with his interest." On this basis, the Federal Crown cannot default on its fiduciary obligation to the Indians through a plea of competing considerations by different departments of Government.[162]

Competing obligations do not, Heald J. states, necessarily place the Crown in a conflict of interest. He suggests how such a conflict can be avoided:

> If there was evidence in the record to indicate that careful consideration and due weight had been given to the pleas and respresentations by Indian Affairs on behalf of the Indians and, thereafter, an offer of settlement reflecting those representations had been made, I would have viewed the matter differently.[163]

With regard to the expropriation of reserve lands, this passage argues that the Crown may fulfill its fiduciary duty to the Indians by offering them compensation based on "careful consideration and due weight" to representations made by Indian Affairs officials.

B. "Good Faith Effort" Test

Although phrased in rather more subjective terms, this standard appears consistent with the "good faith effort" test in American case law. This test was developed by the Court of Claims in *Three Affiliated Tribes of Fort*

[162] *Ibid.* at 21-2 of Heald J.'s reasons [references omitted].
[163] *Ibid.* at 46.

Berthold Reservation v. *United States*,[164] and endorsed by the United States Supreme Court in *United States* v. *Sioux Nation of Indians*.[165] The test

> was proposed ... as a means of distinguishing between Congressional acts of trusteeship and of eminent domain [towards Indians. It] holds that "[w]here Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee."
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> In determining whether Congress has satisfied the good faith effort test in the discharge of its trusteeship duties, careful attention must be paid to the historical record of Congress' conduct and to the adequacy of the consideration paid.[166]

This good faith effort test may assist the Canadian courts in the future to decide whether, in cases of expropriation of Indians' lands, the Crown has discharged its fiduciary duty to them.

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[164] 390 F.2d 686 (1968).

[165] *Sioux Nation*, *supra*, note 32.

[166] J. Hurley, "Aboriginal Rights in Modern American Case Law" [1983] 2 C.N.L.R. 9 at 37 [footnotes omitted].