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Not So Many Hats: The Crown's Fiduciary Obligations to Aboriginal Communities since *Guerin*

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More than twenty-five years have passed since the Supreme Court of Canada's decision in *Guerin v. The Queen* in 1984.[1] It is perhaps the single most influential decision in Aboriginal law in the modern history of the Court.[2] Among other things, it enshrined the relationship between the Crown and Aboriginal peoples as a fiduciary relationship. Recent decisions by the Court, especially *Osoyoos Indian Band v. Oliver (Town)*,[3] *Wewaykum Indian Band v. Canada*[4] and *Ermineskin Indian Band and Nation v. Canada*,[5] have provided important new guidance on the subject of the Crown's fiduciary obligations to Aboriginal peoples. These new cases provide an occasion to consider the case law as it has progressed since *Guerin*.

It would be tempting to read *Wewaykum* and *Ermineskin* as narrowing the Crown's fiduciary obligations. On this view, *Guerin* gave birth to these fiduciary obligations, and the seminal case of *R. v. Sparrow*[6] gave them constitutional prominence, but they were subsequently cut down by *Wewaykum* and *Ermineskin*. With the advent of the idea that the honour of the Crown is a source of its duty to consult, per *Haida Nation v. British Columbia (Minister of*

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

2 For another account of the key role of the *Guerin* case, see James I Reynolds, "The Impact of the *Guerin* Case on Aboriginal and Fiduciary Law" (2005) 63 The Advocate 365 [Reynolds, "The Impact of the *Guerin* Case"].

3 2001 SCC 85, [2001] 3 SCR 746 [*Osoyoos*].

4 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*].

5 2009 SCC 9, [2009] 1 SCR 222 [*Ermineskin*].

6 [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow* cited to SCR].

Forests),[7] fiduciary obligations have been relegated to the sidelines.[8] According to some who hold this view, *Wewaykum* stands for the proposition that "the Crown wears many hats." This means that even while the Crown is wearing the hat of its role as a fiduciary for Aboriginal interests, it is presumed that the Crown's other heads are wearing other hats, which represent the interests of the other parts of Canadian society.[9] This worry is echoed by James Reynolds who wonders if a variety of different factual considerations give rise to ever-thinner views of the Crown's fiduciary obligations, raising "the spectre of spectra."[10] This essay argues that these worries are understandable but can be mollified.

Indeed, this essay argues that paying close attention to the factual bases of the major fiduciary obligations cases, especially in cases where the Crown's fiduciary accountability is purportedly reduced, suggests that there is a constant core to the Crown's fiduciary obligations and that the Crown, in fact, does not "wear so many hats." It may be that the Court took the Crown's fiduciary accountability beyond its origins in the protection of Aboriginal interests in lands and resources in *Sparrow* and has subsequently sought to rein in the development of the doctrine. It is also true that the Court has imposed a new set of obligations on the Crown to consult with Aboriginal communities where their rights have yet to be proven. Yet whatever effect these attempts at circumscribing the Crown's fiduciary accountability to Aboriginal peoples and ascribing new, non-fiduciary obligations upon the Crown have had, a core concept of the fiduciary relationship has remained constant since *Guerin*. The core concept of the Crown's fiduciary obligations to Aboriginal communities is the discretion the Crown has over the property interests of Aboriginal communities. This discretionary power has been held for at least two hundred and

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7 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*].

8 For example, see J Timothy S McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (Markham, ON: Lexis-Nexis, 2008). McCabe, especially at 167-70, is of the view that since *Haida Nation*, the prominence of fiduciary obligations is diminished and may have been replaced by the honour of the Crown. For a detailed exposition of the difference between the concept of the honour of the Crown versus the Crown's fiduciary obligations, see James Reynolds, "The Spectre of Spectra: The Evolution of the Crown's Fiduciary Obligation to Aboriginal Peoples since Delgamuukw" in Maria Morellato, QC, ed, *Aboriginal Law Since Delgamuukw* (Aurora, ON: Canada Law Book, 2009) [Reynolds, "The Spectre of Spectra"]. For a broader discussion of how the Crown's fiduciary obligations may be narrowed, see generally Kent McNeil, "The Crown's Fiduciary Obligations in the Era of Aboriginal Self-Government" (2009) 88 Can Bar Rev 1 at 2-6.

9 *Wewaykum, supra* note 4 at para 96; Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: Oxford UP, 2011) at 79; McCabe, *ibid* at 175-77.

10 Reynolds, "The Spectre of Spectra," *supra* note 8 at 107.

fifty years, ever since the Crown began trying to mitigate conflicts between Aboriginal and settler communities by mediating economic relations between them.

This essay proposes to look at the often Byzantine development of the doctrine of Crown fiduciary obligations to Aboriginal peoples by the Supreme Court of Canada since the *Guerin* decision, and arrive at a coherent way of understanding the developments in the case law.[11] At times, as part of this bigger project, this essay addresses the content of the Crown's fiduciary obligations and how they relate to s. 35(1) of *The Constitution Act, 1982*.[12] It will argue that the recent case law has created distinctions in the content of the fiduciary obligation depending on whether the Aboriginal interest over which the Crown has discretion is an interest protected by s. 35(1), but that such a framework is compatible with the core concept that this paper proposes. In turn, the issue of the nature of the Aboriginal interest protected by the Crown's fiduciary obligations will require a short detour into the nature of reserve land in Canada, to which the essay will turn immediately hereafter. This will lead to a close look at the facts and the reasoning behind *Guerin*, which will illuminate some of the tensions that have formed part of the case law since that case was decided. This analysis will serve as a springboard for looking at the way that *Osoyoos*, *Wewaykum* and *Ermineskin* may have further articulated the doctrine of fiduciary obligations. Where appropriate, recourse will also be made to the Supreme Court of Canada's decision of *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*.[13]

The case law development since *Guerin* has presented a common core concept, the idea that the Crown has a special role in mediating the relationship between Aboriginal and settler communities in Canada, especially in relation to lands and resources. The Crown has arrogated to itself considerable discretion by making itself the exclusive representative of Aboriginal communities in their dealings

11 It has been argued by Robert Flannigan in "The Boundaries of Fiduciary Accountability" (2004) 83 Can Bar Rev 35 that, since *Guerin*, the Supreme Court of Canada has erred by muddying the strict doctrinal waters of traditional fiduciary theory by moving the focus away from the opportunism of the fiduciary to its discretion. Flannigan suggests that the Crown/Aboriginal case law should be seen as *sui generis* and should have no influence on fiduciary obligations case law in other contexts. Others disagree: see Reynolds, "The Impact of the *Guerin* Case," *supra* note 2 at 370. Whatever the merits of Flannigan's critique, this paper aims at a less ambitious goal, that of evaluating the Supreme Court's development of the doctrine of Crown fiduciary accountability to Aboriginal peoples against itself, and articulating where a constant core of understanding has emerged.

12 Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

13 [1995] 4 SCR 344, 130 DLR (4th) 193 [*Blueberry River*].

over lands and resources with settler communities. According to fiduciary theory, this brings with it concomitant obligations to exercise that discretion in the best interests of the beneficiary Aboriginal community. The case law reveals that these obligations often exist in tension with the duties of the Crown in favour of some conception of the public interest, which usually means the interest of the majority settler communities. These public interest obligations have been in tension with the Crown's fiduciary obligations to Aboriginal communities since *Guerin*. It is clear that the Crown's fiduciary obligations constrain the state's relationship to Aboriginal peoples and do not permit their interests to be treated on the same plane as the Crown's public interest obligations. Cases where the Crown's discretion is affected by statute present a special challenge to this picture. A similar challenge can be seen in cases that distinguish between a constitutionally-protected Aboriginal interest and those that do not benefit from this protection. This essay will argue that a major doctrinal uncertainty remains there. This is not to say that the Crown's fiduciary obligations may not sometimes reach beyond this core concept, as an authority like *Sparrow* may have done, but only to say that this core concept has never been the subject of any doubt.

To trace the development of the concept of the Crown's fiduciary obligations to Aboriginal communities, it will be necessary to begin with the *Guerin* case. To illustrate the salient features of the *Guerin* case, however, it will be helpful to start with a discussion of the nature of Aboriginal property rights in land in Canada.

I. RESERVE LANDS AND THE SURRENDER PROCEDURE

While space limitations do not permit a comprehensive review of the nature of reserve land in Canada, a skeletal survey is necessary to understand the larger argument in this essay.[14] Specifically, this survey will focus on the procedure for surrendering lands reserved for Aboriginal peoples, which is the procedure for transferring those lands to the settler community. It is in considering this procedure that the conflicts between the Aboriginal and settler communities is most stark, and the Crown's role as mediator is clearest.

In 1763, shortly after Great Britain's conquest of French colonies in North America, the British Crown was eager to enter into peaceful relations with Aboriginal peoples, many of whom had been military

14 For a much more extensive account of the nature of reserve land in Canada, see Richard H Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Native Law Centre, 1990). For recent case law on the issue, see *Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816 [*Ross River*]; and *Keewatin v Minister of Natural Resources*, 2011 ONSC 4801, [2012] 1 CNLR 13.

allies and trading partners of the defeated French.[15] Some British colonists were keen to gain ownership of lands west of the Appalachian Mountains through private dealings with Aboriginal persons residing there.[16] Some of these eager colonists were not always scrupulous businessmen (see the discussion below about "great Frauds and Abuses" in the *Royal Proclamation of 1763*). In any event, such real estate transactions would have been the site of conflicts and misunderstandings between Anglo-American systems of land ownership and land use, and the analogous systems of the respective Aboriginal communities. According to the wording of the *Royal Proclamation of 1763*[17] ("Proclamation"), such conflicts and misunderstandings had become, as we might say today, a matter of national security. The Crown and the First Nations involved reached an understanding of how to structure their relationship going forward so that such conflicts could be avoided.

To articulate its end of the bargain, the Crown issued a Proclamation, part of which read:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, *not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.*
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> ...
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> And whereas 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: In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of

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15 See generally John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) at 155.

16 See, for example, Colin G Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* (New York: Oxford UP, 2006), especially Chapter 2; Eric Hinderaker & Peter C Mancall, *At the Edge of Empire: The Backcountry in British North America* (Baltimore: Johns Hopkins UP, 2003); and Gregory Evans Dowd, *War Under Heaven: Pontiac, the Indian Nations, & the British Empire* (Baltimore: Johns Hopkins UP, 2004).

17 Reproduced in RSC 1985, App II, No 1 [*Royal Proclamation 1763*].

> Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, *that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement: but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie....*[18]

To oversimplify, the Proclamation established that the Crown had discretion to declare which lands were "thought proper to allow Settlement," and were therefore open to colonization by the settler community. For those lands, the Proclamation established rules about, among other issues, how real estate transactions would work. That is not to say that the Proclamation only concerned real estate transactions; rather, it is the basis of a nation-to-nation relationship between numerous Aboriginal peoples and the Crown that continues to this day. However, it is an important feature of the Proclamation that it contains both rules for dealing with the nation-to-nation relationship, as well as for dealing with land sales. The Crown-Aboriginal relationship having attributes that relate to both public law and private law would seem to have its origins at least as far back as the Proclamation.

The Proclamation established that the only legal way for Aboriginal people to enter into real estate transactions with the colonists was by making a treaty with the Crown, which would then act in place of the Aboriginal community in transactions with the colonists.[19] The scheme was that the Crown would take a proposal for a land purchase to the Aboriginal community. Aboriginal communities, for their part, were to make a decision on such transactions "at some public Meeting or Assembly...held for that Purpose,"[20] that is, usually for the purpose of deciding whether to surrender their land for sale to members of the settler community. The vague specification of "some public Meeting or Assembly" had the advantage of recognizing the validity of the rules of the

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18 *Ibid* [emphasis added].

19 Interestingly, the idea of the Crown becoming the exclusive agent for land sales to colonists may have had its origin in the British-friendly faction of the Iroquois Confederacy in the early 1700s: see Eric Hinderaker, *The Two Hendricks: Unravelling a Mohawk Mystery* (Cambridge, MA: Harvard UP, 2011) at 112.

20 *Royal Proclamation 1763*, *supra* note 17.

Aboriginal community in requiring certain configurations of community representation for a decision of the nature contemplated. For example, if the rule of the community was that members of a specific clan were to have a veto over the sale of lands used by that clan as a trapline, then the Proclamation was flexible enough to incorporate this rule. If the Aboriginal community decided to sell the land to the Crown through their own proceeding, the Crown could then sell it to (or enter into some other land agreement with) members of the settler community. If the Aboriginal community withheld its consent, no such sale was to take place. The procedural rules in the Proclamation gave some assurance that land sales would only take place with the consent of the community, as understood from the perspective of the community.[21] The consent would be verified by the supervision of senior officers of the Crown.

The Proclamation made all private sales of land, that is, sales which did not involve the Crown as mediator, between Indians and colonists illegal. It therefore set up an exclusive regime for real estate transactions in which the Crown became the sole agent, and it established certain rules for how the Crown was to conduct itself. Presumably, if the Crown was to sell the lands to colonists, the Crown and the Aboriginal community could enter into some kind of bargain to share in the revenues of the eventual land sale. Thus, not only was the consent of the Aboriginal community necessary, so was the consent of the Crown. The Crown therefore monopolized the role of real estate agent between the colonists and the Aboriginal communities, and in this manner, took upon itself almost complete discretion over which land transactions would go forward, and which would not.

This system of surrenders and land sales has survived largely intact to the present day in its application to lands on reserves. The *Indian Act*,[22] the contemporary legislation governing First Nations' reserves, defines "reserve" in the following way:

> "reserve"
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> (a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band....[23]

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21 For a contemporary analogue articulating the standard of "free, prior, and informed consent" for alienating the lands of indigenous peoples, see the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61, UNGAOR, 61st Sess, Supp No 295, UN DocA/61/295 (2007), especially articles 19, 28, 29, and 32.

22 RSC 1985, c I-5.

23 *Ibid*, s 2(1).

The *Indian Act* also provides the following in relation to the surrender of reserve lands:

> 18. (1) 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.
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> ...
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> 37. (1) Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty pursuant to subsection 38(1) by the band for whose use and benefit in common the reserve was set apart.
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> ...
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> 39. (1) An absolute surrender or a designation is void unless
>
> (a) it is made to Her Majesty;
>
> (b) it is assented to by a majority of the electors of the band
>
> (i) at a general meeting of the band called by the council of the band,
>
> (ii) at a special meeting of the band called by the Minister for the purpose of considering a proposed absolute surrender or designation, or
>
> (iii) by a referendum as provided in the regulations; and
>
> (c) it is accepted by the Governor in Council.

These provisions, and their provenance from the *Royal Proclamation of 1763*, are deeply important to the evolution of the doctrine of Crown fiduciary obligations toward Aboriginal communities. The Crown remains the exclusive agent through whom Aboriginal communities must go in order to transact business with relation to their reserve lands. The Crown remains committed to the conditions under which it will alienate reserve lands from Aboriginal communities: through assent expressed at a meeting called for the purpose of considering the proposal for surrender. As an exception to this, the *Indian Act* notably provides for unilateral Crown expropriation of reserve land, which will be further discussed below under the rubric of the *Osoyoos* case. The "public Meeting or Assembly" requirement from the Proclamation is echoed in s. 39(1)(b) of the *Indian Act*, which also recognizes the validity of a referendum for this purpose, but crucially retains the general principle that any band member has the right to

be involved in such decisions. The statute imposes a duty on the Crown to assure that these conditions are met, failing which the real estate transaction is void. The Crown now, as in 1763, is the guarantor of First Nations' rights to their reserve land, by holding title to the land for the use and benefit of the First Nation. It remains the sole agent and exclusive intermediary for significant economic interactions between Aboriginal and settler communities involving reserve lands.[24]

A whole host of vulnerabilities on the part of Aboriginal communities arise with this kind of relationship, as it would with any other sole agency relationship. For instance, the Crown becomes the sole determiner of the price for land that will be offered to the Aboriginal community, leaving any reference to market prices to the Crown's discretion;[25] the Crown becomes the exclusive agent through which an Aboriginal community can negotiate with the settler community;[26] the Crown has exclusive power to determine issues of market timing, and of the amount of land that would be the subject of any transaction;[27] and, in the absence of the capacity of Aboriginal communities to hire independent advisors,[28] it also becomes the sole source of information about the real estate transactions that it will put before the community.[29] As we will see, *Guerin* recognized the Crown's continued discretion in this set of relationships, and articulated a standard of conduct arising from them using the language of fiduciary theory.

II. *R. v. GUERIN*

The *Guerin* case involved the people of the Musqueam Reserve, a community not far from downtown Vancouver. The Musqueam

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24 Real estate transactions that fall short of triggering the surrender requirement, such as granting a license for recreational vehicles to occupy a part of a band-run campground, are an exception to this rule. For another exception, see the historical enfranchisement provisions in the *Indian Act*, *supra* note 22 At times, these provisions provided that when a Crown official determined an Indian had attained certain marks of assimilating to the settler society, he could be enfranchised and given a share of his band's community lands. For more on enfranchisement, see Robin Jarvis Brownlie, "A Persistent Antagonism: First Nations and the Liberal Order" in Jean-François Constant and Michel Ducharme, eds, *Liberalism and Hegemony: Debating the Canadian Liberal Revolution* (Toronto: University of Toronto Press, 2009) at 313-14.

25 See *Guerin*, *supra* note 1.

26 *Ibid.*

27 See *Semiahmoo Indian Band v Canada*, [1998] 1 FC 3, 148 DLR (4th) 523.

28 The lack of capacity may arise from a variety of causes, such as a lack of access to markets for advisors, or through Crown controls over band expenditures.

29 See *Blueberry River*, *supra* note 13.

claimed the area of their Reserve as part of their traditional territory.[30] The Reserve was described by the Indian Affairs Branch in 1955 as "the most potentially valuable 400 acres in metropolitan Vancouver today."[31] At around the same time, the Shaughnessy Heights Golf Club became interested in the lands of the Reserve.[32] The Musqueam were willing to enter into some kind of deal and paid to have their lands appraised, the report of which the Crown kept from the Band.[33] At a meeting to ratify the surrender for the lease to the Golf Club, Crown officials gave oral representations to the Band that there would be certain conditions in the lease that were favourable to the Band.[34] The Band apparently consented to the surrender.[35] The Crown, now empowered to deal with the surrendered land, entered into a lease with the Golf Club, though absent many of the favourable conditions that it had previously represented to the Band.[36] As the legal titleholder to the land after the surrender, the Crown's actions bound the Band at law.

The conduct of the Crown clearly did not sit well with any of the members of the Court, who unanimously held against the Crown. Moreover, they unanimously concurred with the remedy awarded by the trial judge, who calculated compensation, using equitable principles, based on what would have happened to the land if the Crown had not engaged in its duplicitous and inequitable conduct.[37] The value of the land at the time of the impugned transaction may have already been so high as to make its development into a golf course uneconomical. The trial judge concluded that the area would have been developed into residential properties by 1968-71, that such development would have been worth about ten million dollars to the Band, and awarded that amount to them.[38] This approach to remedies, according to both the trial judge and the Supreme Court of Canada, was the same as that of calculating remedies for a breach of trust: the beneficiary is "entitled to be placed in the same position so far as possible as if there had been no breach of trust."[39]

In spite of the unanimity of result and remedy, the Supreme Court of Canada was badly divided over the body of law to apply to the

30 See Musqueam Indian Band, online: <http://www.musqueam.bc.ca>.
31 *Guerin, supra* note 1 at 342.
32 *Ibid.*
33 *Ibid* at 343.
34 *Ibid* at 343-48.
35 *Ibid* at 346.
36 *Ibid* at 347.
37 *Ibid* at 356-363, Wilson J; at 390-391, Dickson J; at 394, Estey J, aff'g *Guerin v R* (1981), [1982] 2 FC 385, [1982] 2 CNLR 83 (TD), Collier J [*Guerin* FC].
38 *Guerin, supra* note 1 at 357.
39 *Ibid.*

situation.[40] Justice Dickson, writing for four of the eight judges, applied the law of fiduciary obligations. He began his reasons on the Crown's fiduciary responsibility with a discussion of the surrender requirement in the *Royal Proclamation of 1763*, which, as discussed in the previous section, established the Crown as the exclusive intermediary for Aboriginal-settler land transactions. He wrote, "The purpose of this 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."[41] He also acknowledged the provenance of the *Indian Act* land surrender provisions from the Proclamation. The *Indian Act*, then, was a

> confirmation...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, [through which] Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. ... 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.[42]

The content of this obligation is that "the Crown must hold surrendered land for the use and benefit of the surrendering band."[43] The Crown had breached this obligation because it

> was not empowered by the surrender document to ignore the oral terms which the band understood would be embodied in the lease.... After the Crown's agents had induced the band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms. When the promised lease proved [im]possible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the band to

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40 The debate between the justices at this juncture echoes a criticism later leveled at Justice Dickson's reasons by Flannigan, *supra* note 11 at 61-63, who worried that among other things, the Crown's breach was of the nominate dimension rather than the fiduciary dimension, since the breach benefitted a third party rather than the Crown itself.

41 *Guerin, supra* note 1 at 383.

42 *Ibid* at 383-84.

43 *Ibid* at 386.

> explain what had occurred and seek the band's counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.[44]

He therefore held the Crown liable.

Justice Wilson, writing for three judges, reached the same result by applying trust law directly, without resorting to the less developed doctrines of fiduciary law. She held:

> The subject of the trust, the trust *res*, was not the Band's beneficial interest in the land but the land itself. The Crown prior to the surrender had title to the land subject to the Indian title. When the Band surrendered the land to the Crown, the Band's interest merged in the fee. The Crown then held the land free of the Indian title but subject to the trust for lease to the golf club on the terms approved by the Band at its meeting on October 6, 1957. This trust was breached by the Crown when it leased the land to the club on terms much less favourable to the Band.[45]

She also agreed with Justice Dickson that the Crown owed a fiduciary obligation to the Musqueam. She held that s. 18 of the *Indian Act* was a statutory acknowledgement of the Crown's fiduciary obligation "to protect and preserve the Bands' interests from invasion or destruction."[46]

Justice Estey, writing for himself, applied the law of agency. He held that "[t]he Crown becomes the appointed agent of the Indians to develop and exploit, under the direction of the Indians and for their benefit," the Band's interest in the land.[47] The Crown, as agent, failed to carry out the instructions given to it by their principal, the Band, and thus became liable to the Band.

Notwithstanding this disagreement, the Supreme Court of Canada unanimously reversed the decision of the Federal Court of Appeal. The Court of Appeal's holding turned on what amounted to the justiciability of the issue. It held that although the surrender literally gave the land interest to the Crown "in trust,"[48] this was a use of the term "in a public law context," and therefore what was created was

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44 *Ibid* at 388-89.
45 *Ibid* at 353-54.
46 *Ibid* at 350.
47 *Ibid* at 393.
48 *Ibid* at 346.

not a "true trust," but a "political trust."[49] As a result, the equitable jurisdiction of the courts was excluded. The reasons of the Supreme Court of Canada, in their result as well as their reasons, rejected this proposition. For Justice Dickson, while the Crown's duty was "not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary."[50]

Thus, although they were unanimous in acknowledging that the Crown had done some wrong to the Musqueam and on how to best remedy the wrong, the judges of the Supreme Court of Canada fractured on the precise legal doctrines to apply, though they were sure that the continuing application of the doctrine of political trust to justify Crown behaviour was inappropriate. Justice Dickson's characterization of a *sui generis* fiduciary relationship between the Crown and Aboriginal people, commanding the plurality of votes of the panel, seemed to best articulate the mood of the Court. By characterizing the relationship as *sui generis*, the Court opened the door to a development of the fiduciary concept in the Aboriginal-Crown relationship outside the confines of the fiduciary concept *simpliciter*, yet nonetheless suggested it should remain tethered to that concept in important ways.[51] From then on, the case law itself was going to be *sui generis* too. As we shall see, one of the ways it was going to be *sui generis* was on the question of the nature of the duties as either private law duties or public law duties, which the progeny of *Guerin* confronted.

In soundly rejecting the decision of the Federal Court of Appeal, the *Guerin* Court repudiated the kind of justiciability reasoning that had kept the courts from intervening on behalf of Aboriginal peoples when the Crown's conduct violated the standards that might have been expected from it based on the promises enunciated in the Proclamation, and often repeated afterward. Even if subsequent case law was to develop *sui generis*, the Court was not setting the stage for the case law to journey on a lonely frolic into the wilderness. Rather, by explicitly sourcing the fiduciary obligation in the Proclamation, the Court gave the new fiduciary concept a reference point in a fundamental promise that has informed centuries of Crown-Aboriginal interaction. The genre of the Crown's fiduciary obligations, though of its own kind, was not without previous examples, even if the previous examples illustrated the Crown's breaches as often as

49 *Guerin v R* (1982), [1983] 2 FCR 656 at 717, 143 DLR (3d) 416 (CA) [*Guerin* FCA].

50 *Guerin*, *supra* note 1 at 385.

51 For a critique of a close relationship between the fiduciary obligations of the Crown to Aboriginal peoples and the broader doctrine of fiduciary responsibility, see Flannigan, *supra* note 11.

they illustrated its compliance.[52] The centre of this obligation was the obligation to care for the land assets of Aboriginal communities, on which subsequent case law would elaborate.

This case law would not be entirely *sui generis* in another important way. After *Guerin*, the Supreme Court of Canada engaged in important debates about the nature of fiduciary theory itself.[53] By *Hodgkinson v. Simms*, which was decided ten years after *Guerin*, a majority of the Supreme Court of Canada had come to agree on a "useful guide" for identifying new fiduciary relationships. Such relationships must be characterized by "(1) scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and, (3) a peculiar vulnerability to the exercise of that discretion or power."[54] As the Court was recognizing *Guerin*-like fiduciary accountability outside the Crown/Aboriginal community context, it was also applying *Guerin* logic in major cases within that context, such as in *Blueberry River* and *Osoyoos*.

III. *BLUEBERRY RIVER*—DEVELOPING THE *GUERIN* REASONS

In *Blueberry River*, the Band had entered into one of the Numbered Treaties with the Crown in 1916. The treaty promised the Band a reserve.[55] Two subsequent surrenders of interests in the reserve were at issue in the case. In 1940, the Band surrendered the mineral rights on its reserve to the Crown "in trust to lease for its benefit."[56] In 1945, the Crown sought and obtained a surrender of reserve land "to sell or lease"[57] those lands in order to provide veterans returning from World War II with agricultural land for settlement.[58] The 1940 surrender only gave the Crown the authority to lease the surrendered lands, but the 1945 surrender gave the Crown the discretion to choose between leasing and selling the interest in the reserve. Contrary to

52 For a more detailed account of such breaches, see Bartlett, *supra* note 14, especially chapter 3. The Crown seemed to be constantly torn between its awareness of the duty that it had undertaken to protect Aboriginal interests, and the politically attractive option of furthering settler community interests. See also McCabe, *supra* note 8 at 4-23.

53 See *Frame v Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81; *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14; *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534, 85 DLR (4th) 129 [*Canson*]; *Norberg v Wynrib*, [1992] 2 SCR 226, 92 DLR (4th) 449 [*Norberg*]; *Hodgkinson v Simms*, [1994] 3 SCR 377, 117 DLR (4th) 161 [*Hodgkinson*].

54 *Hodgkinson*, *ibid* at 408.

55 *Blueberry River*, *supra* note 13 at para 25.

56 *Ibid* at para 26.

57 *Ibid* at para 19.

58 *Ibid* at para 27.

the established policy of the Department of Indian Affairs to only lease the land in such a situation while retaining the mineral rights thereto,[59] Crown officials arranged for a sale of the full fee simple to the veterans. Oil and gas were later discovered on the surrendered lands.[60] No one was able to account for the decision to sell the fee simple in the land rather than retain mineral rights and lease only the surface rights, a decision that deprived the Band of potential royalties.[61]

The Supreme Court of Canada unanimously agreed that the Crown breached its fiduciary obligation to the Band by selling the entire interest in the land to the veterans rather than reserving the mineral interests for the Band. Four members of the Court stood behind Justice Gonthier's reasons, while three stood behind Justice McLachlin's. Other than disagreeing over how to characterize the relationship between the two surrenders, the group of Justices behind Justice Gonthier's opinion actually agreed with the result of Justice McLachlin's fiduciary obligations analysis.[62] We will therefore turn to her opinion.

Justice McLachlin's reasoning in *Blueberry River* is a rather rich source of understanding regarding the Crown's fiduciary obligations toward Aboriginal communities. First, *Blueberry River* affirmed that the Crown owes fiduciary obligations to the Aboriginal community even prior to the surrender of reserve land.[63] The Crown has a duty to ensure that the Band has consented to the surrender, and also to evaluate the surrender to ensure that it is not an exploitative transaction from the Band's perspective.[64] After the surrender, the Crown has an obligation to abide by the terms of the surrender.[65] Where the surrender specifies that the Crown is to deal with the land in a way that is "most conducive to [the] welfare" of the Band, the Crown's duties will include ensuring that any subsequent dealings with the land do not infringe on the interests of the Band any more than is necessary to promote the Band's own goals.[66] These duties will also include selling the land at market value[67] and employing the discretion given to it through the surrender terms in a way that best furthers the interests of the Band.[68]

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59 *Ibid* at paras 48-49.
60 *Ibid* at para 28.
61 *Ibid* at paras 18, 94.
62 *Ibid* at para 23.
63 *Ibid* at para 32ff.
64 *Ibid* at para 35.
65 *Ibid* at paras 45-46.
66 *Ibid* at paras 47-51.
67 *Ibid* at paras 52-56.
68 *Ibid* at paras 61-105.

The obligations found in *Guerin* and *Blueberry River* are not entirely different from those imposed on relationships between real estate agents and their clients,[69] outside of the Crown-Aboriginal context, or indeed upon any trustee-beneficiary relationship. The fiduciary's duty to be truthful in communications with beneficiaries and to use their discretion in a way that furthers the interests of a beneficiary are the basic building blocks of any trust relationship. Although a fuller analysis of *Blueberry River* will be made later in this paper, at this point it suffices to say that this case seems straightforwardly aligned with the logic in *Guerin*: the Crown is obliged to manage the process for surrendering reserve lands for the best interests of the Aboriginal community and to ensure their consent to it.

IV. *OSOYOOS* AND *WEWAYKUM*: THE CROWN AS FIDUCIARY MEETS THE CROWN AS GUARDIAN OF THE PUBLIC INTEREST

The next two major cases in which the Supreme Court addressed the Crown's fiduciary obligations to Aboriginal peoples were *Osoyoos* and *Wewaykum*. Although the Court in *Guerin* rejected the Crown's use of public law as a shield for its conduct, the distinction between public law and private law duties interjected itself in the Court's reasoning again in *Osoyoos* and *Wewaykum*. *Guerin*'s logic was applied assertively in *Osoyoos*, but *Wewaykum* has sometimes been thought to be a retrenchment of *Guerin*, a view that is challenged in this essay. The way the Court analyzes the difference between the Crown's public law duties and the Crown's private law duties turns on rather intricate factual distinctions, which necessitates delving into the facts of those cases.

In *Osoyoos Indian Band v. Oliver (Town)*, the Court deals with issues arising from an irrigation canal constructed through the Band's reserve in 1925 to spur the development of agriculture in the Okanagan Valley.[70] However, it was not until 1957 that the federal Crown retroactively invoked s. 35 of the *Indian Act* to authorize the province's earlier taking of land from the Osoyoos Reserve.[71] In effect, the federal Crown retroactively validated the provincial expropriation of land, using the power it holds by virtue of s. 35 of the *Indian Act*.[72] The issue on appeal to the Supreme Court was whether the Band retained a sufficient interest in the taken land and would therefore be entitled to tax the owner of the canal, pursuant to its power under

69 See e.g. *Soulos v Korkontzilas*, [1997] 2 SCR 217 at paras 46-52, 146 DLR (4th) 214.
70 *Supra* note 3 at para 5.
71 *Ibid* at para 1.
72 *Ibid* at para 6.

s. 83(1)(a) of the *Indian Act*.[73] In other words, this case explored whether the provincial expropriation, purportedly validated by the federal Crown's powers set out in s. 35 of the *Indian Act*, succeeded in removing the land from the reserve, or whether the Band retained some interest in spite of the federal Crown's actions.

The Court decided in favour of the Band. The Court arrived at this conclusion by interpreting s. 35 of the *Indian Act*,[74] and held that the Crown's fiduciary obligations include the duty to interpret its statutory power to expropriate reserve lands. The Court rejected the Crown's argument that its decision to expropriate the land was a public law decision and hence not subject to the strictures of the Crown's fiduciary obligations.[75] Instead, the Court established a two-step process for reconciling the Crown's expropriation powers with its fiduciary obligations. In the first stage, when the Crown is "determining that an expropriation involving Indian lands is required to fulfill some public purpose," no fiduciary duty exists.[76] In the second stage, the Crown's fiduciary obligations arise, "requiring the Crown to expropriate an interest that will fulfill the public purpose while preserving the Indian interest to the greatest extent practicable."[77] The Court explained that "[t]he duty to impair minimally Indian interests in reserve land not only serves to balance the public interest and the Indian interest, it is also consistent with the policy behind the rule of general inalienability in the *Indian Act* which is to prevent the erosion of the native land base."[78] The Crown's fiduciary obligations served to help interpret the statutory expropriation power in *Osoyoos*; since all that was necessary to operate the canal in this case was an easement, the Court held that the expropriation only succeeded in removing that interest from the reserve. The Court therefore found that the expropriation fell short of expropriating the fee simple and the interest in the reserve remained subject to the Band's taxation powers. The Crown's fiduciary obligations served to interpret the Crown's statutory expropriation powers in a way that minimized the impairment of the Band's land interests.

In *Osoyoos*, the *Guerin* vision of the Crown as fiduciary for the property of Aboriginal peoples was faced with a conceptual challenge. It would be a rare situation, of course, where an ordinary fiduciary could appropriate the property of a beneficiary to himself without the beneficiary's consent, but the Crown's powers to expropriate reserve

73 *Ibid* at para 1.
74 *Ibid* at paras 51-55.
75 *Ibid* at para 51.
76 *Ibid* at para 53.
77 *Ibid*.
78 *Ibid* at para 54.

lands allowed for this very occurrence. The Court recognized the inherent contradiction and sought to resolve it by acknowledging that, in some situations, the Crown plays multiple roles. By establishing a two-stage process, the Court gave content to the fiduciary obligation as it exists in each of those roles. In the first stage, when the Crown is determining whether an expropriation is necessary, the Crown's public law role is clear and no fiduciary obligation exists. In some sense, this is a limit on the Crown's fiduciary obligations.[79] At the second stage, the *Guerin* vision of the Crown as a private law guardian of Aboriginal interests applies in full force. It is crucial that once the Crown steps out of its role as the guardian of public interest, it once again becomes the steward of property for Aboriginal communities and is responsible for ensuring the minimal impairment of Aboriginal community interests.

The next major Supreme Court case to address the Crown's fiduciary obligations to Aboriginal people also involved tension between the Crown's role as private law trustee for the interests of an Aboriginal community and its role as guardian of the public interest. *Wewaykum* is often remembered as the case of the "ditto mark error,"[80] but its implications for the law of fiduciary obligations extends much further than the peculiar facts presented in *Wewaykum*. The Aboriginal parties, the Wewaikai and the Wewaykum, are both members of the larger Laich-kwil-tach First Nation. One of the crucial facts in *Wewaykum* is that the Laich-kwil-tach First Nation made no claim that its traditional territory extended to the land where the reserves were located. Rather, both Bands moved into the area from elsewhere, as the Court was at pains to point out,[81] and the Bands alleged that the Crown breached its requisite fiduciary obligation in the late nineteenth century. The Crown sought to create reserves for both bands; however, in the Crown's internal paperwork, a reserve that should have been identified with the Wewaykum Band was erroneously identified with the Wewaikai. In an attempt to correct the error, the Crown misidentified another reserve that should have been identified with the Wewaikai Band and identified it with the Wewaykum Band. No formal correction of this error was made before an Order in Council was issued that confirmed possession of the reserve lands by the band that actually settled on it. In litigation, both Bands asserted a right to equitable compensation from the Crown for the loss of its reserve lands, stemming from the issuance of the Order in Council that deviated from representations made in previous records.

79 See for example McCabe, *supra* note 8 at 155-56.
80 *Supra* note 4 at paras 42, 55-62.
81 *Ibid* at paras 3, 12, 77, 95.

The Supreme Court rejected the *Wewaykum* claim in a unanimous decision authored by Justice Binnie, but the Court took this opportunity to elaborate on the law of the Crown's fiduciary obligations to Aboriginal communities. The *Wewaykum* reasons began by affirming much of what *Guerin* said about the fiduciary duty being "called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples."[82] *Wewaykum*'s most influential refinement on *Guerin*, however, was to "affirm the principle [...] that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature."[83] Rather, the Court found that "[t]he fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests."[84] Justice Binnie did not offer much in the way of an elaboration on what he meant by "specific Indian interests," except to acknowledge the central role that land has played in previous fiduciary obligations cases,[85] and thus implicitly recognized land as a "specific Indian interest." Rather cryptically, Justice Binnie observed, "[f]iduciary protection accorded to Crown dealings with aboriginal interests in land (including reserve creation) has not to date been recognized by this Court in relation to Indian interests other than land outside the framework of s. 35(1) of the *Constitution Act, 1982*."[86]

Wewaykum consequently offered a novel distinction that impacts the extent of the Crown's fiduciary obligations: it distinguished between fiduciary obligations that existed prior to reserve creation from those that existed after reserve creation. In an often cited passage, Justice Binnie enumerated his reasoning on why the claimants' argument must fail:

> 1. The content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity.
> 2. Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* — which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic obligations of loyalty, good faith in the discharge of its

82 *Ibid* at para 79.
83 *Ibid* at para 83.
84 *Ibid* at para 81.
85 *Ibid.*
86 *Ibid.*

mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.

3. Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.[87]

Justice Binnie then elaborated on this schema. It appeared that *Wewaykum* only re-articulated what was known of the Crown's fiduciary duties following the creation of a reserve. As expressed in *Guerin*, *Osoyoos*, and *Blueberry River*,[88] a trust-like duty applies to the Crown following the creation of a reserve. In this context, the Crown's duty is to exercise its discretion over the Aboriginal interest in a way that prevents exploitative bargains. Justice Binnie continued:

> The "interests" to be protected from invasion or destruction, it should be emphasized, are legal interests, and the threat to their existence, as in *Guerin* itself, is the exploitative bargain (e.g. the lease with the Shaughnessy Heights Golf Club that in *Guerin* was found to be "unconscionable"). [...] Wilson J.'s comments should be taken to mean that ordinary diligence must be used by the Crown to avoid invasion or destruction of the band's quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself.[89]

In *Guerin*, the exploitative bargain arose after the Band surrendered its lands to the Crown, but *Wewaykum* affirmed that the exploitative bargain could arise prior to surrender, as decided in *Blueberry River*; for instance, the fiduciary obligation could extend to the Crown's discretion over the conduct of a meeting of the Band to determine whether to surrender the interest in question.[90] Moreover, *Blueberry River* is also clear that fiduciary obligations extend to the conduct of the Crown in deciding whether to accept the surrender of the

87 *Ibid* at para 86.
88 *Ibid* at paras 98-100.
89 *Ibid* at para 100.
90 *Ibid* at paras 99-100; *Blueberry River*, *supra* note 13 at paras 39-40. Prior to *Blueberry River*, it would have been plausible to argue that the Crown exercised the amount of discretion requisite to trigger a fiduciary obligation only after the band had agreed to a surrender. However, in *Blueberry River*, at para 40, the Court seemed to hold that certain circumstances could give rise to a Crown fiduciary obligation even prior to a surrender.

interest, a decision which allows the Crown to evaluate the substance of the transaction and the procedure of the surrender for evidence of exploitative conduct.[91] *Wewaykum* approved of these assertions from *Blueberry River*[92] and made no explicit moves to modify the law of fiduciary obligations "[o]nce a reserve is created,"[93] aside from establishing the requirement that the fiduciary obligation attach only to a "specific Indian interest."[94]

Wewaykum's great innovation was establishing a new doctrine of the Crown's fiduciary obligations "prior to reserve creation." On the former side of the reserve creation divide,

> the Crown exercises a public law function under the *Indian Act*—which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.[95]

At first glance, *Wewaykum* may have seemed like an odd case in which to introduce this distinction. As stated in the reasons for judgment itself, "the reserve-creation process dragged on from about 1878 to 1928, a period of 50 years in this case."[96] If anything, the facts here seemed to provide ample evidence that reserve creation might not be such a clear demarcation point on which to base a distinction that leads to the varying content of the Crown's fiduciary obligations.[97] Moreover, the distinction would have been of doubtful utility in resolving *Wewaykum*, since it is not clear that a ditto mark error would constitute a breach of the Crown's fiduciary obligations, even on the *Guerin* standard.

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91 *Ibid* at para 35.
92 *Wewaykum*, *supra* note 4 at para 99.
93 *Ibid* at para 86.
94 *Ibid* at para 81.
95 *Ibid* at para 86.
96 *Ibid* at para 89.
97 For more on the vagaries of the reserve creation process, see *Ross River*, *supra* note 14, *per* LeBel J, speaking for a majority of the Court, at para 43: "Canadian history confirms that the process of reserve creation went through many stages and reflects the outcome of a number of administrative and political experiments. Procedures and legal techniques changed. Different approaches were used, so much so that it would be difficult to draw generalizations in the context of a specific case, grounded in the particular historical experience of one region of this country."

Nonetheless, it is crucial to note that the establishment of a pre-reserve creation standard of fiduciary obligations was based on the rather unusual set of facts in *Wewaykum*, as the Aboriginal parties in the case traced their traditional territories to elsewhere in the province, not to the land on which the two impugned reserves sat. This explains the reasoning behind the establishment of less onerous content for the Crown's fiduciary obligations prior to reserve creation: the reserve was being created for the applicant Bands *outside of their traditional territory*. That is, prior to the creation of the reserve, the appellant Bands would have had as much of an interest in the land as non-Aboriginal settlers. Their land interests would have been elsewhere, in places where they had a s. 35(1) interest in land, namely their traditional territory. In that sense, the Crown was exercising a public law function under the *Indian Act* when it created reserves for the appellant Bands, according to Justice Binnie.[98] As such, reserves were created for the Bands in the same vein as land grants were being made to non-Aboriginal settlers. Justice Binnie elaborated:

> *When exercising ordinary government powers* in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting [...]. In resolving the dispute between Campbell River Band members and the non-Indian settlers named Nunns, for example, the Crown was not solely concerned with the band interest, nor should it have been. The Indians were "vulnerable" to the adverse exercise of the government's discretion, but so too were the settlers, and each looked to the Crown for a fair resolution of their dispute. At that stage, prior to reserve creation, the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians.[99]

He continued:

> As the dispute evolved into conflicting demands between the appellant bands themselves, the Crown continued to exercise public law duties in its attempt to ascertain "the

98 *Wewaykum*, *supra* note 4 at para 86.

99 *Ibid* at para 96 [underline in original; italics emphasis added].

> places they wish to have" (as stated at para. 24), and, as a fiduciary, it was the Crown's duty to be even-handed towards and among the various beneficiaries.[100]

Thus, although at times the language in *Wewaykum* seems broad enough to establish a new, lighter level of fiduciary obligations prior to reserve creation, the Court explained that this is only the case when a reserve is being created outside of the band's traditional territory, in the "exercise of ordinary government powers." In this context, Justice Binnie's remarks about the Crown wearing many hats is accurate. Outside of the band's traditional territory and outside of the context of a treaty or constitutional protection of Aboriginal rights, the Bands in question were in a contest with non-Aboriginal settlers on the basis of equality. The Crown was obliged to treat all parties' interests equally, since the Crown was "exercising ordinary government powers in matters involving disputes between Indians and non-Indians."[101]

The more common manner of creating reserves in Canada was to create the reserve on the traditional territory of a band. Reserves were typically created as a reserve from a land surrender, and the Crown would not be asking for a surrender of land from a band unless the Crown believed that the land was the band's to surrender. Where an Aboriginal community holds Aboriginal title to lands, they have a s. 35(1) interest protected under the *Constitution Act, 1982*. Previous case law, including *Guerin*, *Blueberry River*, and *Osoyoos*, concerned land that was already reserve land, land in which a band had a s. 35(1) interest, or both. For land in pre-reserve creation time in which a band has a s. 35(1) interest, the fiduciary obligation of the Crown would necessarily be subject to a different analysis.[102] It therefore seems clear that *Wewaykum*'s dictum about the Crown wearing many hats does not apply in situations where the Crown has discretion over a s. 35(1) interest. *Wewaykum* worries explicitly about the flood of fiduciary accountability litigation after *Guerin* and perhaps seeks to blunt the wide-ranging application of the Crown's fiduciary obligations to Aboriginal communities after the Court used those duties to inform itself of the interpretation of s. 35(1) of the *Constitution Act, 1982* in *Sparrow*.[103] *Wewaykum* seeks to refocus the doctrine on cases

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100 *Ibid* at para 97.

101 *Ibid* at para 96.

102 Commentators on *Wewaykum* generally do not identify a distinction between government powers exercised on s 35(1) lands and those exercised outside of s 35(1) lands: see e.g. Reynolds, "The Spectre of Spectra," *supra* note 8 at 130-31, McCabe, *supra* note 8 at 175-77. This paper argues that this distinction is indeed validly made and of great significance.

103 *Wewaykum*, *supra* note 4 at para 82; *Sparrow*, *supra* note 6 at 1109-11.

where there is a "cognizable Indian interest,"[104] but it is important to note that it has not disavowed any of the past Supreme Court of Canada decisions on Crown fiduciary accountability to Aboriginal communities. Furthermore, *Wewaykum* said nothing to change the Crown's fiduciary obligations over Aboriginal interests in lands as these obligations had been previously understood.

Wewaykum did not give any indication that the fiduciary obligation owed to Aboriginal communities within their traditional territory pre-reserve creation would be lightened in any way. If anything, *Wewaykum* seemed to broaden the scope of the fiduciary obligation outlined in *Guerin* and *Blueberry River* by establishing that the Crown owed the Bands a fiduciary obligation with respect to lands in which they had no s. 35(1) interest. *Wewaykum* is also remembered for explicitly limiting the Crown's fiduciary obligations to situations where a "cognizable Indian interest" over which the Crown has assumed discretion can be identified,[105] yet the standard set out in *Guerin* and *Blueberry River* was not affected when the Aboriginal interest in question was protected by s. 35(1). This was the picture of the Crown's fiduciary obligations as the Court headed into the next major case on the topic, *Ermineskin Indian Band and Nation v. Canada.*

V. *ERMINESKIN*: NEW CHALLENGES

The dominant question in *Ermineskin* was whether the Crown breached its fiduciary obligations to the Ermineskin Nation and Samson Nation, both "bands" within the meaning of the *Indian Act*, in how it handled the Bands' oil and gas royalty funds. The neighbouring Bands were signatories to Treaty No. 6,[106] and had reserves created for them pursuant to that Treaty.[107] Later, oil and gas was discovered below the surface of the reserve lands. In 1946, the Crown obtained surrenders of the oil and gas interests in their reserves from both Bands,[108] and the Crown agreed to manage the oil and gas royalties for them. The Crown decided to keep the royalties in the government's Consolidated Revenue Fund.[109] Between the time of the surrender and 1969, the Crown paid an interest rate of 3 per cent to 5 per cent on the royalties it kept for the Bands.[110] In 1969, the Crown began to tie the amount of interest paid on the

104 *Wewaykum, ibid* at para 85.
105 *Ibid* at paras 81-85.
106 *Treaty No 6*, Her Majesty the Queen and the Plain and Wood Cree Indian and other Tribes at Fort Carlton, Fort Pitt and Battle River, 1876.
107 *Ermineskin, supra* note 5 at para 8.
108 *Ibid* at para 9.
109 *Ibid* at para 12.
110 *Ibid* at para 13.

royalty monies to the yields of long-term government bonds.[111] In 1981, after a discussion between Crown officials and various First Nations representatives over market conditions in which short-term debt yielded greater returns than long-term debt, the Crown established a new, more diversified way of calculating interest.[112] However, this did not resolve the disagreement over how to manage the royalty fund. The Samson Band commenced an action in 1989, with the Ermineskin Band following suit in 1992. Both Bands alleged, *inter alia*, that the Crown was the trustee of the royalty monies, and that as such, it owed the Bands the duties of a common law trustee. Furthermore, in that capacity, it had the duty to invest the monies as a private trustee would have: in a diversified portfolio. If the Crown had done so, the monies would have yielded much higher returns than what they yielded sitting in the Consolidated Revenue Fund, accruing only government bond rates.[113] The monies, amounting at least in the hundreds of millions, were managed by a small team of generalist Crown officials, as opposed to expert management that a fund of this size would have been expected to command in the private sector.[114]

Justice Rothstein, delivering the judgment of the Supreme Court, denied the petition of the Bands. He acknowledged that it was incontrovertible that the Crown owed the Bands a fiduciary obligation over the royalty monies, but there was also controversy over the source of the fiduciary obligation and the content of the obligation, which, according to his reasoning, depended on the source of the obligation.

Five different sources of the fiduciary obligation were proposed: Treaty No. 6, the 1946 surrenders, the *Indian Oil and Gas Act*[115] [the *IOGA*], the common law, and the *Indian Act*.[116] For Justice Rothstein, the content and extent of the Crown's fiduciary obligation varied with the nature of each of the five different sources. For him, the source of the obligation was important because he found that the Crown had a statutory obligation that conflicted with its fiduciary obligations to manage the funds in the manner required of a common law trustee. Justice Rothstein's discussion of the distinction is as follows:

> If the fiduciary relationship arose out of Treaty No. 6, arguably the rights of the bands as beneficiaries of the

111 *Ibid* at para 14.
112 *Ibid* at para 16.
113 *Ibid* at paras 2, 17.
114 *Ermineskin Indian Band and Nation v Canada*, 2006 FCA 415 at paras 250-72, [2007] 3 FCR 245 [*Ermineskin* FCA].
115 RSC 1985, c I-7.
116 *Ermineskin, supra* note 5 at para 45.

> relationship are treaty rights and thus constitutionally protected under s. 35(1) of the *Constitution Act, 1982*. The bands submit that any legislation purporting to restrict the Crown's fiduciary obligations and the bands' corresponding rights as beneficiaries would be inconsistent with their rights under Treaty No. 6, and therefore unconstitutional and of no force and effect according to s. 52 of the *Constitution Act, 1982*.
>
> [...] If this is correct, any provisions of the *Indian Act* which preclude the Crown's ability to invest the royalties would be unconstitutional and of no force and effect.
>
> If, on the other hand, the Crown's fiduciary obligations arose from the Surrenders, the IOGA and/or the *Indian Act*, the bands will have rights as beneficiaries of the Crown's obligations, but they will not be constitutionally protected rights. As such, legislation that precludes investment of Indian royalties by the Crown will be valid legislation.[117]

Justice Rothstein held that Treaty No. 6 could not ground a Crown obligation to invest the monies. He found that it was part of the oral terms of the Treaty that proceeds from surrendered lands would be "put away to increase."[118] According to Justice Rothstein, this meant that the Crown had guaranteed to the First Nations signatories that there would be no loss to their capital.[119] As such, he held that the Treaty could not ground an obligation on the part of the Crown to invest the monies.

On the other hand, Justice Rothstein considered that the 1946 surrenders did state that the mining rights were surrendered in trust to the Crown "upon such terms and conditions as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people."[120] This, according to him, did grant the Crown the requisite amount of discretion to trigger a fiduciary obligation in the nature of *Guerin*.

However, Justice Rothstein held that this obligation, presumably since it was not sourced in a treaty and thus not protected by s. 35(1), could be modified by other statutes. He cited *Guerin* and *Authorson (Litigation Guardian of) v. Canada (Attorney General)*,[121] in which it was alleged that the Crown had violated its fiduciary obligations to war

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117 *Ibid* at paras 46-48.
118 *Ibid* at para 56.
119 *Ibid.*
120 *Ibid* at para 68 [emphasis omitted].
121 2003 SCC 39, [2003] 2 SCR 40.

veterans.[122] The discussion on *Authorson* is omitted here, but the reasoning is as follows:

> In *Guerin*, Dickson J. stated, at p. 387:
>
> > 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.
>
> ...
>
> This Court has held in *Guerin* and *Authorson* that when the Crown is a fiduciary, Parliament may legislate in ways that constrain or eliminate the Crown's fiduciary duties. The Crown's obligation is to act in a way that is consistent with its fiduciary duties as constrained by valid legislation. It is therefore necessary to consider whether legislation limits the Crown's fiduciary duties to the bands with respect to their royalties.[123]

At this stage, it bears noticing that the passage of *Guerin* cited by Justice Rothstein stated that "[a] fiduciary obligation will *not*...be eliminated by the imposition of conditions that have the effect of restricting the fiduciary's discretion."[124] However, at the part of the above-cited passage where the *Guerin* quote is explained, Justice Rothstein stated that the Crown's fiduciary duties *can* be constrained or eliminated.

In any event, Justice Rothstein held that the *Financial Administration Act*[125] and the *Indian Act* had constrained the Crown's discretion with respect to the oil and gas royalties, ignoring a strong dissent at the Federal Court of Appeal.[126] He held that "[a] fiduciary that acts in accordance with legislation cannot be said to be breaching its fiduciary duty,"[127] and since the *Financial Administration Act*

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122 *Ibid.*
123 *Ermineskin, supra* note 5 at paras 76, 79.
124 *Ibid* at para 76 [emphasis added].
125 *Financial Administration Act*, RSC 1985, c F-11.
126 *Ermineskin* FCA, *supra* note 114 at paras 199-204.
127 *Ermineskin, supra* note 5 at para 128.

obliged the Crown to put the royalties in the Consolidated Revenue Fund, the Crown was restricted by statute from fulfilling its fiduciary obligations. Citing *Wewaykum*, he stated that "[t]he Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting."[128] He concluded that the method of providing for a return on the royalties that the Crown had settled upon was an appropriate discharge of the fiduciary obligations that it owed to the Bands.[129] Justice Rothstein justified his reasoning by invoking the unique obligations of the Crown to safeguard the interests of the public: "The Crown has responsibilities to all Canadians, and some balancing inevitably must be involved."[130]

Up to this point, this essay was devoted to a review of the jurisprudence up to *Ermineskin*, in which it was argued that the courts imposed upon the Crown, as a guardian of the real property interests of Aboriginal peoples, a fiduciary obligation over those interests in a manner akin to the duties imposed upon a common-law trustee. Where the powers of the Crown were simply incompatible, such as in *Osoyoos*, the duty of the Crown would have been to minimize the infringement of the interests of the Aboriginal party. Where the Crown was acting to safeguard the land interests of an Aboriginal community outside of its traditional territory and outside of any treaty protection, as in *Wewaykum*, the Crown's obligations may be lighter. But neither of these reasons for discounting the Crown's fiduciary obligations were present in *Ermineskin*. Is *Ermineskin* therefore an authority for lightening the fiduciary obligations on the Crown even in *Guerin*-like cases where an Aboriginal property interest is safeguarded by the Crown? The rest of this paper will address this question and argue that the answer is no.

VI. THE NATURE OF FIDUCIARY OBLIGATIONS AFTER *ERMINESKIN*

Ermineskin contains many interesting implications for the nature of the fiduciary obligations of the Crown toward Aboriginal interests. Most interesting for the subject of this paper is the relationship between the Crown's obligations with respect to the public interest, and its obligations with respect to the interest of Aboriginal communities. While *Ermineskin* may have lightened the Crown's fiduciary obligations with relation to interests not protected by s. 35(1), it has clarified and strengthened those same obligations with relation to interests that *are* protected by s. 35(1). In this way, in spite of some muddying

128 *Ibid* at para 130, quoting *Wewaykum, supra* note 4 at para 96.
129 *Ermineskin, ibid* at para 149.
130 *Ibid* at para 129.

of the waters, *Ermineskin* has affirmed that the core of the Crown's fiduciary obligations are to safeguard the lands and resources of Aboriginal communities.

This section argues that the relationship between statutory obligations and the Crown's fiduciary obligations is the key to understanding how *Ermineskin* impacted the case law. From this perspective, it is useful to understand statute law as representative of the interests of the settler community, as statutes are made by legislatures, constituted through the politics of the majoritarian settler community. Therefore, the conflict is not merely between two different technical sources of law (statute vs. equity, whatever its source) but between settler interests and indigenous interests, understanding that indigenous interests are not effectively represented by legislatures because they have been made a minority of the population through colonialism.[131] So what happens to the Crown's fiduciary obligations when they conflict with its statutory obligations? *Ermineskin* takes the position that the statutory obligations weaken the fiduciary obligations. Initially, this position seems to sit awkwardly with the jurisprudence that came before it, but at the same time highlights a distinguishing feature of the Supreme Court's jurisprudence on fiduciary obligations to Aboriginal communities that renders it *sui generis* when compared to fiduciary obligations in other contexts. We begin by considering *Ermineskin*'s statements on this point in some detail.

As shown in the summary above, *Ermineskin* held that the Crown's statutory obligations prohibited it from prioritizing the Aboriginal interest.[132] It is important to remember that Justice Rothstein found that the fiduciary obligations of the Crown were *not* sourced in Treaty No. 6 on the facts of the case. Rather, he found that the fiduciary obligation was based on the terms of the 1946 surrenders, which, according to *Ermineskin*, did not give rise to fiduciary obligations that could trump what Justice Rothstein characterized as a legislative restriction on the powers of the Crown over the royalty monies over which it had assumed discretion as a fiduciary. The Court did not find (and the parties apparently did not argue) that the 1946 surrenders constituted a treaty within the meaning of s. 35(1) of the *Constitution Act, 1982*. This distinction between fiduciary obligations sourced in s. 35(1) protected documents, and those derived from some other source, is crucial to the Court's

131 See e.g. *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 49, 82, 161 DLR (4th) 385, for authority that the protection of the rights and interests of Aboriginal peoples is part of one of the four constitutional principles of Canada, that of the protection of minorities.

132 *Ermineskin, supra* note 5 at paras 89-98.

reasoning in *Ermineskin*. *Ermineskin* relies on the proposition that the Crown's fiduciary obligations with relation to interests not protected by s. 35(1) can be reduced or eliminated by statute.

It is apparent from the reasons in *Ermineskin* that Justice Rothstein thought that he was operating within well-established authority. As cited in the précis above, he cited *Guerin* and *Authorson* for the proposition that "when the Crown is a fiduciary, Parliament may legislate in ways that constrain or eliminate the Crown's fiduciary duties."[133] Nonetheless, we observed above that the passage cited by Justice Rothstein from *Guerin* actually seemed to state the opposite. For convenience, the passage from *Guerin* is cited again here:

> 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.[134]

Does *Ermineskin* cite an authority from *Guerin* for an opposite conclusion? This apparent contradiction, however, seems to be less serious when we consider the passage from *Guerin* in its context, which affords us a chance to look more deeply at the reasoning in *Guerin*. In context, it appears that the passage from *Guerin* was addressing the issue of the *effect* of narrowing the *discretion* available to a fiduciary, rather than the issue of the *possibility* of narrowing the *obligations* on the fiduciary. It was here that Justice Dickson considered the effect of s. 18(1) and s. 38(2) of the *Indian Act*, which structured the discretion of the Crown, and in doing so, narrowed its range. What we should conclude from this kind of statutory narrowing of discretion is summed up by Justice Dickson: "The *discretion* which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case."[135] This seems rather different from the discussion on narrowing the *duty* of the fiduciary which appears in *Ermineskin*.

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133 *Ibid* at para 79.
134 *Guerin*, *supra* note 1 at 387 [emphasis added].
135 *Ibid* [emphasis added].

The logic of the passage from *Guerin* appears to concern the effect of narrowing the discretion of the fiduciary: *even if* the discretion of the fiduciary is narrowed in some way, the duties of the fiduciary are *not* eliminated. Rather, the failure to adhere to the conditions that narrow the discretion will simply be a *prima facie* breach of the fiduciary's obligations. A consideration of the provisions of the *Indian Act* cited in Justice Dickson's reasons, s. 18(1) and s. 38(2), supports this interpretation. For ease of reference, those sections at the time of the *Guerin* decision read as follows:

> 18. (1) Subject to the provisions of this Act, reserves shall be 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.[136]
>
> 38. (2) A surrender may be absolute or qualified, conditional or unconditional.[137]

Some clue as to the role that these provisions of the *Indian Act* play in Justice Dickson's reasons can be gleaned from their relation to the larger context of the argument. The judgment of the Federal Court of Appeal in *Guerin*, which the Supreme Court of Canada overturned, made much of s. 18(1) of the *Indian Act*. The Court of Appeal decision, authored by Justice Le Dain (then of that Court), held that the statutory provisions gave the Governor in Council the discretion "to determine whether a particular purpose to which reserve land is being put, or is proposed to be put, is 'for the use and benefit of the band.'"[138] For Justice Le Dain, this kind of discretion "was incompatible with an intention to impose an equitable obligation, enforceable in court, to deal with the land in a certain manner."[139] In other words, according to this view, the inquiry into the Crown's powers and duties stops with the statute, which appeared to give the Crown full discretion over the disposal of the land. Justice Dickson unequivocally rejected this view. He wrote:

> The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective

136 *Indian Act*, RSC 1952, c 149, s 18(1).
137 *Ibid*, s 38(2).
138 *Guerin*, *supra* note 1 at 373.
139 *Ibid.*

> purchasers or lessees of their land, so as to prevent the Indians from being exploited. ... 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.[140]

In other words, statutes that apparently give the Crown complete discretion over a First Nation's interests do indeed do so, but the catch is that, *as a result*, the Crown becomes subject to the supervision of the courts in the exercise of that discretion to the standard of a fiduciary. It is in this context that Justice Dickson's comments on the narrowing of the fiduciary's discretion must be read. It is apparent from the above-cited passages that he believed that s. 18(1) of the *Indian Act* actually conferred very broad discretion on the Crown, so broad as to trigger the application of the fiduciary concept to the Crown-First Nation relationship. However, s. 18(1) narrows the Crown's discretion by structuring the Crown's power to determine whether any use to which reserve land is proposed to be put is for the benefit of the band. The structured discretion confines the Crown to the terms of the *Indian Act* and to any treaty or surrender. Thus, as an example, the Crown's discretion to act with the surrendered land in a way that is contrary to the terms of the surrender is outlawed by s. 18(1) of the *Indian Act*. In this way, the Crown's discretion is narrowed. Similarly, s. 38(2) specifies two variables for characterizing a surrender: absolute or qualified and conditional or unconditional. Thus, the Crown's discretion to design a surrender that is neither conditional nor unconditional (however that may look) is made illegal by the statute.

From this context, it becomes clearer what Justice Dickson meant in the passage from *Guerin* cited in *Ermineskin*. The narrowing of the Crown's discretion in s. 18(1) and s. 38(2) of the *Indian Act*, reasoned Justice Dickson, does *not* eliminate the fiduciary obligation. Rather, "[a] failure to adhere to the imposed conditions will simply itself be

140 *Ibid* at 383-84.

a *prima facie* breach of the obligation."[141] Where statutory provisions such as s. 18(1) and s. 38(2) constrain the Crown, i.e. take away the Crown's discretion, the result is *not* that the Crown's fiduciary obligations are eliminated, but that a failure to adhere to the narrowed conditions constitutes a *prima facie* breach. Thus, he reasoned that the very fact that the Crown ignored its oral representations to the Musqueam, representations which the Musqueam agreed to and thus formed part of the terms of the surrender, constituted a breach of the fiduciary obligation of the Crown.[142]

With respect to the reasons in *Ermineskin*, then, it is evident that nothing akin to alleviating the fiduciary duty of the Crown was contemplated by *Guerin*. Rather, the cited passage was about how restrictions on the discretion of the Crown did *not* lighten the Crown's fiduciary obligations. To be fair to the *Ermineskin* reasoning, though, it must be admitted that the situation in which a statutory obligation purportedly contradicted the fiduciary obligation of the Crown was not considered in *Guerin*. Rather, in *Guerin*, the issue was whether the Crown's violation of a term of surrender, incorporated into statute through s. 18(1), constituted a breach of the Crown's fiduciary obligation. The Court in *Guerin* answered that question in the affirmative.

An analogous situation to *Ermineskin* would be, for example, if s. 18(1) obliged the Crown to exploit the First Nations party in spite of the Crown's fiduciary obligations to do otherwise. This was obviously not the case in *Guerin*, but then *Guerin* is not entirely clear on what the relationship is between statutory law and fiduciary obligations. For instance, Justice Wilson, in her reasons, considered s. 18(1) of the *Indian Act*, and held the following:

> 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....[143]

She continued:

> 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

141 *Ibid* at 387.
142 *Ibid* at 388-89.
143 *Ibid* at 348-49.

> direction to the Crown. I think it is the acknowledgment 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. I believe that in this sense the Crown has a fiduciary obligation to the Indian Bands with respect to the uses to which reserve land may be put and that s. 18 is a statutory acknowledgment of that obligation. It is my view, therefore, that while the Crown does not hold reserve land under s. 18 of the Act in trust for the Bands because the Bands' interests are limited by the nature of Indian title, it does hold the lands subject to a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction.[144]

Justice Dickson is similarly insistent on the origins of the fiduciary obligation:

> 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.[145]

According to Justice Dickson, the effect of s. 18(1) is a confirmation of the Crown's historic responsibility to protect the interests of the Aboriginal community, a reaffirmation of a responsibility the Crown undertook to mediate relations between Aboriginal and settler communities. In its mediation, it acts with a wide berth of discretion, a discretion that, as Justice Dickson said, "has the effect of transforming the Crown's obligation into a fiduciary one."[146]

As is apparent from both Justice Wilson and Justice Dickson's reasons, the *source* of the fiduciary obligation is not the statute itself, nor the surrender provisions, but the very relationship between the Crown and the Aboriginal community. The relationship, in which

144 *Ibid* at 349-50.
145 *Ibid* at 379.
146 *Ibid* at 384.

the Crown exercises discretion over an Aboriginal interest, is that which gives rise to the fiduciary obligation. The source of the obligation is not found in any legal text but in *history*, in the prior occupation of the lands now making up Canada by Aboriginal peoples, in the Crown's alliance with those peoples, and in its promise in the Royal Proclamation to guarantee the interests of Aboriginal communities in their dealings with settler communities and to obtain their consent with respect to settler development on their lands. The statute is a codification of this relationship. The fiduciary obligation becomes a way of interpreting the statute, a way of constraining the discretion apparently recognized in the statute, a discretion that can itself be traced to the historical relationship between the Crown and the Aboriginal community.

It does not seem exact to say that in *Guerin* the fiduciary obligation either did or did not override the statutory provision. Rather, the fiduciary obligation had its origins in the very relationship of the Crown and Aboriginal peoples itself. Therefore, it is not susceptible to the textbook hierarchical classification of legal norms that places constitutional norms at the top, statutory norms in the middle, and common law norms at the bottom. However, it *did* seem to provide for a normative principle through which to interpret the statute. In this sense, it read a duty out of a statutory provision that apparently gave discretion to the Crown. Indeed, it was the very breadth of the statutory power, which might have been thought to reduce the scope or stringency of the Crown's fiduciary obligations, that in the end was what motivated the Court to impose those obligations on the Crown. From this perspective, the Crown's fiduciary obligations to Aboriginal people are analogous to the rules of the common law constitution, such as the prescription from *Roncarelli v. Duplessis*[147] that the good faith of the public official is always a constraint that the courts will read in to statutory grants of apparently unconstrained discretion.[148]

In this picture, how *can* fiduciary obligations be reduced? If the Crown's fiduciary obligations to Aboriginal communities were simply another common law constitutional principle, like in *Roncarelli*, the answer would be simple: a clear and plain statute evincing the Legislature's intent to reduce or eliminate such obligations. Yet Justice Dickson also stated that a fiduciary obligation could *not* be eliminated by reducing the discretion of the Crown (presumably by statute), which seemed to suggest that in some way it sat above statutory obligations in the hierarchy of norms in the legal system. How it could be eliminated, and whether it could be eliminated at all, Justice

147 [1959] SCR 121 at 140, 16 DLR (2d) 689, Rand J [*Roncarelli*].
148 *Ibid.*

Dickson did not elaborate; *Guerin* neither affirmed nor denied the proposition, so crucial to the reasoning in *Ermineskin*, that the Crown's public interest obligations or obligations to "the interests of other Canadians"[149] could theoretically form the basis of such narrowing. We know, however, that *Guerin* held on the facts of the case that the Crown's public law obligations could not have this effect. But what about the subsequent case law? Did it have anything to say about the reduction or elimination of the Crown's fiduciary obligations to Aboriginal communities?

The first case to be considered is *R. v. Sparrow*, which was the first case to reach the Supreme Court of Canada in which s. 35(1) of the *Constitution Act, 1982* was explicitly considered.[150] We know that s. 35(1) was considered implicitly in *Guerin* because the Court said so in *Sparrow*. The facts of *Sparrow* are not crucial to the argument of this paper and will not be repeated here. The judgment of the Court, penned by Chief Justice Dickson and Justice La Forest, held that rights and interests protected by s. 35(1) were supreme over legislated statutes. Part of its reasoning was explained in the following passage:

> It is clear, then, that s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power. *We are, of course, aware that this would, in any event, flow from the* Guerin *case, supra*, but for a proper understanding of the situation, it is essential to remember that the *Guerin* case was decided after the commencement of the *Constitution Act, 1982*.[151]

Two points bear observing here: first, the Court in *Sparrow* wished to remind us that s. 35(1) was already in its mind when deciding *Guerin*. Second, the cited passage in *Sparrow* states that the supremacy of s. 35(1) over statute law was not a novel proposition of the *Sparrow*

149 *Ermineskin, supra* note 5 at para 130.
150 [1990] 1 SCR 1075 at 1082-83, 70 DLR (4th) 385 [*Sparrow*].
151 *Ibid* at 1105 [emphasis added].

case itself but was actually a proposition that "in any event, flow[ed] from the *Guerin* case." It is difficult to interpret this passage any other way. Legislative power was, traditionally, understood to be supreme. The fact that the passage references *provincial* legislative power does not seem to be salient, as the *Guerin* case itself held that the fiduciary obligation was a bulwark against *federal* legislative power. The only constraint on legislative power is the Constitution. Thus, the fiduciary obligation in *Guerin* must have been understood by the *Sparrow* court to have had constitutional force and be supreme, in some sense, over statutes. It would seem from this passage that the *Sparrow* court would not have thought that it was possible for a statute to reduce or eliminate the Crown's fiduciary obligations to Aboriginal communities.

The next interesting waypoint in the story of the relationship between the Crown's fiduciary obligations to Aboriginal people and the force of statute law is *Osoyoos*.[152] As summarized above, in that case, a canal had been constructed over a strip of property in a reserve. Later on, the federal Crown regularized the taking of the reserve land by using its power under s. 35 of the *Indian Act* to authorize the expropriation of the land without the consent of the Band and to grant the interest taken to the Province of British Columbia. Justice Iacobucci, writing for the majority, held that only a right-of-way was taken for the canal and, therefore, the Band had the power to tax the canal. The Crown's fiduciary obligations explicitly informed his reading of the expropriation power:

> In my view, the fiduciary duty of the Crown is not restricted to instances of surrender. Section 35 clearly permits the Governor in Council to allow the use of reserve land for public purposes. However, once it has been determined that an expropriation of Indian lands is in the public interest, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band. This is consistent with the provisions of s. 35 which give the Governor in Council the absolute discretion to prescribe the terms to which the expropriation or transfer is to be subject. In this way, instead of having the public interest trump the Indian interests, the approach I advocate attempts to reconcile the two interests involved.[153]

152 *Osoyoos*, *supra* note 3.
153 *Ibid* at para 52.

Once again, the fiduciary obligation served to inform the Court's interpretation of a statutory provision that had apparently granted the Crown a wide berth of discretion. Like in *Guerin*, the interpretation served to constrain the powers of the Crown in the exercise of the very discretion that it purportedly gained through the statute (unlike the role that s. 18(1) played in *Guerin*, the expropriation power in *Osoyoos* could not have been said to have had its origins in the historical practice of the Crown seeking surrenders of land from Aboriginal peoples). Indeed, the fiduciary obligation served to constrain the Crown's broad statutory expropriation powers to that of minimally infringing the Aboriginal interest. At this stage in the Court's history, the requirement that the Crown justify violations of Charter rights by showing that its measures only minimally infringed on the claimant[154] could not have been far from the judges' minds. In effect, the Crown's fiduciary obligations operated like a Charter right for the protection of Aboriginal interests, obliging the Crown to a minimal infringement of those interests. Fiduciary obligations in *Osoyoos* maintained their constitutional flavour and operated, in effect, to constrain the Crown's statutory powers, although in this case, they do not seem to work much differently than the common law constitutionalist principles found in *Roncarelli*. Although *Osoyoos* does not explicitly address the question of whether a statute could reduce or eliminate the Crown's fiduciary obligations, it seems clear that, like in *Guerin*, those obligations operate to constrain the Crown's statutorily derived authority.

Wewaykum seemed to depart from the strictness of this position by establishing a periodization of fiduciary obligations: prior to reserve creation and after reserve creation.[155] Different standards for the Crown as fiduciary are meant to operate in each period. The standard to which the Crown had been held up to at that point in the case law, such as in *Guerin*, *Blueberry River*, and *Osoyoos*, fell under the rubric of post-reserve-creation obligations. The standard of behaviour expected of the Crown prior to reserve creation, on the other hand, was diminished. Nonetheless, it is important to recall that *Wewaykum*'s pre-reserve-creation period refers to a time prior to the creation of a reserve for an Aboriginal community *outside* of their traditional territory. This was because, according to *Wewaykum*, in such a situation the Crown was "exercising ordinary government powers in matters involving disputes between Indians and non-Indians."[156] In this situation, "[t]he Crown can be no ordinary fiduciary; it wears many

154 See *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.
155 *Wewaykum*, *supra* note 4 at para 86.
156 *Ibid* at para 96.

hats and represents many interests, some of which cannot help but be conflicting."[157] But of course, since most reserves are within the traditional territory of an Aboriginal community, *Wewaykum*'s pre-reserve-creation period, and its concomitant fiduciary obligation standard, applies only to a small minority of cases where the Aboriginal community's interests are to be prioritized at the same level as those of the settler communities.

Curiously, *Ermineskin* also cited the "many hats" passage from *Wewaykum* as a justification for allowing the Crown to depart from the strict duties to which the Crown would have been held if the doctrinal understandings of a fiduciary's duties had been applied.[158] In *Ermineskin*, though, the fiduciary duty being alleged was certainly after reserve creation, which would seem to distinguish it from the *Wewaykum* situation. Furthermore, *Wewaykum* was careful to note that the adulterated fiduciary obligations applied prior to reserve creation in non-s. 35(1) lands.[159] *Ermineskin*, on the other hand, took place on Treaty 6 lands. Presumably, the Crown signed Treaty 6 with the appellant bands from *Ermineskin* because it believed those Bands had the authority to relinquish Aboriginal title to their traditional lands. In any event, since reserve creation is a prerogative power exercised through orders-in-council, it is not immediately apparent what effects *Wewaykum* might have had on the question of the relationship between statutory and fiduciary obligations, and how it might have justified the finding in *Ermineskin* that the Crown's statutory obligations alleviated its fiduciary obligations.

Even if a doctrine of the formal supremacy of fiduciary obligations over statute law was never explicitly articulated in the above-cited line of cases, it is clear that, at the very least, the fiduciary obligation operated to privilege Aboriginal interests when it came to interpreting statutory constructions of Crown powers. If we take seriously the dictum from *Sparrow*, it would seem that fiduciary obligations may have a force that trumps a clearly and plainly contradictory statute. The significance of *Ermineskin*, then, is that it concerned a situation where the Court believed that a statutory duty on the Crown somehow contradicted its fiduciary obligations. After this review of the case law, it seems the question remains: What effect does a clear and plain statute reducing or eliminating the Crown's fiduciary obligations have? *Ermineskin* has clarified the law for situations where a s. 35(1) interest is at stake: a clear and plain statute cannot eliminate those fiduciary obligations. But what about where the Aboriginal interest is

157 *Ibid.*
158 *Ermineskin*, *supra* note 5 at para 130.
159 *Wewaykum*, *supra* note 4 at para 94.

not protected by s. 35(1)? The holding suggests that a clear and plain statute *would* eliminate those obligations, but this position is difficult to square with previous case law, which *Ermineskin* did not repudiate but instead confirmed as authoritative.

In at least one way, *Sparrow* provides an answer, albeit one that is paradoxical. Recall that *Sparrow* recognized the Crown's assertion of sovereignty over Aboriginal peoples as one of the bases for the Crown's fiduciary relationship with them.[160] As Chief Justice Dickson said: "Federal power must be reconciled with federal duty."[161] On this argument, a clear and plain statute reducing or eliminating a Crown fiduciary obligation would itself be an exercise of Crown discretion and an incident of the legal powers that the Crown gained through its assertion of sovereignty over Aboriginal peoples. As such, this clear and plain statute would itself be subject to fiduciary accountability, and would only pass muster if it were consonant with the consent or best interests of the Aboriginal community in question. On this view, it would be doubtful if any such enactments that proceeded without the consent of the Aboriginal party would be a legitimate exercise of Crown discretion.

Practically speaking, however, it seems that the problem of the relationship between statute law and the Crown's fiduciary obligations is an aspect of the larger problem of the Crown's competing obligations—its wearing of many hats, as the *Wewaykum* and *Ermineskin* judgments put it. Its most important other hat—other than fiduciary obligations to Aboriginal communities, that is—is its duty as the guardian of the public interest, which, in an electoral democracy, is likely to coincide, most of the time, with the interests of the majority of the population, i.e. the non-Aboriginal, settler society. The Crown's statutory obligations, then, are likely to be only one of the instantiations of its more broadly conceived obligations to the public interest, which is the subject of the next section of the paper.

VII. PUBLIC INTEREST AND THE CROWN'S FIDUCIARY OBLIGATIONS

Ermineskin, of course, was not the first case in which the Crown's public interest obligations were argued as alleviating or eliminating the Crown's fiduciary obligations to Aboriginal communities. Whereas the previous section addressed the somewhat technical question of the relationship between statutory obligations and fiduciary obligations,

160 For a fuller articulation of this argument, see *Mitchell v Minister of National Revenue*, 2001 SCC 33 at para 9, [2001] 1 SCR 911, McLachlin CJC; and Fox-Decent, *supra* note 9 at chapter 2.

161 *Sparrow*, *supra* note 6 at 1077.

we now turn to the larger question of what interests the Crown's fiduciary obligations may be protecting and why they might override the Crown's other obligations. As before, we will understand statutory obligations as originating from legislatures representing majoritarian, settler interests. The Crown's role as fiduciary of minority Aboriginal interests sometimes stands against settler interests. The role of the courts, then, will at times be to ensure that the Crown is living up to its obligations. Again, we will trace the development of this debate from its origins in *Guerin* through *Osoyoos* and *Wewaykum*. This paper will argue that throughout the development of this case law, the Crown's obligations toward the land interests of Aboriginal communities have remained consistently impregnable in the face of assaults from appeals to the public interest. It will further argue that far from reducing the stringency of those obligations, *Ermineskin* has clarified their status as being supreme over statutory obligations.

It will be helpful to recall that *Guerin* was appealed to the Supreme Court of Canada after the Federal Court of Appeal rejected the Musqueam's claims. In the words of Justice Wilson, the Court of Appeal held that the Crown's duties as a trustee only imposed on it "a governmental obligation of an administrative nature. It was a public law obligation rather than a private law obligation,"[162] and as such, was not justiciable (to borrow a term from American doctrine). For that reason, the Crown could not be liable for breach of trust. Indeed, that was the position of the law prior to *Guerin*, which gave licence to the courts to ignore the centuries of use of trust language in a cornucopia of legal documents that characterized the legal relationship between the Crown and Aboriginal peoples.[163] The Court of Appeal held that the effect of s. 18(1) of the *Indian Act* was to oust the Crown-Aboriginal community relationship from the jurisdiction of private law. Justice Le Dain of the Federal Court of Appeal said:

> All of this, it seems to me, clearly excludes an intention to make the Crown a trustee in a private law sense of the land in a reserve. How the Government chooses to discharge its political responsibility for the welfare of the Indians is, of course, another thing. The extent to which the Government assumes an administrative or management

162 *Guerin, supra* note 1 at 348.

163 See James I Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* (Saskatoon: Purich Publishing, 2005) at 9-17; Sidney L Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998) at 80-81, 98-99; Bartlett, *supra* note 14 at 185-189; and McCabe, *supra* note 8 at 4-23.

> responsibility for the reserves of some positive scope is a matter of governmental discretion, not legal or equitable obligation.[164]

Guerin's great innovation was to soundly reject this view. As Justice Wilson held: "I do not think we are dealing with a purely public law context here."[165] Justice Dickson also echoed this understanding:

> 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 a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.[166]

The argument that the Crown has competing obligations, such as to the public interest, was certainly not lost on the *Guerin* Court. The significance of characterizing the Crown's fiduciary obligation as being "in the nature of a private law duty"[167] is that the Crown is not allowed to resile from it by citing its public law obligations, such as to the public interest. The courts will hold the Crown liable as a fiduciary, *in spite* of its other competing obligations.[168] It may have been that developing Musqueam land into a golf course was good for the economic development of the settler community and that it would have provided an excellent venue for deal-making among settler elites in Vancouver; as such, it may have been in the public interest, conceived with a generous degree of breadth.[169] It may have

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164 *Guerin* FCA, *supra* note 49 at 469.

165 *Guerin*, *supra* note 1 at 351.

166 *Ibid* at 385.

167 *Ibid.*

168 For a forceful statement of the inappropriateness of allowing the Crown to cite public interest as a justification for breaching the constitutional rights of Aboriginal peoples, see *Sparrow*, *supra* note 6 at 1113, in which Chief Justice Dickson stated that permitting such an argument would "be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights."

169 For an instance where the public interest was explicitly equated by Crown officials with the expansion of white settlement, see Bartlett, *supra* note 14 at 28.

provided the Musqueam with income that they would have foregone had no golf course been developed. Indeed, such a development was certainly within the powers granted by the literal terms of s. 18(1) of the *Indian Act*, which enabled the Crown to determine whether such development was for the welfare of the Band. None of this mattered. By virtue of its historical relationship with Aboriginal communities, the Crown was to be held to a higher, trust-like standard.

In *Osoyoos*, the Supreme Court was confronted with a novel challenge to the model of thinking of the Crown as a private law trustee of Aboriginal interests. It was difficult to square the Crown's expropriation powers with its fiduciary obligations toward Aboriginal peoples. After all, it would be unimaginable for the law to permit a private law trustee to merely take the property of a beneficiary as its own in the way that the Crown's expropriation power allows it to do with relation to reserve lands, thus allowing it to bypass the regime for the alienation of reserve lands that had regulated Crown-Aboriginal relations since the *Royal Proclamation of 1763*. The majority in *Osoyoos* proposed a novel way of resolving this dilemma: there is no fiduciary obligation when the Crown is deciding *whether* to expropriate land for a public purpose. However, once the decision has been made to effect the expropriation, the fiduciary obligation arises to compel the Crown to expropriate only the minimum interest required to fulfill the public purpose.[170] This, according to the Court, "minimizes any inconsistency between the Crown's public duty to expropriate lands and its fiduciary duty to Indians whose lands are affected by the expropriation."[171] Rather than weakening or creating a categorical exception to the *Guerin* stringency of fiduciary obligations, *Osoyoos* established a way to reconcile the Crown's competing obligations when there is no alternative but for those obligations to conflict: the Crown's fiduciary obligations oblige it to impair the interests of the First Nation to the minimum degree possible. The Court acknowledged that in the case of the exercise of the expropriation power some inconsistency was inevitable, but found a way that it believed minimized that inconsistency to resolve the case. For any landowner but an Aboriginal community, none of this would have been an issue: to be deprived of one's land because an expropriation has been judged to be in the public interest is simply one of the risks of land ownership. For an Aboriginal community, however, the public interest must be modulated according to the minimal infringement principle.

The question of the effect of public interest obligations on the Crown returned with *Wewaykum*, in which two Aboriginal communities, outside of their traditional territories, sought to have reserves created

170 *Osoyoos*, *supra* note 3 at para 52.
171 *Ibid* at para 53.

for them in competition with white settlers for land. That situation generated the distinction between pre-reserve creation fiduciary obligations and post-reserve creation fiduciary obligations. It is important to remember that *Wewaykum* also established that once the reserve was created, even in the situation where the First Nation was outside of its traditional territory, it would be protected by the full force of fiduciary obligations on the Crown as they had been applied in *Guerin* and subsequent cases. When, as in *Wewaykum*, the interest of the First Nation is in land *outside* of its traditional territory, it seemed that the Court felt that such an interest could not be considered on the same plane as more traditionally understood Aboriginal rights, such as the interest of a First Nation in land within its traditional territory or the interest of a First Nation in land guaranteed to them by treaty. These latter interests, after all, are s. 35(1) interests, unlike the interest of the First Nations in *Wewaykum*, as the Supreme Court was at pains to point out. Therefore, the first true exception to the stringency of the fiduciary obligations laid out in *Guerin* arises when the First Nation lays claim to an interest that is not really an interest protected by an Aboriginal right. When the land interest of an Aboriginal community is outside of its traditional territory, and outside of any treaty protection, then the First Nation's interests are to be weighed equally alongside the public interest. The exception laid out in *Wewaykum* is clearly circumscribed by s. 35(1): the reasoning in *Wewaykum* only applies to non-s. 35(1) interests. Therefore, s. 35(1) interests remain protected by the same *Guerin* stringency.

Ermineskin established a second exception to the stringency of private law fiduciary obligations on the Crown. The reasons were different from *Wewaykum*—the First Nations in *Ermineskin* were thought to be firmly within their traditional territory, having been signatories to one of the Numbered Treaties. On the one hand, held *Ermineskin*, the Aboriginal community's interests in the oil and gas royalties were not of an importance that would trump contradictory statutory obligations on the Crown.[172] On the other hand, the Court held that *if* those interests were important enough, *if* they attracted the protection of s. 35(1) of the *Constitution Act, 1982*, they *would* trump Crown statutory obligations, even if those statutory obligations contradicted the Crown's fiduciary obligations.[173] Thus, *Ermineskin*

172 Or perhaps the economic situation at the time of the *Ermineskin* decision was such that it was not as apparent as it had been in years previous that a wise trustee would invest the royalty monies in more than just government bonds. See Scott HD Bower & Donald E Greenfield, "Recent Judicial Developments of Interest to Oil and Gas Lawyers" (2010) 47 Alta L Rev 607 at 609.

173 *Ermineskin, supra* note 5 at para 47.

relied on the finding that the First Nations' oil and gas interests were not s. 35(1) interests. Why this might be the case, considering that they were oil and gas reserves discovered in the treaty-protected reserves of the First Nations, is never fully explained in the judgment. For whatever reason, the Court arrived at this decision and held that the oil and gas interests in the case did not call for protection by the Crown's full fiduciary obligations.

Ermineskin and *Wewaykum* both demonstrate exceptions to the level of stringency of fiduciary obligations on the Crown that were set out in *Guerin*, but they distinguish the situation with respect to the *nature* of the Aboriginal interests in question and not with respect to the seriousness of the Crown's fiduciary obligations. It is notable that both characterize those exceptions as relating to Aboriginal interests standing outside the protection of s. 35(1). There is something significant about the rights protected by s. 35(1) to immunize them from the Crown's public interest obligations. This was also the case in *Guerin* and *Osoyoos*, where the Band's Aboriginal title rights had crystallized into an interest over their reserve lands. Similarly, where a right to reserve land arose out of a treaty, the interest would be protected by s. 35(1), hence Justice Rothstein's suggestion in *Ermineskin* that if the Aboriginal community's interests arose out of Treaty 6, the Crown's fiduciary obligation would run in full force and trump any other statutory obligations.[174]

Conversely, we now know that the situations in *Wewaykum*, the process of reserve creation for a First Nation outside its traditional territory (but only before the reserve is actually created), and *Ermineskin*, where a First Nation surrendered its oil and gas rights to its reserve land, are not protected by fiduciary obligations of the same stringency as in *Guerin*. What those two cases have in common is that they both involve an interest of an Aboriginal community that does not benefit from the protection of s. 35(1).[175]

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174 *Ibid.*

175 This interpretation of *Wewaykum*, however, may be subject to some doubt stemming from Justice Binnie's observation in the reasons for judgment that "[f]iduciary protection accorded to Crown dealings with aboriginal interests in land (including reserve creation) has not to date been recognized by this Court in relation to Indian interests other than land outside the framework of s 35(1) of the *Constitution Act, 1982*": *Wewaykum, supra* note 4 at para 81. An objection to the thesis propounded in this essay might be constructed from this quotation, suggesting that Justice Binnie in *Wewaykum* did not believe that the Aboriginal interest protected in *Guerin* was subject to the protection of s 35(1). It would seem, however, that another more plausible interpretation of this passage exists. He seems just as well to have been saying that outside of the framework of s 35(1) of the *Constitution Act, 1982*, fiduciary obligations have *only* been applied to land in the Supreme Court. Indeed, such an interpretation of the passage would bolster the argument of this

Indeed, it is *Ermineskin*'s innovation to clearly establish that any statute that contradicts the Crown's fiduciary obligations would, if those obligations were to protect an interest protected by s. 35(1), be invalid (justifiable infringement aside) to the extent that they contradicted those obligations. This point was not entirely clear from *Guerin* and *Osoyoos*. We knew from *Guerin* that the Crown's fiduciary obligations were a gloss upon the statute granting the Crown a great degree of discretion, but we did not know what would be the result of a statutory obligation that flatly contradicted those obligations. In *Osoyoos*, we found out that a statute that granted the Crown powers that contradicted its fiduciary obligations was to be interpreted in a way that minimized that conflict. From *Ermineskin*, however, we now know that legislation that directly contradicts the Crown's fiduciary obligations will likely be considered invalid to that extent. On *Ermineskin*'s logic, it would seem, for example, that justifiable infringement aside, an expropriation statute would be invalid insofar as it permits the Crown to expropriate lands to which an Aboriginal community is entitled by virtue of s. 35(1). In this case, an *Osoyoos*-type minimal infringement analysis may apply, but the expropriation would nonetheless be a *prima facie* breach.

It may also be the case that *Ermineskin* fits somewhat awkwardly into the scheme proposed here. Recall that *Ermineskin* suggested that

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essay by affirming that *Guerin* was addressing an Aboriginal interest protected by s 35(1).

Even if we took the contrary interpretation of the foregoing passage from *Wewaykum*, it would seem that the dictum must be balanced against other Supreme Court dicta. As discussed earlier, the *Sparrow* decision observed that while s 35(1) afforded Aboriginal peoples constitutional protection against provincial legislative power, "this would, in any event, flow from the *Guerin* case": *Sparrow*, *supra* note 6 at 1105. It is difficult to understand this dictum in any other way except that the interests protected by *Guerin* were indeed s 35(1) interests. Other Supreme Court dicta also support this interpretation. In *Canson*, Justice La Forest, writing for the majority of the Court, characterized *Guerin* as a case where "the Crown had accepted a surrender from the plaintiff Indians of their aboriginal title to land": *Canson*, *supra* note 53 at 566 [cited to SCR]. A similar characterization may be found in the reasons of Justice McLachlin in *Norberg*, *supra* note 53 at 291 [cited to SCR]. This, after all, is consistent with the oft-cited observation of Justice Dickson in *Guerin* that: "It does not matter, in my opinion, that the present case is concerned with the interest of an Indian band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases": *Guerin*, *supra* note 1 at 379. On this logic, the reserve lands in *Guerin* were the same kind of interest as Aboriginal title lands protected by s 35(1) and the reserves created in *Wewaykum* for bands outside their traditional territory similarly became protected by s 35(1). On *Wewaykum*'s reasoning, the full fiduciary obligation applies to these lands; on *Ermineskin*'s reasoning, this fiduciary obligation will supersede any other Crown obligations, including statutory ones.

if the fiduciary obligation had been sourced in a s. 35(1) protected instrument, the obligation would override statutory provisions to the contrary, but that if it were sourced in a non-s. 35(1) protected instrument, contrary statutory provisions would override the fiduciary obligation. Conceptually, a s. 35(1) instrument contains Aboriginal or treaty rights protected by the *Constitution Act, 1982* in a way that constrains both the Crown's legislative and executive discretion. Recall that *Guerin* established the Crown's fiduciary obligations to Aboriginal peoples as a product of the Crown's discretion over their interests. On this paradigm, it should follow that a reduction in the Crown's discretion, such as the constitutional protection of certain rights, should reduce the Crown's fiduciary obligations.[176] *Ermineskin*, however, appears to hold the contrary result. It may be, then, that *Ermineskin* and *Wewaykum* have established a new paradigm for gauging the content of the Crown's fiduciary obligations. This new paradigm could then be considered along with the one from *Guerin*, which was aligned with the amount of discretion possessed by the Crown over the Aboriginal interest, in that the importance of the interest being protected by the fiduciary obligation contributes as much to determining its content as the amount of discretion that the Crown possesses. In any event, the affirmation in *Ermineskin* that a fiduciary obligation of the Crown can defeat contradictory statutory obligations is a significant development that pushes the protection of Aboriginal interests first set out in *Guerin* even further along.

To summarize, it would appear that we now have the following schema for understanding the relationship between the Crown's fiduciary obligations and its statutory obligations. Where the statutory obligations contradict the Crown's fiduciary obligations, the inquiry will proceed to determine whether the Aboriginal interest in question is protected by s. 35(1). If it is not, then, according to *Ermineskin*, the Crown's statutory obligation will override its fiduciary obligation. However, if it is a s. 35(1) protected Aboriginal interest then the statute will be invalid by virtue of the Crown's fiduciary obligations. Where the Crown's statutory obligations and fiduciary obligations do not contradict, then the case law from *Guerin*, *Blueberry River*, and *Osoyoos* through *Wewaykum* suggests that the Crown's fiduciary obligations will inform the interpretation of the Crown's statutory powers and obligations. Where the statute grants the Crown discretion, the Crown will be obliged to exercise that discretion to the standard of a fiduciary over the relevant Aboriginal interest. Where for some reason it believes there is a compelling public purpose to infringe on the Aboriginal interest, it is obliged to do so to the minimum extent necessary to achieve that public purpose. *Ermineskin*, in affirming

176 See McNeil, *supra* note 8.

the status of the Crown's fiduciary obligations over s. 35(1) interests as analogous to constitutional protection, has reaffirmed the core normative concept animating the whole line of case law canvassed here: the Crown interposes between Aboriginal and settler communities to protect the interests of Aboriginal communities over their traditional lands and resources.

VIII. CONCLUSION

The fiduciary obligations of the Crown to Aboriginal communities have their origins in historic bargains made between the Crown and Aboriginal communities near the beginning of British colonization of Canada. The historic bargains established a regime for managing the sharing of the land between Aboriginal and settler communities in a relationship that came to be called fiduciary in *Guerin*. Naturally, this complicated the picture of demands on the Crown and obliged it to devote its resources to interests other than those for which it had a majoritarian or public mandate to pursue. The introduction of the recognition of Aboriginal rights in s. 35(1) complicated the picture further, raising the question of the boundary between Aboriginal interests protected by the *Constitution Act, 1982* and those protected by fiduciary obligations. *Ermineskin* seems to establish the proposition that where fiduciary obligations are protecting Aboriginal interests that arise out of rights protected by s. 35(1), they will trump statutory obligations duly made by the legislature. This affirms the *Guerin* line of cases that have given consistent recognition to the importance of fiduciary obligations. However, *Ermineskin* also establishes a puzzling exception to the picture established in previous case law, one in which certain interests arising out of an agreement between the Crown and the First Nation that was not recognized as a s. 35(1) treaty are protected by a less stringent standard of fiduciary obligation. Given the history of the Crown-Aboriginal relationship, and the importance of treaties to that relationship, the distinction between treaty and non-treaty agreements makes some sense. However, the lesser importance of non-treaty agreements makes the most important implication of *Ermineskin*: the affirmation of the proposition that fiduciary obligations over s. 35(1) interests will trump statutory obligations. This conclusion is in line with the importance that the law has placed on the Crown's obligations to protect the land interests of Aboriginal communities and reinforces the thrust of the case law since *Guerin*. Rather than diluting the entirety of the case law on fiduciary obligations of the Crown to Aboriginal communities, this essay has argued that the exceptions to the *Guerin* standard may instead be tightly confined.

The role of the Crown as the guardian of the Aboriginal interest has been an important idea since the *Royal Proclamation of 1763*.

Aboriginal communities then rightly feared what the settler influx would mean for their land rights and secured the Proclamation as a promise to protect those rights. That promise is as important today as it was then, since Aboriginal interests are under threat today from the settler community just as they were then. The introduction of electoral democracy in settler political institutions may have made it less palatable for the Crown to exercise its role as a protector of Aboriginal interests, but Canadian courts, true to their constitutional role as protectors of minority rights, stepped in with the articulation of the fiduciary concept in *Guerin*. The fiduciary concept is only judicial recognition of an idea and a relationship that remains crucial for the peaceful and just development of Canadian society, and one that the courts have done well in articulating in the case law since *Guerin*.

IX. POSTSCRIPT

The Supreme Court of Canada released its decision in *Manitoba Métis Federation Inc. v. Canada (Attorney General)*[177] right before this article went to press, and too late to incorporate it into the analysis of the article. However, this article's argument that Aboriginal land interests lie at the core of the Crown's fiduciary obligations seems bolstered by the Court's discussion of the "discretionary control" branch of the two ways fiduciary obligations may arise.[178]

177 2013 SCC 14.
178 *Ibid* at paras 51-59.