CASE COMMENTS

WEWAYKUM: A NEW SPIN ON THE CROWN'S FIDUCIARY OBLIGATIONS TO ABORIGINAL PEOPLES?

LEONARD I. ROTMAN[†]

In the recent Wewaykum *case, the Supreme Court of Canada dismissed claims by the Wewaykum and Wewaikai Bands based on,* inter alia, *alleged breaches of the federal Crown's fiduciary duty in relation to the federal Crown's handling and recording of the bands' reserve interests. In the process, the* Wewaykum *judgment provided the first substantive discussion of the Crown's fiduciary duty to Aboriginal peoples since the initial judicial recognition of the Crown's duty in* Guerin v. The Queen. *This paper considers some of the implications of* Wewaykum *in light of existing jurisprudence and commentary on Crown-Native fiduciary relations. Ultimately, it concludes that notwithstanding the rather negative portrayal of Crown-Native fiduciary relations in* Wewaykum, *the promise held out by* Guerin *and* Sparrow *regarding the Crown's duty to Aboriginal peoples still exists, even if it has yet to be realized to any significant degree. At the end of the day, the post-*Guerin, *post-*Sparrow *fiduciary "work-in-progress" that existed before* Wewaykum *remains a work-in-progress after* Wewaykum, *only on somewhat different terms.*

I. INTRODUCTION

In the Supreme Court of Canada's recent judgment in *Wewaykum Indian Band v. Canada*,[1] the Court engaged in its most substantive discussion of Crown[2]-Native fiduciary relations since it sanctioned the fiduciary nature of Crown-

---

[†] B.A., LL.B., LL.M., S.J.D., of the Ontario Bar. Professor, Faculty of Law, University of Windsor. An earlier version of this paper was prepared for the Pacific Business & Law Institute conference "Canadian Aboriginal Law 2003," held in Ottawa, ON, Sept. 10-11, 2003.

[1] (2002), 220 D.L.R. (4th) 1, 2002 SCC 79 [*Wewaykum* cited to D.L.R.].

[2] In an English common law context, the phrase "the Crown" has a variety of meanings and may refer to various personifications of that entity. It could refer to the historical notion of a single and indivisible Crown, to the Imperial Crown, to the Crown in right of Britain or, domestically, to the Crown in right of Canada or the various provincial Crowns.. Moreover, there are further divisions within these classifications that relate to the executive and legislative branches of the Crown. The term "the Crown" is used throughout this paper to denote both the Canadian federal and provincial Crowns. Where reference is made to an individual Crown, whether the Crown in right of Canada or the Crown in right of a province, such references will be specified in the text. The phrase "the Crown" is used rather than "government" to more accurately denote the nature of the relationship between the parties and the executive and legislative functions of the Crown that are implicated by that relationship.

Native interaction in its landmark judgment in *Guerin v. The Queen*.[3] In doing this, *Wewaykum* marked a departure from Canadian courts' general practice relating to Crown-Native fiduciary relations.[4] Although the judicial recognition of the fiduciary nature of Crown-Native relations in Canada has existed for almost two decades, Canadian jurisprudence on Crown-Native fiduciary relations remains in a rather undeveloped, embryonic, state, even after *Wewaykum*.[5]

This paper examines the current status of Crown-Native fiduciary relations in Canada in light of the Supreme Court's unanimous judgment in *Wewaykum*. As part of its discussion, the paper looks to the Court's analysis of the nature of the federal Crown's fiduciary duty to Aboriginal peoples, the existence of conflicts of interest and how they were dealt with, the availability of equitable relief, and defences used by the federal Crown against the claims that it had breached its fiduciary duty.

II. OVERVIEW OF THE SUPREME COURT OF CANADA'S JURISPRUDENCE ON THE CROWN-NATIVE FIDUCIARY RELATIONS

As indicated above, the judicial understanding of Crown-Native fiduciary relations in Canada is rather undeveloped. Why is this so? One reason is a profound misapprehension of the extent of *Guerin*'s discussion of fiduciary principles. Aside from Dickson J.'s limited illustration of the historic rationale for imposing the fiduciary concept upon Crown-Native relations, none of the judgments in *Guerin* delve into any substantial discussion of Crown-Native fiduciary relations.[6] Indeed, where it does speak to the fiduciary nature of

---

[3] [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [*Guerin* cited to D.L.R.].

[4] Indeed, the Supreme Court in *Wewaykum* specifically addressed how the general understanding of Crown-Native relations applied to the facts in the case. While this may not seem particularly noteworthy, it is an exception to that Court's general predilection to cite *Guerin* as the basis for finding Crown-Native fiduciary relations to exist without discussing how the fiduciary concept affects the interaction between the parties. This proposition is discussed further, below.

[5] As explained in *Bonaparte v. Canada (A.G.)* (2003), 64 O.R. (3d) 1 at para. 32, 169 O.A.C. 376 (C.A.):

> ... fiduciary law in Canada, particularly in respect of the Crown's relationship with aboriginal peoples, is a very dynamic area of Canadian law. The nature and extent of the particular obligations that may arise out of this relationship are matters that remain largely unsettled in the jurisprudence.

[6] Indeed, Estey J. did not even describe the relationship in *Guerin* as fiduciary, preferring instead to base his judgment on agency principles, while Wilson J., who found that a fiduciary relationship was created by the surrender requirements under the *Indian Act*, R.S.C. 1985, c. I-5, based her judgment particularly on trust principles, having found that the surrender of the

Crown-Native relations, *Guerin* does not engage in more than a rudimentary discussion of the principles underlying the fiduciary concept and how they apply to those relations.

Because of the lack of substantive discussion of fiduciary principles and how they ought to apply to Crown-Native interactions in *Guerin*, it is surprising that subsequent cases have simply referred to the *Guerin* decision to substantiate the existence of Crown-Native fiduciary relations, largely without explaining why these subsequent relationships were fiduciary or the implications of such findings. Even in the *Sparrow* decision,[7] where the Crown's duty was found to be an integral element of section 35(1) of the *Constitution Act, 1982*,[8] the Supreme Court did not say much about the fiduciary nature of Crown-Native interaction or the application of the Crown's duty beyond the limited context of what was required by the Crown to justify legislative initiatives that had the potential to derogate from the Aboriginal rights protected by section 35(1).[9] Given the well-entrenched understanding of Crown-Native relations as fiduciary,[10] it is shocking that no decision after *Guerin* that has considered the Crown's fiduciary duty has ventured into the vast territory left untouched by *Guerin*. Thus, while *Guerin* did lead Canadian Aboriginal and treaty rights jurisprudence down the fiduciary path, it did not

---

Musqueam Band's interest in its reserve lands in *Guerin*, combined with the nature of the *Indian Act*'s surrender requirements, constituted a trust.

[7] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [*Sparrow* cited to D.L.R.].

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

[9] Although *Sparrow* created a justificatory framework for the regulation of Aboriginal rights, its framework was subsequently adopted vis-á-vis treaty rights in *R. v. Badger*, [1996] 1 S.C.R. 771, 133 D.L.R. (4th) 324 and confirmed in *R. v. Marshall*, [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513 [*Marshall No. 1* cited to S.C.R.] and *R. v. Marshall*, [1999] 3 S.C.R. 533, 179 D.L.R. (4th) 193 [*Marshall No. 2* cited to S.C.R.]. Notwithstanding the jurisprudence on this topic, I have suggested that the application of the *Sparrow* test to treaty rights is inappropriate because of the important distinctions between those forms of rights: see Leonard I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights and the *Sparrow* Justificatory Test" (1997) 36 Alta. L. Rev. 149; Leonard I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at 125-26 [*Parallel Paths*].

[10] As discussed below, while Crown-Native relations are understood to be fiduciary, that is a general inference rather than a rebuttable presumption absent its *prima facie* demonstration by an Aboriginal plaintiff. Once a *prima facie* inference of a fiduciary duty and its breach are properly demonstrated in light of the facts of a particular interaction between the Aboriginal claimant and the Crown, a rebuttable presumption is thereby created which the Crown has the onus to refute, either by demonstrating that no such duty exists or that the duty does exist, but was not breached. Alternatively, the Crown may invoke other defences, such as the lapse of a pertinent statutory limitation period or the equitable defences of laches and acquiescence, to avoid liability for any breach of duty.

provide adequate directions for the future navigation of that trail and subsequent jurisprudence has not seemed too terribly concerned about it.

Because *Guerin* did not fully establish, much less flesh out, the application of the fiduciary concept to Crown-Native relations, there was initial confusion following *Guerin* about the extent of the Crown's fiduciary duty and whether it applied to situations other than the surrender of reserve lands. This confusion was subsequently cleared up in *Sparrow* through the Supreme Court's finding that the Crown's fiduciary duty informed the rights contained in section 35(1), thereby making it a necessary consideration in the context of the Aboriginal and treaty rights existing within that section.[11] The *Sparrow* judgment provided no indication or guidelines, though, for how the Crown's duty would apply to those rights. Similarly, in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*,[12] which centred around the Crown's fiduciary duty in the context of the surrender of reserve lands and their subsurface rights, there was little discussion of the principles governing Crown-Native fiduciary relations and no consideration given to their nature or scope. The fact that Binnie J.'s judgment in *Wewaykum* addressed these issues – even if it did not go significantly beyond what was said in the existing jurisprudence – indicates that much about the Crown's fiduciary duty to Aboriginal peoples remains unknown.

The difficulty with the present-day understanding of Crown-Native fiduciary relations, then, lies not in the fact that recognition of the fiduciary nature of those relations has become axiomatic, but that in becoming axiomatic, it has obviated juridical perceptions of the need to flesh out the meaning and implications of describing those relations as fiduciary.[13] This fact

---

[11] *Supra* note 7 at 408-09.

[12] [1995] 4 S.C.R. 344, 130 D.L.R. (4th) 193 [*Blueberry River* cited to S.C.R.].

[13] As was stated in *Parallel Paths*, *supra* note 9 at 12:

> The continued application of fiduciary principles to the Crown-Native relationship based on the *Guerin* precedent may be seen to be inversely related to the perceived need to explain its application to that relationship. The more often *Guerin* is cited, without elaboration, for its proposition that the Crown owes fiduciary obligations to aboriginal peoples, the perceived need to explain the basis of the Crown's duty is reduced. Indeed, since *Guerin* has been used as the springboard for the imposition of fiduciary duties upon the Crown towards aboriginal peoples, judicial and academic analysis of the basis of the Crown's duty and its effects has decreased. However, it is of little benefit to state that a fiduciary relationship exists or that it has been breached without illustrating what the relationship encompasses or the ramifications of such a breach. Indeed, the portrayal of a relationship as fiduciary is only an initial step; the explanation of the resultant obligations arising by virtue of the relationship's existence is much more onerous.

is curious, insofar as the finding in *Guerin* that the federal Crown owed fiduciary duties to Aboriginal peoples forever altered pre-existing conceptions of Crown-Native relations and, indeed, the entirety of Canadian Aboriginal and treaty rights jurisprudence.

Guerin was a landmark judgment that continues to have significant repercussions to the present day. Its significance is on par with the initial recognition of Aboriginal title in *Calder v. British Columbia (A.G.)*[14] or the Supreme Court's development of the canons of treaty interpretation in cases like *Nowegijick v. the Queen*[15] and *Simon v. The Queen.*[16] The application of the *Guerin* precedent is, however, arguably more important than either of these other significant developments. By applying the unique fiduciary concept to Crown-Native interaction in *Guerin* and later affirming its application in *Sparrow*, the Supreme Court of Canada "initiated a new way of thinking about Aboriginal peoples' rights and their relationship with Canadian legal, political, and social realms".[17] As suggested by Judge David Arnot, the Treaty Commissioner for Saskatchewan:

> The Supreme Court of Canada's unanimous rebuke of government privilege in *R. v. Guerin* is the milestone in restoring a system of law based on principles of fundamental justice over the exercise of the individual discretion. In defining the "fiduciary duty" of the Crown, the Supreme Court restored the concept of holding ministers to a standard of fairness that demands forethought as to what conduct lends credibility and honour to the Crown, instead of what conduct can be technically justified under the current law.[18]

See also Leonard I. Rotman, "Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism, and Fiduciary Rhetoric in *Badger* and *Van der Peet*" (1997) 8 *Const. Forum Const.* 40 at 44-45:

> ... simple judicial recognition of or professed adherence to the Crown's fiduciary obligations to Aboriginal peoples is not identical to the courts' enforcement of those obligations. Effecting the latter necessitates scrutinising the Crown's actions in light of its fiduciary responsibilities. The use of fiduciary rhetoric by the judiciary is rendered meaningless without a commitment to enforce its application in practice. ...
>
> The existence of the Crown's fiduciary duty in section 35(1) of the *Constitution Act, 1982* is a constitutional imperative to ensure that the Crown lives up to the historical obligations it owes to the Aboriginal peoples. ... This constitutional imperative requires more of the courts ... than the proliferation of empty rhetoric ...

[14] [1973] S.C.R. 313, 34 D.L.R. (3d) 145.

[15] [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193.

[16] [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390.

[17] Leonard I. Rotman, "Conceptualizing Crown-Aboriginal Fiduciary Relations," in Law Commission of Canada, *In Whom We Trust: A Forum on Fiduciary Relationships* (Toronto: Irwin, 2002) at 26.

[18] Judge D. Arnot, "Treaties as a Bridge to the Future" (2001) 50 U.N.B.L.J. 57 at 66-67.

This "new way of thinking" is revealed when one considers the implications of *Guerin* and *Sparrow*. In *Guerin*, the Supreme Court indicated that the federal Crown did not possess unfettered discretion in its dealings with lands surrendered by Aboriginal peoples pursuant to the requirements of the *Indian Act*.[19] It also had a positive obligation to act in the best interests of the band in question and, in appropriate circumstances, to defer to the band's wishes.[20] As Dickson J.'s majority judgment indicated, the *Indian Act*[21] imposed a fiduciary duty upon the federal Crown pursuant to which it had a legally-enforceable obligation to deal with reserve lands for the benefits of Indians. He stated "[w]hen, as here, an Indian band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf".[22] On a similar note, Justice Wilson held that once the federal Crown had accepted the oral conditions stipulated by the band prior to its surrender of the lands in question, "[t]he Crown was no longer free to decide that a lease on some other terms would do. Its hands were tied".[23]

In the *Sparrow* case, the Supreme Court was faced with the need to "explore for the first time the scope of s. 35(1) of the *Constitution Act, 1982*, and to indicate its strength as a promise to the aboriginal peoples of Canada".[24] In the context of examining the scope of section 35(1) generally and Musqueam Aboriginal fishing rights specifically, the Court held that section 35(1) operated as a restraint on the exercise of Crown legislative power. This finding entailed, much as the Supreme Court had earlier suggested in *Guerin*, that the Crown, as fiduciary, did not possess an unfettered discretion to act as it pleased on behalf of Aboriginal peoples; this time, however, the Court stated this in a situation where the Crown sought to promulgate legislation that had the potential to infringe upon Aboriginal rights.[25] Further to its fiduciary duty to Aboriginal peoples, the Crown had to justify the imposition of legislative initiatives that could adversely affect Aboriginal interests by subjecting them to scrutiny according to specified

---

[19] *Supra* note 6.

[20] This was fleshed out further in the *Blueberry River* case, *supra* note 12, where the Court held that the federal Crown's fiduciary duty entailed an obligation to ensure that a band was not made subject to exploitative bargains.

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

[22] *Guerin*, *supra* note 3 at 341-42.

[23] *Ibid.* at 361.

[24] *Sparrow*, *supra* note 7 at 389.

[25] *Ibid.* at 408-09. See also *supra* note 9.

criteria.[26] This marked a drastic change from pre-1982 jurisprudence. In support of this change, the Court quoted, with approval, Professor Lyon's characterization of the purpose and function of section 35(1):

> [T]he context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.[27]

From this discussion, it may be surmised that while *Guerin* initiated the process of providing shape and content to the Crown's fiduciary duties to Aboriginal peoples, *Sparrow* augmented their scope by enmeshing them in the constitutional protection provided by section 35(1). This progression in the articulation of the Crown's fiduciary obligations existed solely at a macroscopic level in a manner consistent with the situation-specific nature of fiduciary relations.[28] It was left to individual judgments to take the developments from *Guerin* and *Sparrow* and apply what was established therein to specific facts.

While cases such as *Blueberry River* made fact-specific applications of the principles established in earlier fiduciary jurisprudence, they did not add to the limited understanding of the implications of the fiduciary nature of Crown-Native relations developed in *Guerin* and *Sparrow*. This practice changed somewhat with the Supreme Court's decision in *Osoyoos Indian Band v. Oliver (Town of)*.[29]

In *Osoyoos* – which was not a case that centred around the Crown's fiduciary duty to Aboriginal peoples, but concerned the ability of an Indian band to tax lands that had been expropriated from its reserve – the Supreme Court made two important statements about the Crown's fiduciary duty. The first, as seen in Iacobucci J.'s majority judgment, was that the Crown's fiduciary duty to Aboriginal peoples was not restricted to acts of surrender, but applied equally to expropriations. While this should have been clear

---

[26] Briefly, the test developed in *Sparrow* requires that Crown legislative objectives be reasonable, not impose undue hardship on the Aboriginal peoples to be affected, and not deny Aboriginals their preferred means of exercising their section 35(1) rights. Other requirements are that the legislative goal must be consistent with the Crown's fiduciary obligations, that it minimally infringe the rights in question in order to effect the desired result, and that the Crown must engage in consultation with Aboriginal peoples regarding the legislative initiative and, where appropriate, offer fair compensation for its legislative infringement of section 35(1) rights.

[27] Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95 at 100, cited with approval in *Sparrow*, *supra* note 7 at 406.

[28] This is discussed in greater detail, below.

[29] [2001] 3 S.C.R. 746, 206 D.L.R. (4th) 385 [*Osoyoos* cited to S.C.R.].

following the *Sparrow* decision's discussion of the nature and extent of the Crown's duty more than a decade previously, the proposition was not expressed as clearly in that case as it was in *Osoyoos*.

Secondly, and more importantly, was Iacobucci J.'s rejection of the argument that the Crown can owe no fiduciary duty to Aboriginal peoples where such a duty would conflict with the Crown's public law duties.[30] In concluding this, the Court opposed the previous benchmark commentary on this point in the Federal Court of Appeal's majority judgment in *Kruger v. The Queen*.[31] Iacobucci J. held that the Crown was obliged to reconcile its often competing interests rather than having the public interest automatically trump that of Indians.[32] The expropriation of the land in question in order to build an irrigation canal that was designed to aid the agricultural development of the South Okanagan region of British Columbia was allowed, but the interest in the land taken was limited to the extent necessary to allow the canal's operation while minimally impairing the rights and interests of the band. The notion that the Crown may not cite competing considerations as a defence to its failure to fulfill its fiduciary duty to Aboriginal peoples is entirely consistent with the generally applicable fiduciary principle, which holds that a fiduciary must treat all of its beneficiaries fairly, even when they have disparate or competing interests.

Thus, almost twenty years after the *Guerin* decision, judicial commentary on the implications of describing Crown-Native relations as fiduciary has not been significantly augmented. The *Wewaykum* decision, while not entirely different in this regard, does, at least, engage in a somewhat more substantive discussion of Crown-Native fiduciary relations than many of its predecessors.

Before engaging in meaningful discussion about the implications of *Wewaykum* on existing Crown-Native fiduciary jurisprudence, it is useful to briefly recount some of the basic principles that flow from the application of the fiduciary concept.

III. SOME FIDUCIARY BASICS

The fiduciary concept protects certain forms of interaction by imposing onerous duties upon those with actual or effective power over the interests of others in a variety of relationships. Fiduciary duties arise when the nature of the interaction between two or more parties necessitates the imposition of exacting equitable responsibilities on the party (or parties) possessing power over the interests of the other(s). These duties require that the former (called

---

[30] Note the corroboration of this point in *Wewaykum*, *supra* note 1 at para. 104.

[31] [1986] 1 F.C. 3, (1985), 17 D.L.R. (4th) 591 (C.A.) [*Kruger*].

[32] *Osoyoos*, *supra* note 29 at para. 52.

fiduciaries) act honestly, selflessly, with integrity, and with the utmost good faith (*uberrima fides*) in the interests of the latter (called beneficiaries). While acting in a fiduciary capacity, fiduciaries may not place their personal interests, or those of third parties, ahead of or on par with their beneficiaries' interests. The beneficiaries, meanwhile, become vulnerable to the fiduciaries' discretionary use, misuse, or non-use of their power within the confines of their fiduciary relationship. This vulnerability need not be pre-existing or inherent for a fiduciary relationship to exist (although it may be), but arises from the nature of the interaction between parties which gives rise to a fiduciary relationship.[33]

A breach of fiduciary duty occurs simply by virtue of any action or inaction that is inconsistent with the high standards of integrity, selflessness, and utmost good faith required of fiduciaries. A breach may exist, for example, where a fiduciary places personal interests ahead of or on par with the interests of its beneficiary or where the fiduciary fails to disclose the existence of a conflict of interest which has a bearing on a decision made, or action taken, by the fiduciary on behalf of a beneficiary. It neither depends upon the existence of bad faith, nor may it be automatically exculpated by the presence of good faith. Nor, for that matter, is it dependent upon actual harm or loss suffered by the beneficiary.[34] Rather, a breach is found where a fiduciary obligation exists and the fiduciary has deviated from the standard of care that is required in such circumstances, or where there is a potential for harm or loss to the beneficiary effected by the fiduciary's conduct.[35] The reason for the deviation is irrelevant to determining whether or not a breach has occurred, although it may be relevant to the measure of relief imposed.[36]

---

[33] For a detailed discussion of the role of vulnerability in fiduciary relations, see Leonard I. Rotman, "The Vulnerable Position of Fiduciary Doctrine in the Supreme Court of Canada" (1996) 24 Man. L.J. 60 [*Vulnerable Position*]. See also *infra* note 38 and its accompanying text.

[34] As, for example, in the notable case of *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378 (H.L.).

[35] On this latter point, see *Keech v. Sandford* (1726), 2 Eq. Ca. Abr. 741, 25 E.R. 223 (Eng. Ch. Div.), which was premised entirely upon a potential conflict of interest. See also *LAC Minerals Ltd. v. International Corona Resources Ltd.* [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 at 140 (S.C.C.) [*LAC Minerals* cited to D.L.R.].

[36] The measure of relief awarded for a breach of fiduciary duty is determined in conjunction with the nature of the obligation and the circumstances of the breach. Generally, it is premised upon restitutionary principles, which provide the basis for a disgorgement order or an accounting for profits, but may include the equitable equivalent of common law damages (equitable compensation) or even punitive damages in appropriate circumstances. It has been established that the ability to award equitable compensation is not dependent upon *Lord Cairns' Act* – the *Chancery Amendment Act, 1858*, 21 & 22 Vict. c. 27 – but is inherent: see *e.g. Day v. Mead*, [1987] 2 N.Z.L.R. 443 at 450 (C.A.); I.C.F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 5th ed. (London: Sweet and Maxwell, 1997) at 623 [Spry, *Equitable Remedies*]; Peter M. McDermott, *Equitable*

The fiduciary concept's primary function is as a public policy tool designed to regulate important social and economic relationships. Fiduciary law is impressed with the difficult task of maintaining the integrity of these valuable, or necessary, relationships that arise as a consequence of the need for human interdependency in contemporary society.[37] It accomplishes this by prescribing onerous duties on fiduciaries and strong disincentives to breach those duties. By protecting socially and economically important relationships, the fiduciary concept secures the benefits associated with the effective continuation of meaningful human interaction. Fiduciary law's protection of these relationships safeguards necessary interactions that result in one party becoming vulnerable to the actions of another in situations where the latter possesses power over the former's interests.[38] The protection of these relationships also provides those individuals who become vulnerable to the power held by others with a means to protect their interests against abuse by those others.

The fiduciary concept's protection of relationships and the interests of the parties to them is not entirely unlike that underlying other areas of law, such as contract, which were designed to provide protection and stability for parties to agreements. What separates fiduciary law from areas such as contract, however, is the severity of the former's principles and the wider range of

---

Damages (Sydney: Butterworths, 1994) at 5-26, 155-156. For the ability to award punitive damages for a breach of fiduciary duty, see *Norberg* v. *Wynrib*, [1992] 2 S.C.R. 226, 92 D.L.R. (4th) 449 at 506, citing Mark Vincent Ellis, *Fiduciary Duties in Canada* looseleaf (Don Mills, ON: De Boo, 1988) at 20-24 [current citation (as of 11 March 2003) being Mark Vincent Ellis, *Fiduciary Duties in Canada* looseleaf (Toronto: Carswell, 2000) at 20-32.1]: "Where the actions of the fiduciary are purposefully repugnant to the beneficiary's best interest, punitive damages are a logical award to be made by the Court. This award will be particularly applicable where the impugned activity is motivated by the fiduciary's self-interest." See also *M.(K.)* v. *M.(H.)*, [1992] 3 S.C.R. 6 at para. 106, 96 D.L.R. (4th) 289 [*M.(K.) cited to S.C.R.*] ("The punitive damage award should also not be varied in equity. Of course, equitable compensation to punish the gravity of a defendant's conduct [in breach of fiduciary duty] is available on the same basis as the common law remedy of punitive damages ..."); *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 at para. 82, 209 D.L.R. (4th) 257; *Aquaculture Corp. v. New Zealand Green Mussel Co.*, [1990] 3 N.Z.L.R. 299 at 301 (C.A.).

[37] See Leonard I. Rotman, "Fiduciary Doctrine: A Concept in Need of Understanding" (1996) 34 Alta. L. Rev. 821 at 826-827 [*Fiduciary Doctrine*]; Paul Finn, "Contract and the Fiduciary Principle" (1989) 12 U.N.S.W.L.J. 76 at 84; Peter D. Maddaugh, "Definition of Fiduciary Duty" in Law Society of Upper Canada *Fiduciary Duties* (Toronto: De Boo, 1991) 15 at 26 [*Fiduciary Duties*].

[38] While fiduciary relationships do create a vulnerability of one party at the hands of another, as indicated earlier, the fiduciary nature of the relationship is what creates the vulnerability contemplated here; any pre-existing vulnerability that may exist between the parties is not relevant to the vulnerability generated as a result of the fiduciary relationship and is not a prerequisite for the creation of a fiduciary relationship: see Rotman, *Vulnerable Position*, *supra* note 33.

relationships that it potentially applies to. Fiduciary law imposes a higher standard of morality, as evidenced by its requirement of utmost good faith, than the ordinary contractual standard of good faith. As illustrated by Lord Millett:

> The common law insists on honesty, diligence, and the due performance of contractual obligations. But equity insists on nobler and subtler qualities: loyalty, fidelity, integrity, respect for confidentiality, and the disinterested discharge of obligations of trust and confidence. It exacts higher standards than those of the market place, where the end justifies the means and the old virtues of loyalty, fidelity and responsibility are admired less than the idols of "success, self-interest, wealth, winning and not getting caught".[39]

The fiduciary nature of a relationship describes both the law governing its existence as well as the bundle of rights, duties, and obligations that stem from such a relationship. Fiduciary relationships are an amalgam of specific duties and benefits. They only exist in a meaningful way because of the enforcement of the parties' mutual obligations and benefits. This situation creates a legal equilibrium achieved through the balancing of theoretically equal and opposite forces.[40] While fiduciaries have a duty to act with honesty, integrity, and *uberrima fides* towards their beneficiaries' best interests, beneficiaries have a correlative right to rely upon their fiduciaries' fulfilment of those duties without having to monitor their fiduciaries' activities. Consequently, where both the fiduciary and beneficiary in any given relationship act in accordance with their respective responsibilities and entitlements, the integrity of the relationship is maintained.

Because the application of the fiduciary concept is context-specific, no two relationships deemed to be fiduciary will be identical, nor will the application of fiduciary principles to them be identical. Thus, while there may be a general presumption that Crown-Native relations are fiduciary, that does not entail that all aspects of those relations are fiduciary.[41] Binnie J. emphasized

---

[39] Rt. Hon. Sir Peter Millett, "Equity's Place in the Law of Commerce," (1998) 114 L.Q.R. 214 at 216, citing Jonathan Sacks, *The Politics of Hope*, (London: Jonathon Cape, 1997) at 179 [Millett, "Equity's Place"].

[40] Much in the manner of the system of jural correlatives and opposites pioneered by Hohfeld in the early stages of the twentieth century: see Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1916-17) 26 Yale L.J. 710; Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913-14) 23 Yale L.J. 16.

[41] Note, for example, the statements made in *Quebec (A. G.) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at 183, 112 D.L.R. (4th) 129:

> It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. The Queen*, [1984] 2 S.C.R. 335. Nonetheless, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *Lac Minerals Ltd.*

this point in *Wewaykum* when he referred to the cases, cited below, that alleged breaches of fiduciary duty against the Crown in a variety of unique circumstances.[42]

While it is true that the Crown's fiduciary duties do not insulate Aboriginal peoples from all executive and legislative actions which result in detriment or harm to them, the limits of the fiduciary concept remain open.[43] The situation-specific nature of the fiduciary concept entails that *a priori* assumptions or the use of categories of relations are inappropriate methods of defining whether a fiduciary obligation exists. As La Forest. J. explained in *Hodgkinson v. Simms*:

> ... the precise, legal or equitable duties the law will enforce in any given relationship are tailored to the legal and practical incidents of a particular relationship. To repeat a phrase used by Lord Scarman, "[t]here is no substitute in this branch of the law for a meticulous examination of the facts": see *National Westminster Bank plc. v. Morgan*, [1985] 1 All E.R. 821 (H.L.) at p. 831.[44]

The fiduciary concept's focus on the unique requirements of individual circumstances allows for the tailoring of the concept's general principles to the needs of particular forms of interaction that, because of their nature and/or characteristics, ought properly be described as fiduciary. For this reason, it is presumptively incorrect to suggest, as Binnie J. intimated in *Wewaykum*, that unique claims of Crown fiduciary duties may not be described as fiduciary because of the uniqueness of the claims made.

---

v. International Corona Resources Ltd., [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed.

See also *LAC Minerals*, *supra* note 35; *New Zealand Netherlands Society 'Oranje' Inc. v. Kuys*, [1973] 2 All E.R. 1222 at 1225-1226 (P.C.) ("A person ... may be in a fiduciary position *quoad* a part of his activities and not *quoad* other parts: each transaction, or group of transactions must be looked at."); *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, 93 D.L.R. (4th) 415 at 423; *Henderson v. Merrett Syndicates Ltd.*, [1995] 2 A.C. 145 at 206, [1994] 3 All E.R. 506 (P.C.).

[42] See *infra* notes 69-76.

[43] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 55, 201 D.L.R. (4th) 129, where McLachlin C.J.C. said, "In recent decades fiduciary obligations have been applied in new contexts, and the full scope of their application remains to be precisely defined."

[44] *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161 at 179 (S.C.C.) [*Hodgkinson* cited to D.L.R.]. See also Deborah A. DeMott, "Beyond Metaphor: An Analysis of Fiduciary Obligation," [1988] Duke L.J. 879 at 910 ("Described instrumentally, the fiduciary obligation is a device that enables the law to respond to a range of situations in which, for a variety of reasons, one person's discretion ought to be controlled because of characteristics of that person's relationship with another" at 915).

Insofar as the fiduciary concept may properly apply to any interaction, or specific element of an interaction, where its application is consistent with the concept's fundamental purpose, any relationship, whether in whole or in part, may potentially be described as fiduciary. Of course, the specific facts that characterize any individual interaction must provide a sound basis for supporting the application of the fiduciary concept to that interaction. This may be accomplished by reference to the relevant *indicia* for the establishment of the fiduciary nature of individual interactions, such as those provided in *Frame v. Smith*[45] and *Hodgkinson*.[46]

In her dissenting judgment in *Frame v. Smith*, Justice Wilson articulated what she described as a "rough and ready" guide for identifying appropriate situations for the application of the fiduciary concept. Specifically, she said:

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (13) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (14) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[47]

Wilson J.'s guide was subsequently adopted by the majority judgment of the Supreme Court in *LAC Minerals*,[48] thus more firmly establishing its precedential value. This guide was also cited with approval in the Supreme Court's most recent major fiduciary pronouncement in *Hodgkinson*.[49]

In *LAC Minerals*, Sopinka J.'s majority judgment correctly stressed that not all of the characteristics listed in Wilson J.'s "rough and ready" guide had to be present for a fiduciary relationship to exist, nor would the existence of those ingredients invariably identify the existence of a fiduciary relationship.[50] While not all of these criteria need to exist for a fiduciary relationship to arise,

---

[45] *Frame v. Smith*, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81 [*Frame* cited to D.L.R.].

[46] *Supra* note 44.

[47] *Frame*, *supra* note 45 at 99.

[48] *Supra* note 35, in which, ironically, Wilson J. dissented from the majority judgment.

[49] Although La Forest J.'s judgment was a majority one in terms of result, Iacobucci J. did not agree with La Forest J.'s rejection of the principles pertaining to fiduciary relationships formulated by the majority judgment in *LAC Minerals*, *ibid.*: see *Hodgkinson*, *supra* note 44 at 228.

[50] *LAC Minerals*, *ibid.* at 63.

and the satisfaction of each of them does not necessarily indicate the existence of a fiduciary relationship, they provide a sounder context for the application of the fiduciary concept than some previous methodologies.[51] This is not to suggest, though, that Wilson J.'s approach is not without its limitations.[52]

Although the judgments in *Hodgkinson* positively cite and implement the guidelines set out by Wilson J. in *Frame*, La Forest J.'s majority judgment introduced an additional consideration to the fiduciary mix that has also played a significant role in the development of subsequent fiduciary jurisprudence: the concept of "reasonable expectations".[53] As he explained in *Hodgkinson*, "[t]he existence of a fiduciary duty in a given case will depend upon the reasonable expectations of the parties, and these in turn depend on factors such as trust, confidence, complexity of subject matter, and community or industry standards".[54] One should note, however, that this notion of "reasonable expectations" includes those held by *all of the parties*, not simply the alleged beneficiary of a fiduciary relationship. In addition, these "reasonable expectations" are not comprised solely of the subjective understandings held by the parties, but an objective assessment of the subjective positions of those parties in relation to the facts in issue. This is accomplished in a matter akin to the analysis undertaken with respect to the reasonable person in tort law – that is, an objective inference based on what a reasonable person would do in the fact situation in question.

---

[51] Such as the categorical approach to defining fiduciary relations – in which a relationship could only be deemed to be fiduciary if a similar incident of it had either been found to be fiduciary in the past or analogous to a previously-found fiduciary relation – or the "I know one when I see one" approach, whose methodology was no more sophisticated than this description. Note, for example, the statement by Huddart J., as she then was, in *Lefebvre v. Gardiner* (1988), 27 B.C.L.R. (2d) 294 at 299, [1988] B.C.J. No. 1109 (S.C.) (QL): "A review of the substantial jurisprudence to which counsel referred me suggests that the court will recognize a fiduciary relationship when it sees one although it may not be able to say why and it may not even call it that." See also Millett, *supra* note 39 at 218: "In England, as usual, we have tried to muddle through without attempting a definition, believing that anyone can recognise a fiduciary when he sees one. Recent experience shows this to be optimistic."

[52] For example, an obvious limitation of Wilson J.'s "rough and ready" guide is that it is merely descriptive of fiduciary relations and their characteristics rather than definitional. Accordingly, it does not propose a method for identifying fiduciary relations, but proceeds by analogy from the criteria listed. The danger in proceeding by analogy in this manner is that it may result in the description of some relations as fiduciary where they share certain similarities with fiduciary interactions, but are not necessarily fiduciary themselves.

[53] Although, technically, *Hodgkinson* did not introduce the notion of "reasonable expectation" into fiduciary jurisprudence – since it had been used by La Forest J. in his dissenting judgment in *LAC Minerals*, *supra* note 35 at 35-36, 39 – its reintroduction in his majority judgment in *Hodgkinson* was responsible for catapulting it into its present status in the area of fiduciary law.

[54] *Supra* note 44 at 178.

IV. THE FACTS IN *WEWAYKUM*

The *Wewaykum* case centred around a dispute between two bands – the Wewaykum, or Campbell River, Band and the Wewaikai, or Cape Mudge, Band – over the possession of their respective reserves located two miles from each other. Both bands belonged to the Laich-kwil-tach First Nation, which was comprised of four different bands.

It was not until the 1888 survey of Ashdown Green that the dispute in question in *Wewaykum* started to become clear. Green recommended creating two additional reserves, Reserve No. 11 (Campbell River) and Reserve No. 12 (Quinsam), which he identified as belonging to the "Laich-kwil-tach (Euclataw) Indians," but did not break down the individual possession of the reserves by band. This was recorded in the Schedules of Indian Reserves published by the Department of Indian Affairs. The first such schedule, published in 1892, described Reserve Nos. 11 and 12 as belonging to the "Laich-Kwil-Tach Indians," but did not subdivide possession at the band level. In the 1902 schedule, however, Reserve Nos. 11 and 12 were erroneously shown as having been allocated to the Wewaikai Band. In fact, the Wewaikai had not resided in the area designated as Reserve No. 11, although the Wewaykum had been there for several years. This error formed the basis of the Wewaikai Band's claim to Reserve No. 11.

In 1905, a dispute between the Wewaykum and Wewaikai Bands led to a disagreement over who properly possessed Reserve No. 11. In March, 1907, a Resolution was made pursuant to which Reserve No. 11 was ceded to the Wewaykum Band by the Wewaikai, subject to the latter's retention of fishing rights in the area. Under this Resolution, the Wewaikai acknowledged that Reserve No. 11 was recorded in the Department of Indian Affairs' reserve schedule as belonging to it, but that it recognized that the Wewaykum occupied the reserve and were the first to live there. As a result of the Resolution, a handwritten addition was made to the 1902 reserve schedule which indicated that Reserve No. 11 was in the possession of the Wewaykum Band. However, another error was created because of department practice, under which a departmental official would write out a band's name in full for the initial entry, but then use quotation, or "ditto", marks for subsequent references. As a result, the amendment to the schedule showing the Wewaykum Band as being in possession of Reserve No. 11 was followed by ditto marks next to the entry for Reserve No. 12, thereby making it appear as if the Wewaykum Band was in possession of Reserve No. 12 rather than the Wewaikai Band, which rightfully possessed it. This "ditto mark" error, as it was described by the trial judge, formed the basis for the Wewaykum Band's claim to Reserve No. 12.

This ditto mark error was noticed and recorded by the McKenna McBride Commission that was formed in 1912. In the Wewaykum and Wewaikai

Bands' respective appearances before the Commission in 1914, the Wewaykum did not claim Reserve No. 12 and Wewaikai did not claim Reserve No. 11. The subsequent Ditchburn Clark Commission restated the position taken in the McKenna McBride Report that Reserve No. 11 belonged to Wewaykum and Reserve No. 12 belonged to Wewaikai. That report, amended by the Ditchburn Clark Report, was adopted in 1924.

In 1928, Commissioner Ditchburn recommended that the ditto mark error be corrected. Both the Wewaykum and Wewaikai Bands retained legal counsel in 1932 to investigate the matter. Ultimately both bands affirmed the status quo and declarations to that effect were signed by the Wewaikai in 1936 and by the Wewaykum in 1937. A corrected reserve schedule was published in 1943. However, in the 1970s, the matter was raised again by the Wewaykum Band, which then commenced an action against the federal Crown and the Wewaikai Band in 1985. The Wewaikai counterclaimed for exclusive entitlement to both reserves and, in 1989, added its own claim against the federal Crown.

In summary, the Wewaykum and Wewaikai Bands each claimed that they were entitled to both Reserve Nos. 11 and 12 and that, but for various breaches of fiduciary duty by the federal Crown, each band maintained that it would be in possession of both reserves. Put another way, whichever band was successful in its claim would end up possessing both reserves while the unsuccessful band would possess neither. Each band sought formal declarations of trespass and possession and injunctive relief against each other. However, each band acknowledged the hardship that its claim, if successful, would cause to the other; thus, neither band sought possession of the other's reserve, but sought equitable compensation from the federal Crown instead, alleging that it breached its fiduciary duty by denying each band rights to the reserves in question.

V. THE SUPREME COURT'S JUDGMENT

In delivering the judgment of the Supreme Court in *Wewaykum*, Binnie J. considered the following factors: (a) the scope of the federal Crown's fiduciary duty in the creation of reserve lands; (b) whether actions of government officials breached any fiduciary duty found to exist, and; (c) what equitable remedies were available to provide relief for any breaches of fiduciary duty found to have occurred.[55]

Justice Binnie held that the concept of Crown fiduciary duties was premised upon the need to "facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of

[55] *Wewaykum*, *supra* note 1 at para. 5.

Aboriginal peoples" rather than in notions of paternalism.[56] Thus, he held that the federal Crown's fiduciary duty could not be restricted to reserves, as in *Guerin*, or section 35(1) rights, as in *Sparrow*.[57] He found that the "degree of economic, social and proprietary control and discretion asserted by the Crown ...left aboriginal populations vulnerable to the risks of government misconduct or ineptitude"[58] and gave rise to the existence of Crown fiduciary duties. Although Justice Binnie recognized that the scope of the federal Crown's duty was not restricted to what had been found to exist in *Guerin* and *Sparrow*, he emphasized that it was not unlimited in scope.[59]

Further, Binnie J. indicated that the federal Crown's fiduciary duty did "not exist at large but in relation to specific Indian interests".[60] In his opinion, the appellants "seemed at time to invoke the 'fiduciary duty' as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship".[61] As he emphasized, this assertion "overshoots the mark".[62] While he acknowledged that the assertion of the federal Crown's fiduciary duty pertaining to land was well recognized by the Supreme Court in cases such as *Guerin*,[63] *Blueberry River*,[64] and *Ross River Dena Council Band v. Canada*,[65] he held that "[the] protection accorded to [these] dealings ... 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*".[66] Justice Binnie then made particular reference to a number of cases that alleged breaches of fiduciary duty by the federal Crown in relation to a variety of matters:[67] the structuring of elections;[68] the provision of social services;[69] to

---

[56] *Ibid.* at para. 79, quoting Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 753.

[57] *Ibid.* at para. 79.

[58] *Ibid.* at para. 80.

[59] *Ibid.* at para. 81.

[60] *Ibid.*

[61] *Ibid.*

[62] *Ibid.*

[63] *Supra* note 3.

[64] *Supra* note 12.

[65] [2002] 2 S.C.R. 816, 213 D.L.R. (4th) 193.

[66] *Wewaykum*, *supra* note 1 at para. 81.

[67] *Ibid.* at para. 82.

[68] *Batchewana Indian Band (Non-resident members) v. Batchewana Band*, [1997] 1 F.C. 689, 142 D.L.R. (4th) 122 (C.A.), which was dealt with by the Supreme Court on other grounds.

rewrite negotiated provisions;[70] to cover moving expenses;[71] to suppress public access to information about band affairs;[72] to require legal aid funding;[73] to compel registration of individuals under the *Indian Act*;[74] and to invalidate a consent signed by an Indian mother to the adoption of her child.[75]

Justice Binnie offered no comment about the correctness of the dispositions of the judgments in the cases cited above, which he grouped together under what he described as "a flood of 'fiduciary duty' claims by Indian bands across a whole spectrum of possible complaints".[76] However, he re-emphasized the point he made earlier in his judgment that "not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature".[77] Based on this assertion, he held that the only proper method of determining whether the federal Crown held a fiduciary duty towards Aboriginal peoples was "to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation."[78] While Binnie J. held that a public law duty does not necessarily exclude fiduciary relations, such a relationship "depends on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility 'in the nature of a private law duty'".[79]

---

[69] *Southeast Child & Family Services v. Canada (A. G.)* (1997), 120 Man. R. (2d) 114, [1997] 9 W.W.R. 236 (Q.B.).

[70] *British Columbia Native Women's Society v. Canada*, [2000] 1 F.C. 304, [2000] 3 C.N.L.R. 4 (T.D.).

[71] *Paul v. Kingsclear Indian Band* (1997), 137 F.T.R. 275, [1997] F.C.J. No. 1358; *Mentuck v. Canada*, [1986] 3 F.C. 249, 3 F.T.R. 80 (T.D.); *Deer v. Mohawk Council of Kahnawake*, [1991] 2 F.C. 18, (1990), 41 F.T.R. 306 (T.D.).

[72] *Chippewas of Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)* (1996), 116 F.T.R. 37, [1997] 1 C.N.L.R. 1, var'd (1999), 251 N.R. 220, 70 C.R.R. (2d) 278 (F.C.A.); *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)* [1989] 1 F.C. 143, 51 D.L.R. (4th) 306 (T.D.); *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1997), 148 D.L.R. (4th) 356, 132 F.T.R. 106 (T.D.).

[73] *Ominayak v. Canada (Minister of Indian Affairs and Northern Development)*, [1987] 3 F.C. 174, 11 F.T.R. 75 (T.D.).

[74] Rejected in *Tuplin v. Canada (Indian and Northern Affairs)* (2001), 207 Nfld. & P.E.I.R. 292, [2002] 1 C.N.L.R. 350 (P.E.I.T.D.).

[75] *G. (A.P.) v. A. (K.H.)* (1994), 164 A.R. 47, 120 D.L.R. (4th) 511 (Q.B.).

[76] *Wewaykum*, *supra* note 1 at para. 82.

[77] *Ibid.* at para. 83, citing *LAC Minerals*, *supra* note 35 at 61.

[78] *Wewaykum*, *supra* note 1 at para. 83.

[79] *Ibid.* at para. 85.

Using these considerations, Binnie J. articulated a variety of findings. He held that, prior to reserve creation, the federal Crown exercised public law functions under the *Indian Act* and its duty was restricted at that point to "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".[80] He referred positively to the Supreme Court's judgments in *Blueberry River*[81] and in *Fales v. Canada Permanent Trust Co.*,[82] which established that the nature of the federal Crown's duty as a fiduciary was "that of a man of ordinary prudence managing his own affairs."

In discussing the possible existence of the federal Crown's duty prior to reserve creation in *Wewaykum*, Binnie J. found that, because of its unique position, the federal Crown was justifiably concerned with both the interests of the bands and those of certain non-Indian settlers. Consequently, he held that the Court could not "ignore the reality of the conflicting demands confronting the government".[83] Once the bands' conflicting demands became apparent, the federal Crown had a duty to be "even-handed towards and among the various beneficiaries".[84] Justice Binnie agreed with the trial judge's determination that these pre-reserve obligations had been properly fulfilled.[85]

Following the creation of the reserves in question, Justice Binnie stated that the federal Crown's duty expands to include "the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation".[86] This was done to reflect its obligations under the *Indian Act* pursuant to the Act's surrender requirements, as enunciated initially in *Guerin*.[87] This entailed that the federal Crown held a fiduciary duty to ensure that its Aboriginal beneficiaries were not made subject to exploitative bargains[88] and 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 ...the Crown itself".[89] Binnie J. determined that no

---

[80] *Ibid.* at para. 86.

[81] *Supra* note 12 at para. 104.

[82] [1977] 2 S.C.R. 302 at 315, 70 D.L.R. (3d) 257.

[83] *Wewaykum*, *supra* note 1 at para. 96.

[84] *Ibid.* at para. 97.

[85] *Ibid.*

[86] *Ibid.* at para. 86.

[87] *Supra* note 3.

[88] *Wewaykum*, *supra* note 1 at paras. 99-100.

[89] *Ibid.* at para. 100.

exploitation had taken place under the facts in *Wewaykum* – in particular that the Wewaikai had not been victims of an exploitative bargain by disclaiming interest in Reserve No. 11 under the 1907 Resolution, but were, rather, fully informed and autonomous actors who had intended in good faith to resolve a disagreement with the Wewaykum. He described the Wewaikai's attempt to claim a breach of fiduciary duty with respect to the 1907 Resolution as "overly ambitious".[90] Justice Binnie did, however, distinguish the basis of his determination on this point from that upon initial appeal, where the Federal Court of Appeal stated that the federal Crown had fulfilled its duties by balancing its competing responsibilities to each of the bands.[91] As he stated, "the role of honest referee does not exhaust the Crown's fiduciary obligation here. The Crown could not, merely by invoking competing interests, shirk its fiduciary duty".[92] Since he found that each of the appellants lacked a beneficial interest in the other's reserve, neither was entitled to dispossess the incumbent band entitled to that interest or to obtain equitable compensation from the federal Crown for refusing to effect such a dispossession.[93]

Along with his determination that the bands each had no beneficial interest in the other's reserve, Justice Binnie indicated that the bands' "technical arguments" were "singularly inappropriate in a case where they seek equitable remedies".[94] For this reason, he concluded that there was no basis for a mandatory injunction to dispossess the rightful incumbents from their reserves, nor to award equitable compensation to be paid by the federal Crown as a substitute for interests that neither band was found to possess.[95] Moreover, as he further stated, "[o]ne of the features of equitable remedies is that they not only operate 'on the conscience' of the wrongdoer, but require equitable conduct on the part of the claimant".[96] While he did not suggest that the appellants acted inequitably, a strong inference of such a sentiment is clearly evident in Justice Binnie's judgment.

Regardless of his determination of the merits of the bands' claims, Binnie J. concluded that they could not be upheld because of the equitable defences of laches and acquiescence, as well as the lapse of the relevant statutory limitation period. The appellants' contention that the federal Crown's failure

---

[90] *Ibid.* at para. 103.

[91] *Wewaykum Indian Band v. Canada*, [2000] 3 C.N.L.R. 303 at para. 121, 247 N.R. 359 (F.C.A.).

[92] *Wewaykum*, *supra* note 1 at para. 104.

[93] *Ibid.*

[94] *Ibid.* at para. 105.

[95] *Ibid.* at para. 106.

[96] *Ibid.* at para. 107.

to ensure their respective possession of both reserves constituted a continuing breach of duty was held to be inconsistent with the legitimate rationale for the imposition of limitations legislation.[97] For all of these reasons, the appellants' claims were dismissed.

VI. THE IMPLICATIONS OF *WEWAYKUM*

When considering the implications of *Wewaykum*, there are a few major concerns. The fact that Binnie J. appeared to suggest that the Crown must *assume* fiduciary obligations – through his statement that "The fiduciary duty ... is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of Aboriginal peoples"[98] – unfairly limits the scope of the Crown's duty and is presumptively incorrect. While some strongly advocate the need for undertakings by fiduciaries before fiduciary duties may arise,[99] the Supreme Court has made it clear that the existence of fiduciary obligations are not dependent upon the existence of undertakings by fiduciaries, but may arise equally from parties' conduct.[100] Other issues of significance stemming from *Wewaykum* are the availability of equitable relief for breaches of the Crown's fiduciary obligations and the application of statutory and equitable limitations to claims for the breach of those obligations.

Certainly an Aboriginal claimant may be entitled to receive equitable compensation for a demonstrated breach of fiduciary duty by the Crown; a claim of breach of fiduciary duty is an equitable cause of action and may, therefore, be redressed by an award of equitable relief if successfully demonstrated to have occurred. This could come in the form of equitable compensation – Equity's equivalent to common law damages – or other measures of relief, such as accounting for profits or the imposition of a constructive trust. However, as the *Wewaykum* judgment indicates, to receive Equity, one must do Equity. Given the technical nature of the appellant bands' claims in *Wewaykum* and their seeming acquiescence to the status quo, their

---

[97] *Ibid.* at para. 135.

[98] *Wewaykum*, *supra* note 1 at para. 79.

[99] See *e.g.* Austin W. Scott, "The Fiduciary Principle" (1949) 37 Cal. L. Rev. 539 at 540; John D. McCamus, "Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada" (1997) 28 C.B.L.J. 107 at 122; John Glover, "The Identification of Fiduciaries" in Peter Birks, ed., *Privacy and Loyalty* (Oxford: Clarendon, 1997) at 272. See also John Glover, "Wittgenstein and the Existence of Fiduciary Relationships: Notes Toward New Methodology" (1995) 18 U.N.S.W.L.J. 443, esp. at 446, 454.

[100] See *M.(K.)*, *supra* note 36 at para. 73 where La Forest J. expressly stated, "fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by the fiduciary."

claims to equitable compensation from the federal Crown because of the latter's alleged failure to protect them from exploitative bargains sat ill in their mouths. While the federal Crown may not have satisfactorily advised the bands of the implications of their actions, such as signing the 1907 Resolution, the evidentiary record did not support their claims.

The discussion of statutory bars to the appellants' claims in *Wewaykum* affirms the status quo regarding how claims for breach of fiduciary duty are caught by statutes of limitation that expressly apply to equitable causes of action. The preponderance of Canadian limitation statutes, including the British Columbia legislation[101] that applied in *Wewaykum* through its referential incorporation under section 39(1) of the *Federal Court Act*,[102] expressly apply to both statutory and equitable causes of action, thereby ensnaring actions for breach of fiduciary duty within their scope. The only exception to this, at present, is the Ontario *Limitations Act*,[103] which does not purport to apply to all equitable causes of action. While Ontario has recently passed new limitations legislation that will apply to both statutory and equitable causes of action, section 2(1) of the new Ontario Act expressly excludes from its operation:

> (e) proceedings based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada which are recognized and affirmed in section 35 of the *Constitution Act, 1982*; and
>
> (f) proceedings based on equitable claims by aboriginal peoples against the Crown.[104]

Thus, notwithstanding the broadening of the Ontario Act to include equitable causes of action and its creation of an ultimate limitation period, claims by Aboriginal peoples alleging breaches of fiduciary duty by the Crown as a result of actions occurring in Ontario – whether brought before the Ontario or Federal courts – will remain governed by the existing legislative scheme. As recognized by *M.(K.)*,[105] the present Act does not apply to breach of fiduciary duty claims. At the time this paper was written, the only other province to make special provisions in its limitations statute for equitable claims brought by Aboriginal peoples against the Crown is Alberta. Section 13 of the Alberta *Limitations Act*[106] exempts certain claims for breach of fiduciary

---

[101] *Limitations Act*, S.B.C. 1975, c. 37.

[102] R.S.C. 1985, c. F-7.

[103] R.S.O. 1990, c. L-15.

[104] S.O. 2002, c. 24, sch. B, s. 2(1) (in force 1 January 2004).

[105] *Supra* note 36.

[106] R.S.A. 2000, c. L-12. The wording of s.13 reads:

duty brought by Aboriginal peoples against the Crown from the application of the current Act and its ultimate limitation period (although they are still subject to the limits established by its predecessor).

The inclusion of special provisions for Aboriginal peoples' claims against the Crown for breaches of fiduciary duty in the Ontario and Alberta statutes reflects the understanding, expressed by Binnie J. in *Wewaykum*, that, in spite of the rationale behind limitations statutes, "[t]his is not to say that historical grievances should be ignored, or that injustice necessarily loses its sting with the passage of the years".[107] Often a band's claim against the Crown arises long after the alleged breach of duty occurred. This creates particular problems for contemporary breach of fiduciary duty claims since, for many years, Aboriginal peoples in Canada were not in a position to challenge the Crown when their rights were being ignored, infringed, or extinguished and were unaware of their rights under Canadian law for considerable periods of time. Even when they were potentially able to mount challenges to the Crown's treatment of their rights, Aboriginal peoples were denied adequate consideration of their claims, either because they were statutorily prevented from commencing legal actions against the federal Crown under the *Indian Act*,[108] or were confronted with the lack of understanding of the nature of their rights and claims by the overwhelming majority of Canadian judges.

The historic relationship between the Crown and Aboriginal peoples was not only unique, but had profound effects upon both parties. Aboriginal peoples received the short end of the bargain from their alliances and treaties with the Crown and suffered tremendous abuses of their rights over the years.

> 13. An action brought on or after March 1, 1999 by an aboriginal people against the Crown based on a breach of a fiduciary duty alleged to be owed by the Crown to those people is governed by the law on limitation of actions as if the Limitation of Actions Act, R.S.A. 1980 c. L-15, had not been repealed and this Act were not in force.

[107] *Wewaykum*, *supra* note 1 at para. 123.

[108] R.S.C. 1906, c. 81, as amended by *An Act to Amend the Indian Act*, S.C. 1926-7, c. 32, s. 6. The section in question, numbered as s. 149A in the 1906 Act, became s. 141 of the *Indian Act*, R.S.C. 1927, c. 98 and was later repealed by the 1951 consolidation of the *Indian Act*, R.S.C. 1951, c. 29. The section read:

> Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution or promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for any term not exceeding two months.

These abuses often occurred with the knowledge of the Crown or, in a number of circumstances, were perpetrated by the Crown itself. Moreover, the Aboriginal peoples faced distinct disadvantages vis-à-vis the Crown in attempting to enforce their rights in the Crown's own courts, and stacking their limited means against the vast resources available to the Crown. In light of these inequities, to have the Crown escape liability for its actions because of the effects of its own legislation – or legislation that it has taken the positive action of referentially incorporating, as in the case of the federal Crown – appears fundamentally unjust, notwithstanding the legitimate policy rationales underlying the existence of statutory limitation periods.[109]

While Binnie J.'s assessment of the technical nature of the appellants' arguments in *Wewaykum* appears to have been correct, with the result that it properly militated against the bands' claims for equitable compensation, the Crown's assertion of a defence of a lapse of a statutory limitation period is, itself, a technicality that runs contrary to the equitable nature of the obligations owed by a fiduciary. Given the stern words that Binnie J. reserved for the technical nature of the appellants' claims in *Wewaykum*, no lesser measure of disapproval ought properly have been used vis-à-vis the federal Crown's invocation of the lapse of the applicable statutory limitation period as a defence to the claims brought against it. The fact that beneficiaries are not bound to inquire into their fiduciaries' activities nor to monitor the latter's performance of their duties,[110] combined with the historic, *sui generis* nature of Crown-Native relations and the problems, indicated above, which inhibited Aboriginal peoples' abilities to assert claims against the Crown for considerable periods of time, make it difficult to sustain an argument that would allow Aboriginal beneficiaries' claims to be barred by statute. In *Wewaykum*, it appears that this situation was somewhat different, insofar as the bands had retained legal counsel some half-century before their modern claims were commenced. However, for many other Aboriginal claims, there would not be such lengthy knowledge of rights.

---

[109] The rationale for the use of statutory limitation periods was made clear in the trial judgment in *Wewaykum Indian Band v. Canada and Wewayakai Indian* (1995), 99 F.T.R. 1 at para. 520, [1995] F.C.J. No. 1202 where it was explained, "... for much of the century, members of both bands had first hand knowledge of the important events which are the subject of these actions. Unfortunately, within the last 30 years, those band members as well as the Indian Agents, have died and many of their documents have been lost or destroyed."

[110] See *e.g. In re Vernon, Ewens, & Co.* (1886), 33 Ch. D. 402 at 410, 35 W.R. 225 (C.A.): "the *cestui que trust* is entitled to trust in and place reliance upon his trustee, and is not bound to inquire whether he has committed a fraud against him unless there is something to raise his suspicion"; *Carl B. Potter Ltd. v. Mercantile Bank of Canada*, [1980] 2 S.C.R. 343, 8 E.T.R. 219 at 228; Tamar Frankel, "Fiduciary Law" (1983) 71:3 Calif. L. Rev. 795 at 824; Mark Vincent Ellis, *Fiduciary Duties in Canada* (looseleaf) (Toronto: Carswell, 2000) at 2-22.

Certainly, allowing fiduciaries to invoke statutory limitations as a defence to a breach of fiduciary duty appears antithetical to the fiduciary's obligations as a fiduciary. If a fiduciary has a duty to act in the best interests of its beneficiary and it breaches that obligation, allowing that same fiduciary to escape liability by hiding behind a statutory shield appears inconsistent with the nature of the fiduciary's duty. This is especially so since the fiduciary must take the positive step of specifically pleading the statute in order to be availed of its protection. This positive action is doctrinally inconsistent with the fiduciary's duty to its beneficiary, even if it conforms to contemporary legal standards.

The situation with equitable limitations is somewhat different. In *Wewaykum*, Binnie J. indicated that the bands had acquiesced to the status quo and consequently were prohibited from asserting claims to either disrupt that status quo or to obtain compensation from the Crown in lieu of such a disruption because of the application of the defence of laches. This finding was premised upon the length of time that had passed between the creation of the status quo and the bands' claim that it was in error. Laches estops a plaintiff who has knowledge of the existence of a claim from asserting that claim by virtue of the combination of having taken too long to assert it and the prejudice that would likely result to the adverse party if the claim was allowed to proceed after such a lengthy delay. The nature of the actions undertaken in the interval between the cause of action and the commencement of the claim must also be considered by the courts.[111] The existence of delay in such a situation is deemed to demonstrate the plaintiff's acquiescence to the defendant's conduct, thereby impliedly waiving the plaintiff's ability to commence an action based on that conduct. Laches, as an equitable defence, only prevents a claim from proceeding where it would be unjust to allow it to proceed.[112] It is not simply a statutory limitation that establishes a particular period of time beyond which a claim is barred, since such an approach does not account for the unique situation and circumstance of individual claims which Equity must heed.[113]

---

[111] *M.(K.)*, *supra* note 36 at paras. 96-98; *Blundon v. Storm*, [1972] S.C.R. 135, 20 D.L.R. (3d) 413; *Canada Trust Co. v. Lloyd*, [1968] S.C.R. 300, 66 D.L.R. (2d) 722 at 726; *Harris v. Lindeborg*, [1931] S.C.R. 235, 1 D.L.R. 945 at 957; *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221 at 239 [*Lindsay Petroleum*].

[112] *M.(K.)*, *ibid.* at paras. 97-100; *Lindsay Petroleum*, *ibid.* at 239-40; Spry, *Equitable Remedies*, *supra* note 36 ("Laches is established when two conditions are fulfilled. In the first place, there must be an unreasonable delay in the commencement or prosecution of proceedings; in the second place, in all the circumstances the consequences of delay must render the grant of relief unreasonable or unjust" at 226).

[113] Thus, for example, in *Chippewas of Sarnia Band v. Canada (A. G.)* (2000), 51 O.R. (3d) 641, 195 D.L.R. (4th) 135 (C.A), the Ontario Court of Appeal held that a "sixty-year equitable limitation period" imposed by the motions court judge on a summary judgment

In *Wewaykum*, the appellants' knowledge of the basis of their claims and subsequent affirmation of the status quo on more than one occasion rendered their ability to seek compensation for their allegations of breach of fiduciary duty against the federal Crown unjust, thereby legitimizing the latter's use of laches. As Justice Binnie explained:

> It seems to me both branches of the doctrine of laches and acquiescence apply here, namely: (i) where "the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver", and (ii) such conduct "results in circumstances that make the prosecution of the action unreasonable" (*M.(K.) v. M.(H.)*, *supra*, at pp. 76 and 78). Conduct equivalent to a waiver is found in the declaration, representations and failure to assert "rights" in circumstances that required assertion, as previously set out. Unreasonable prosecution arises because, relying on the *status quo*, each band improved the reserve to which it understood its sister band made no further claim. All of this was done with sufficient knowledge "of the underlying facts relevant to a possible legal claim" (*M.(K.) v. M.(H.)*, *supra*, at p. 79).[114]

Statutory and equitable limitations were not the only important considerations in *Wewaykum*. As Dickson J. noted initially in *Guerin*, the *Wewaykum* judgment indicated that the Crown is in a unique position as a fiduciary vis-à-vis Aboriginal peoples. Unlike other fiduciaries, who may owe a variety of duties to various parties in various contexts, the Crown owes a multitude of duties to a wide variety of groups – and groups of groups – because of its executive and legislative functions. As a result of these considerations, some of which directly compete with others, the issue of conflict of interest is a difficult one for the Crown. However, as Justice Binnie indicated in *Wewaykum*, the fact that the Crown has competing obligations does not entail that it may ignore its fiduciary responsibilities to its Aboriginal beneficiaries by citing competing interests.[115] Indeed, as he explained, while the Crown could not "ignore the reality of the conflicting demands

---

motion was inappropriate because of Equity's focus on the particular requirements of individual situations rather than imposing arbitrary limits. As it explained, at para. 308:

> In our view, the imposition of a strict sixty-year "equitable limitation period," extending the time within which the Chippewas could assert their claim to the lands unaffected by the operation of the good faith purchaser for value defence, is not supportable in law. A limitation period prescribes the time within which a claim must be brought. ... Properly understood, the sixty-year period created by the motions judge is not a limitation period at all. ... The sixty-year period he imposed was an "extension period," suspending the operation of a valid defence, and allowing a claim to be asserted after the point at which, by operation of ordinary legal principles, it would have been defeated. There is nothing in *M.(K.) supra*, that would support this.

[114] *Wewaykum*, *supra* note 1 at para. 111.

[115] See the discussion of this, above at 226.

confronting the government",[116] it was bound to be "even-handed towards and among the various beneficiaries".[117]

Justice Binnie's findings in *Wewaykum* on the Crown's ability to cite competing considerations as a defence to its failure to live up to its fiduciary obligations to one of its beneficiaries accords with similar statements made by Iacobucci J. in his majority judgment in *Osoyoos*.[118] The combination of these precedents eliminated the Crown's ability to rely upon the "competing considerations" defence that had existed since the *Kruger* case.[119] As indicated earlier, the rejection of this defence accords with the fiduciary principle that dictates that a fiduciary must treat all beneficiaries fairly, even where their interests are irreconcilable.

From a fiduciary standpoint, the significance of *Wewaykum* lies primarily in its discussion of the scope of the Crown's fiduciary duty. The mere fact that this issue was even addressed marks a major advance from post-*Guerin* jurisprudence. It appears, from the tone of Binnie J.'s judgment in *Wewaykum*, that he views the scope of the Crown's fiduciary duty in a rather limited way. This is particularly evident in his statement that the Crown's fiduciary duties do "not exist at large but in relation to specific Indian interests".[120] This is unfortunate, since the broad and flexible nature of the fiduciary concept generally and its application to Crown-Native relations specifically is intended to allow for the demonstration of any and all claims that can fit within the requirements of the concept and pays heed to the existence of valid limitations on the scope of the Crown's duty.

VII. AN INTERESTING DEVELOPMENT

Shortly after the Supreme Court's rejection of the *Wewaykum* appeal, the Wewaykum Band filed a request under the federal *Access to Information Act*[121] in an attempt to determine whether Justice Binnie had previous involvement in the matter while serving as Associate Deputy Minister of Justice.[122] Information obtained from that request revealed that there had been

---

[116] *Wewaykum*, *supra* note 1 at para. 96.

[117] *Ibid.* at para. 97.

[118] See the discussion, above at 225-26.

[119] *Supra* note 31.

[120] *Supra* note 1 at para. 81.

[121] R.S.C. 1985, c. A-1.

[122] In particular, the request sought:

> ... copies of all records, including letters, correspondence and internal memoranda to, from or which make reference to Mr. William Binnie (Ian Binnie) [now Justice Binnie] in the matter of the claim against Canada by the Wewaykum (or Campbell

exchanges of correspondence between Department of Justice (DOJ) lawyers and Binnie[123] in which the *Wewaykum* claim was discussed. In addition, Binnie had attended a meeting with DOJ lawyers during the early stages of the claim, although, as emphasized by the Supreme Court in *Wewaykum No. 2*, these interactions came only in the context of negotiating a Specific Claim based on the Wewaykum Band's assertions and had occurred prior to the filing of a statement of claim by the band.[124] The memos that were discovered pursuant to the Wewaykum Band's information request were, for the most part, memos to Binnie rather than memos written by him.

These memos revealed that Binnie provided advice to DOJ lawyers about the *Wewaykum* claim and that they relied on his advice in drafting the federal Crown's statement of defence once a statement of claim had been filed by the Wewaykum in 1985.[125] As a result of these discoveries, Assistant Deputy Attorney-General James D. Bissell, Q.C. advised the Supreme Court's registrar that he was waiving solicitor-client privilege to the documents uncovered pursuant to the band's request and that he would file a motion for directions pursuant to Rule 3 of the *Rules of the Supreme Court* regarding the steps to be taken, if any, as a result of the information that was uncovered. Attached to his letter was a statement that set forth some additional factual information, including the following: (1) that, in his role as Associate Deputy

---

River) Indian Band and the Wewaikai (or Cape Mudge) Indian Band for Quinsam IR 12 and Campbell River IR 11 between the years 1982 and 1986.

See *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 15 [*Wewaykum No. 2*].

[123] For greater clarity, references to Justice Binnie prior to his appointment to the bench will be made to "Binnie," except for where it would be unclear to do so.

[124] *Wewaykum No. 2*, *supra* note 122 at paras. 38, 40, 83, 84.

[125] This is evident in a number of the memos, attached as an Appendix to *Wewaykum No. 2*, *ibid.*, that make reference to Binnie's advice regarding how to treat the findings of the McKenna-McBride Commission. In particular, the memo of February 25, 1986 from Mary Temple, Legal Counsel, Native Claims ("Temple") to Bill Scarth, Legal Counsel, ("Scarth") indicates that the idea of "going behind" the face of the decisions made in the McKenna McBride Commission report was advised against by Binnie and that, since it appeared that DOJ's defence strategy might not follow Binnie's advice, "these instructions are being communicated to Ian Binnie because when the Government position respecting the claim was initially discussed with him, he advised that, at least, in the claims process we should not challenge the McKenna McBride report itself." Note also the subsequent memo from Temple to Carol Pepper, Legal Counsel, Specific Claims Branch, Vancouver dates February 27, 1986, where she writes '... I eventually reflected Ian Binnie's preferred position (to not "go behind" the McKenna McBride Report) ...' and the memo from Scarth to Binnie dated March 3, 1986, in which Binnie is advised that Scarth has "attempted not to repudiate the McKenna- McBride Commission report." These exchanges indicate that Binnie gave advice that was intended to be relied upon by DOJ counsel in *Wewaykum* and that that advice was, in fact, followed and correspondence exchanged with Binnie keeping him abreast of these decisions well beyond the initial negotiation stages of the *Wewaykum* matter.

Minister of Justice, Justice Binnie was responsible for all litigation involving the federal government as a party in the common law provinces and the territories of Canada; (2) that he was responsible for Native Law in the department; and (3) that, in preparing for the hearing of the *Wewaykum* appeal before the Supreme Court of Canada, DOJ lawyers had questioned whether Justice Binnie had had any involvement in the case while in the employ of the DOJ, but failed to conduct a thorough examination of the files necessary to answer this query.[126]

The federal Crown served and filed its motion for directions on May 26, 2003. Upon the Supreme Court's receipt of the motion, Justice Binnie recused himself from further dealings on the matter and, on May 27, 2003, filed a statement with the Supreme Court's registrar explaining his position. In the statement, Justice Binnie advised that he had no recollection of his participation in the *Wewaykum* defence.[127] He further emphasized that, at the time in question, he was responsible for providing guidance to DOJ lawyers in several thousand cases.[128]

Upon receipt of the federal Crown's motion, the Supreme Court invited submissions by the parties on the motion. The federal Crown maintained that the Supreme Court's unanimous judgment in *Wewaykum* ought to stand and insisted that public confidence in the Supreme Court would not be adversely affected by what had transpired. The federal Crown submitted that there was "neither actual bias nor any reasonable apprehension of bias on his part" as a result of Justice Binnie's previous involvement in the case.[129] The federal Crown maintained that Justice Binnie's failure to recollect his involvement dispelled any appearance of bias and that the 17-year passage of time between Justice Binnie's initial involvement and his disposition of the *Wewaykum* appeal reinforced this conclusion.[130] Moreover, it insisted that a judge must be

---

[126] *Ibid.* at para. 20. Lawyer Vincent O'Donnell, representing the DOJ, acknowledged that DOJ lawyers had recalled, while they were preparing their briefs in *Wewaykum*, that Justice Binnie had worked for the Department and had questioned whether he had had any involvement in the case, but did not follow up on the matter. As he explained, "Counsel did not examine the departmental files with a focus on this question": Jim Brown, "Judge's Past Work Could Taint Top Court's Ruling" *Canadian Press* (30 May 2003), online: CNEWS <http://cnews.canoe.ca/CNEWS/Law/2003/05/30/99650-cp.html> [*Judge's Past Work*].

[127] As he stated, "I had no recollection of personal involvement 17 years earlier at the commencement of this particular file, which was handled by departmental counsel in the Vancouver Regional Office": *ibid.* at para. 23.

[128] *Ibid.*

[129] *Wewaykum No. 2*, *supra* note 122 at para. 53. See also Kirk Makin, "Judge Seen As Absolved of Any Bias" *Globe and Mail* (31 May 2003), online: The Globe and Mail <http://www.globeandmail.com>.

[130] *Wewaykum No. 2*, *ibid.* at para. 53.

disqualified from a matter only if that judge had acted as counsel in the matter, which Justice Binnie had not in *Wewaykum*.[131]

The intervener, the Attorney-General of British Columbia, agreed that the judgment in the *Wewaykum* appeal should not be disturbed. It also maintained that Binnie J. had not acted as counsel in the matter, but, rather, in a general administrative and supervisory capacity only. Moreover, the Attorney-General of British Columbia submitted that since the judgment in the *Wewaykum* appeal was unanimous, any apprehension of bias in respect of Justice Binnie was, as summarized by the Supreme Court in *Wewaykum No. 2*, "not legally significant unless it also establishes a reasonable apprehension of bias in respect of the judgment of the Court as a whole".[132] The Attorney-General dismissed the idea that the entire Court's judgment could be biased because "appellate courts normally evaluate a written record and the collegial nature of an appellate bench reduces the leeway within which the personal attributes, traits and dispositions of each judge can operate".[133]

Not surprisingly, the bands involved saw the matter differently. The Wewaikai Band suggested that there was a reasonable apprehension of bias and, consequently, requested that the judgment in *Wewaykum* be set aside and that the Supreme Court recommend the parties enter into a negotiation and reconciliation process. Alternatively, it sought an order suspending the judgment for four months to permit negotiation and reconciliation between the parties, with further submissions to the Court if required.[134] The Wewaikai Band alleged that Justice Binnie was actively involved in risk analysis and the development of litigation strategy on behalf of the federal Crown.[135]

The Wewaykum Band also sought an order vacating the Supreme Court's judgment in *Wewaykum* and an order permitting a further application for relief in the judgment was, in fact, vacated.[136] It submitted that a reasonable apprehension of bias is met where a judge sits on a case in which that judge has had any prior involvement. It maintained that this test was met by the facts surrounding Justice Binnie's participation in the *Wewaykum* matter while in the position of Associate Deputy Minister of Justice.[137] The band also suggested that, on the basis of Justice Binnie's special interest in Aboriginal matters, the unique nature of the facts in the case, and Justice Binnie's

---

[131] *Ibid.* at para. 52.

[132] *Ibid.* at para. 56.

[133] *Ibid.*

[134] *Ibid.* at para. 24.

[135] *Ibid.* at para. 47.

[136] *Ibid.* at para. 25.

[137] *Ibid.* at para. 48.

involvement as counsel in *Guerin*[138] "common sense would indicate that some contaminating knowledge would have survived the passage of time, albeit unconsciously".[139] The Wewaykum Band also disagreed with the notion that the concurrence of eight other judges in Justice Binnie's judgment in *Wewaykum* removed any taint of bias.

More informally, Chief Aubrey Roberts of the Wewaykum Band said, "It would be nice to have our own judge sitting there deciding for us. As far as I'm concerned, those nine judges are like a jury. If somebody taints a juror, its taints the whole jury".[140] Bob Duncan, economic development officer with the Wewaykum Band, stated in a May 29, 2003 letter to Vancouver Island North MP John Duncan that his band "feels very strongly that [it] didn't receive a fair trial in the highest court of the land; what is the alternative for justice in this case given the circumstance"?[141]

The interveners the Gitanmaax Band, the Kispiox Band, and the Glen Vowell Band all presented written submissions supporting the motions to vacate the *Wewaykum* judgment. They regarded Justice Binnie's lack of recollection as irrelevant and submitted that a finding of reasonable apprehension of bias entailed, in the result, a finding of legal bias.[142] The interveners suggested that actual bias may have existed on the part of Justice Binnie, even if he neither intended it nor recalled his previous involvement in the matter.[143]

On June 23, 2003, the Supreme Court heard arguments on the motions for directions and motions to vacate its judgment in *Wewaykum*. John McAlpine, a lawyer for the Wewaikai Band, maintained that "[w]e are speaking of a judge who has acted in a dual capacity, as counsel and then as referee".[144] Lawyers for the Wewaykum Band expressed similar sentiments: Michael Carroll stressed that "[i]t is of fundamental importance that justice not only be done, but manifestly be seen to be done",[145] while Malcolm Maclean said

---

[138] *Supra* note 3.

[139] *Wewaykum No. 2*, *supra* note 122 at para. 48.

[140] Kirk Makin, "Judge's Conflict Mars Supreme Court Ruling" *The Globe and Mail* (30 May 2003), online: The Globe and Mail <http://www.globeandmail.com> [*Judge's Conflict*].

[141] "Native Land Case Ruling in Jeopardy" *Campbell River Mirror* (4 June 2003), online: Campbell River Mirror <http://campbellrivermirror.com>.

[142] *Wewaykum No. 2*, *supra* note 122 at para. 51.

[143] *Ibid.*

[144] Jim Brown, "Top Court Asked to Overturn Land Claim Judgment Over Possible Binnie Conflict" *CNEWS* (23 June 2003), online: CNEWS <http://cnews.canoe.ca/CNEWS/Law/2003/05/30/99650-cp.html>.

[145] *Ibid.*

"[w]e're dealing with the integrity of the court".[146] Meanwhile, the federal Crown's lawyer Vincent O'Donnell insisted "[w]hat we have here is 13 judges who all came to the same conclusion. I really believe the reasonable-minded person would say: 'No, it should not be revisited'".[147] The Supreme Court released its judgment on the motions on September 26, 2003 in *Wewaykum No. 2*.[148]

In *Wewaykum No. 2*, the Supreme Court determined that there was no reasonable apprehension of bias on the part of Justice Binnie and that the judgment in *Wewaykum* ought to stand. The Court stated that such a claim "can only succeed if it is established that reasonable, right-minded and properly informed persons would think that Binnie J. was consciously or unconsciously influenced in an inappropriate manner by his participation in this case over 15 years before he heard it here in the Supreme Court of Canada".[149] It concluded that no such apprehension was established by the bands, which bore the brunt of establishing its existence.

The Court held that Justice Binnie's prior involvement in *Wewaykum* "would convince a reasonable person that his role was of a limited supervisory and administrative nature",[150] even while it acknowledged that his role "exceeded *pro forma* management of the files".[151] The Court emphasized the fact that Justice Binnie was never counsel to the federal Crown on *Wewaykum* and that he only advised on the negotiation of the matter, not its litigation.[152]

The Court also pointed to what it described as "a significant factor" in determining whether a reasonable apprehension of bias existed under the test it set out in *Wewaykum No. 2*: the passage of time.[153] It held that the

---

[146] Mark Bourne, "Top Court to Decide on Vacating Judgment" *Law Times* (30 June 2003) 3 at 3.

[147] *Ibid.*

[148] *Supra* note 122.

[149] *Ibid.* at para. 73. The Court rephrased the question, *ibid.* at para. 74 as follows:

> What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would this person think that it is more likely than not that Binnie J., whether consciously or unconsciously, did not decide fairly?

[150] *Ibid.* at para. 82.

[151] *Ibid.* at para. 83.

[152] *Ibid.* at paras. 81-82. Relatedly, the Court also said, at para. 71, that "the rule of automatic disqualification [of a judge] does not apply to the situation in which the decision-maker was somehow involved in the litigation or linked to counsel at an earlier stage, as is argued here [in *Wewaykum No. 2*]".

[153] *Ibid.* at para. 85.

significant length of time between Justice Binnie's involvement in *Wewaykum* as Associate Deputy Minister of Justice and his involvement as a judge sitting on the final appeal of the matter rendered it "improbable" that a reasonable person would conclude that bias existed after such a lengthy gap.[154] Curiously, the Court did not offer reasons for this conclusion.

The Supreme Court made some important statements about the public's perception of the impartiality of the legal system and the courts that administer it in *Wewaykum No. 2*. Indeed, it stated that "public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so".[155] It positively cited the Canadian Judicial Council's statement that "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary".[156] There are some unsettling aspects of the *Wewaykum No. 2* judgment, though, that derogate from the strength of such statements. These pertain primarily to the Court's characterization of Binnie's "limited" role in the *Wewaykum* matter and, more importantly, the Court's treatment of the bias issue.

In the Supreme Court's review of the memos uncovered as a result of the access to information request, it emphasized the fact that Binnie's involvement predated the issuance of a statement of claim by the Wewaykum Band.[157] It also stated, as indicated previously,[158] that a reasonable person would have viewed his role as being of a "limited supervisory and administrative nature".[159] However, as seen in the Court's analysis of memorandum number 12, dated March 3, 1986 from DOJ counsel Bill Scarth to Binnie, that memo indicates that Scarth sent Binnie a copy of the federal Crown's statement of defence in *Wewaykum*. This followed on memorandum number 9 sent to Binnie from Mary Temple, Legal Counsel, Native Claims, which was accompanied by a copy of the Wewaykum Band's statement of claim. Thus, as suggested previously,[160] Binnie was involved in *Wewaykum* beyond giving advice at the preliminary stages of the matter, as the Supreme Court had characterized the extent of his role in *Wewaykum No. 2*. Indeed,

---

[154] *Ibid.* at para. 89.

[155] *Ibid.* at para. 57.

[156] Canada, Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) at 30.

[157] *Wewaykum No. 2*, *supra* note 122 at paras. 37-38, 40.

[158] *Supra* note 125.

[159] *Wewaykum No. 2*, *supra* note 122 at para. 82. See also paras. 89 and 90, where the Court described Justice Binnie as having a "limited administrative and supervisory role".

[160] *Supra* note 125.

these exchanges indicate that Binnie gave advice that was intended to be relied upon by DOJ counsel in *Wewaykum* and that that advice was, in fact, followed and correspondence was exchanged with Binnie that kept him abreast of these decisions well beyond the initial negotiation stages.[161] This reveals a rather different scenario than that painted by the Supreme Court in *Wewaykum No. 2*.

The Court did acknowledge, as conceded by the parties, that the extent of Binnie's involvement in the *Wewaykum* matter in 1985-86 was limited by the documentary record produced by the Crown.[162] Indeed, there are questions about the completeness of this record. For example, there is a gap in the record between March 5, 1986 and February 3, 1988, even though Binnie remained Associate Deputy Minister of Justice until July 31, 1986. Also, a memo sent by Justice Binnie to Harry Wruck of the DOJ's Vancouver Regional office dated January 15, 1986 thanks Wruck for his note of January 16, 1985. While this could simply be a typographical error, the fact remains that no such note from Wruck was reproduced, whatever its actual date. In any event, it seems that the Supreme Court's characterization of Binnie's involvement in the *Wewaykum* matter was not as full and ample – nor, for that matter, as accurate – as it ought to have been, which profoundly affected its final determination in *Wewaykum No. 2*.

Aside from its focus on the time period within which Binnie had involvement in *Wewaykum*, the Court's emphasis on Justice Binnie's prior involvement in *Wewaykum* should not have centred upon his title – i.e. whether he was "counsel" to the federal Crown – but, rather, upon the function he performed. In his supervisory and administrative role, as illustrated above, he shaped part of the policy that would eventually underlie the federal Crown's defence in *Wewaykum*, even if he may not have directly "planned litigation strategy for this case," as suggested by the bands and dismissed by the Supreme Court.[163] Further, whether or not his active involvement only took place during the negotiation stage, the fact of the matter is that his involvement clearly transcended that element of the matter, as indicated in the memos cited above.

What was improperly ignored by the Supreme Court in its analysis of Binnie's prior involvement in *Wewaykum* is that the negotiation of the *Wewaykum* claim was subject to the federal Crown's Specific Claims process, which is marked by the Crown's practice of determining the existence of an

---

[161] This is revealed in a memo dated February 3, 1988 from Scarth to Mr. E.A. Bowie, Q.C., Assistant Deputy Attorney General, written after Justice Binnie had left the DOJ. In this memo, Scarth advises, at point number five under the heading "Historical Background," that he followed Justice Binnie's advice regarding the report of the McKenna-McBridge Commission.

[162] *Wewaykum No. 2*, *supra* note 122 at para. 44.

[163] *Ibid.* at para. 83.

alleged federal Crown obligation in accordance with its own assessment of the likelihood of success of the claim through litigation. Thus, Binnie's assessment would have been just as relevant to litigating the *Wewaykum* claim as to negotiating it, something that DOJ lawyers would have been aware of. As a result, the Supreme Court's attempt to distinguish his role as being relevant only to the preliminary stages of the claim and not to the litigation of it is, practically speaking, artificial and incorrect. The relevance of the fact that Binnie may have engaged in similar practices vis-à-vis many cases, or classes of cases,[164] does not obviate the fact that he participated in *Wewaykum* in a particular manner which created a certain effect.

It is also clear from the memos uncovered that counsel and other DOJ personnel lower in rank than Binnie were well aware of the position he advocated and attempted to follow it. Even where, at one point, these others thought of deviating from that position, they ensured that he was advised of their course of action. Why would they have done this if Binnie's role were as limited as the Supreme Court suggested it was in *Wewaykum No. 2*? Theses actions provide a strong indication of the authority actually carried by Binnie in the *Wewaykum* matter, which is consistent with the supervisory role he played, as acknowledged by the Supreme Court.[165] Thus, it remains curious why a reasonable apprehension of bias would likely have been created on his part if he had served as counsel in *Wewaykum*, but the same finding was not made where his position made counsel accountable to him? Indeed, given the nature of his role and responsibility, particularly his responsibility for Aboriginal law matters in the DOJ, Binnie was, effectively, the personification of the federal Crown responsible for its defence in *Wewaykum*. Consequently, his role was far more vital in *Wewaykum* than it was characterized to be by the Supreme Court in *Wewaykum No. 2*.

Returning to the manner in which the Supreme Court dealt with the question of bias in *Wewaykum No. 2*, the Court properly put emphasis on the notion that an allegation of reasonable apprehension of bias is "the manifestation of a broader preoccupation about the image of justice".[166] However, the Court undermined the importance of this statement by holding that in considering this broad concern, "the criterion of disqualification still goes to the judge's state of mind, albeit viewed from the objective perspective of the reasonable person".[167] This qualification is an improper restriction on the nature of the inquiry as initially set out by the Court. Further, it is inconsistent with the emphasis manifest in Lord Hewart C.J.'s aphorism in

---

[164] See *ibid.* at para. 84.

[165] Refer back to the discussion, *supra* note 125.

[166] *Wewaykum No. 2*, *supra* note 122 at para. 66.

[167] *Ibid.* at para. 67.

The King v. Sussex Justices: "justice should not only be done, but should manifestly and undoubtedly be seen to be done".[168]

What is key in the analysis of whether a reasonable apprehension of bias exists, as the Supreme Court itself indicated in *Wewaykum No. 2*, is not the presence of actual bias – *i.e.* whether Justice Binnie recalled his participation in *Wewaykum* and the potential conflict that it created vis-à-vis his ability to adjudicate the *Wewaykum* appeal[169] – but whether the public would perceive that bias might have existed which would bring into question the legitimacy of the *Wewaykum* judgment. This idea is reflected in Lord Goff's statement, cited with approval in *Wewaykum No. 2*, that "there is an overriding public interest that there should be confidence in the integrity of the administration of justice".[170] According to the principle in *Sussex Justices*, above, it ultimately does not matter whether a judge may have been biased, but only if reasonably minded people would think that the judge may have been biased, which would bring the administration of justice into disrepute. This is consistent with the Supreme Court's statement that "a decision-maker may be totally impartial in circumstances which nevertheless create a reasonable apprehension of bias".[171] However, the Court added:

> But, even where the principle is understood in these terms, the criterion of disqualification still goes to the judge's state of mind, albeit viewed from the objective perspective of the reasonable person. The reasonable person is asked to imagine the decision-maker's state of mind, under the circumstances. In that sense, the oft-stated idea that "justice must be seen to be done", which was invoked by counsel for the bands, cannot be severed from the standard of reasonable apprehension of bias.[172]

When public perception is the primary reference point, any perception or apprehension of bias itself has more to do with the image of justice, broadly conceived, than with the standard of reasonable apprehension of bias, which is a judge-made standard that cannot entirely capture the essence of the public's primary concern regarding the administration of justice. Any concern of bias that might exist would be based on the circumstances that gave rise to the

---

[168] [1924] 1 K.B. 256 at 259, as quoted in *Wewaykum No. 2*, *supra* note 122 at para. 66.

[169] If Justice Binnie's ability to recall his participation was the issue, then he would arguably have been able to have advised specifically on, or have been involved in, the drafting of the Statement of Claim in *Wewaykum* without giving rise to a reasonable apprehension of bias as long as he did not recall his involvement at the time he sat on the matter's appeal. Clearly, this cannot be right.

[170] *R. v. Gough*, [1993] A.C. 646 at 659, [1993] 2 All E.R. 724 (U.K. H.L.), as cited in *Wewaykum No. 2*, *supra* note 122 at para. 66.

[171] *Wewaykum No. 2*, *ibid.* at para. 67.

[172] *Ibid.*

decision, which may or may not be restricted to Justice Binnie's state of mind. Additionally, such a concern may also relate to his previous role in *Wewaykum* and the conflict of interest that that role created which would appear, to the reasonably-minded member of the public, acting objectively, to have potentially tainted his ability to provide an impartial, unbiased judgment. If the larger semblance of justice being seen to be done is to be subordinated to a judge's state of mind – even if viewed from the objective perspective of the reasonable person – then what is truly being scrutinized is not the public's perception at all.

If, as suggested, the Supreme Court ought not to have focussed solely on the public's perception of Justice Binnie's state of mind when he sat on the *Wewaykum* appeal, but on the larger issue of whether the public would have perceived justice to have been done given his previous involvement in the case, then the length of time between Justice Binnie's involvement in *Wewaykum* as Associate Deputy Minister of Justice and his involvement as a judge sitting on the final appeal of the matter would not be as significant a matter as it was made out to be in *Wewaykum No. 2*. Additionally, given that the nature of the inquiry in *Wewaykum No. 2* was based upon apprehension and perception, the fact that the Court found an apprehension of bias on the part of Binnie J. to be "improbable" seems to ignore the fact that that adjective is more akin to "unlikely" than to "never."

In light of the facts in *Wewaykum* and the potential consequences of a finding of reasonable apprehension of bias, if legitimate fears about public perception of bias could have existed in *Wewaykum*, those fears would need to be completely and absolutely dispelled by the Court's analysis to remove their possible taint on the *Wewaykum* judgment, not their probable dissipation, as was the case in *Wewaykum No. 2*.

VIII. CONCLUSION

The *Wewaykum* judgment is, in some ways, much akin to *Guerin* and, in others, rather distinct from it. It is like *Guerin* in that it more directly engages the principles of Crown-Native fiduciary relations than other recent jurisprudence. *Wewaykum* is distinct from *Guerin*, though, in that while *Guerin* holds that it is not possible to determine whether a relationship, in its entirely or in any of its components, is fiduciary without engaging in a close analysis of the facts at hand, *Wewaykum* attempts to limit the scope of such relations through a visibly negative portrayal of existing claims of unique, or non-typical, Crown-Native fiduciary duties by various bands. By using this approach, *Wewaykum* focuses on the type of claim being made rather than the context in which the claim was made – a methodology that was expressly held to be improper in *Guerin* and by subsequent Crown-Native fiduciary jurisprudence. The approach used in *Wewaykum* is inconsistent with the

situation-specific nature of the fiduciary concept and appears to be more goal-driven than the approach followed in *Guerin*. On the positive side, however, it does engage some of the debate that was created in the aftermath of *Guerin* and that continued with the expansion of the Crown-Native fiduciary relationship in *Sparrow* more so than cases like *Blueberry River*[173] had done.

The advancement of such shallow claims and the virtual mocking they received in the Supreme Court's judgment in *Wewaykum* has cast a pall over future Aboriginal claims of breach of fiduciary duty by the Crown. The Supreme Court's overwhelming rejection of the appellants' claims goes beyond the weak facts in the case; the judgment reads as if it is actively pointed towards limiting the scope of Crown fiduciary duties to Aboriginal peoples generally. Since this message was not necessary to dispense with the claims in *Wewaykum*, Justice Binnie appears to have gone far beyond what he needed to do to indicate that the Crown did not breach any fiduciary duty. Because of this, one may be circumspect about *Wewaykum*'s implications for future breach of fiduciary duty claims by Aboriginal groups against the Crown.

However, in spite of the weak facts that underscored the appellants' arguments in *Wewaykum* and the Supreme Court of Canada's overwhelming rejection of their claims, the *Wewaykum* case reaffirms the important role that the fiduciary concept plays in Canadian Aboriginal and treaty rights jurisprudence. It demonstrates the great lengths that the Court determined it had to go to in order to quell the application of the fiduciary concept to an unsympathetic fact scenario. This suggests that the Court recognized the promise held out by *Guerin* and *Sparrow* regarding the Crown's duty to Aboriginal people, even if the Court was intent on subduing it in *Wewaykum*. Thus, in spite of the Supreme Court's attempt to limit the scope of the Crown's duty in *Wewaykum*, the Court ultimately reaffirmed the primacy of the characterization of Crown-Native relations as fiduciary through its discussion of some of the reasons why the duty exists, such as the "degree of economic, social and proprietary control and discretion asserted by the Crown" over Aboriginal peoples, which left them vulnerable to the Crown's power and discretion over their interests.[174]

The characterization of Crown-Native relations as fiduciary establishes guidelines for understanding the legal implications of modern Crown-Native interaction. It acts as an umbrella that overarches the nature of those relations. In addition to its function as a means of fostering a particular way of looking at Crown-Native relations, the application of the fiduciary concept to Crown-Native relations serves other vital functions which were ignored in

---

[173] *Supra* note 12.

[174] *Wewaykum*, *supra* note 1 at para. 80.

Wewaykum: (1) it acts as an important check on governmental legislative power (as seen in *Sparrow*, this applies to both federal and provincial power); (2) it is the primary manifestation of the notion of the "honour of the Crown"; (3) it is the primary link between historic and modern Crown-Native relations; (4) it animates the rights contained in section 35(1) of the *Constitution Act, 1982*; and (5) it underscores the non-adversarial character of Crown-Native relations, as indicated in *Sparrow*.[175] This vision is consistent with the Supreme Court's articulation of the purpose of section 35(1) in *Sparrow*, which the Court said was influenced by the existence of Crown fiduciary duties to Aboriginal peoples.

At first glance, *Wewaykum* appears to indicate that the Supreme Court, after years of neglect, has refocused its approach to Crown-Native fiduciary relations and will be looking to detail the implications of characterizing Crown-Native relations as fiduciary – even if the Court has done so in a rather restrictive manner in that case. The *Wewaykum* decision has not, however, completely overcome some of the problems that have been characteristic of Canadian jurisprudence on this matter. Like its predecessors, *Wewaykum* fails to address some of the fundamental questions that have existed since the initial sanctioning of Crown-Native interaction as fiduciary in *Guerin*; for example: (1) which emanation(s) of the Crown owe(s) fiduciary duties to Aboriginal peoples; and (2) who the beneficiaries of Crown-Native fiduciary relations are – status Indians as defined under the *Indian Act* or Aboriginal peoples as defined in section 35(1) of the *Constitution Act, 1982*? The *Wewaykum* judgment also ignores the significance of the link between the nature of Crown fiduciary duties and the notion of the "honour of the Crown" seen in a variety of non-fiduciary cases, particularly in the treaty context.[176]

On this latter point, Binnie J. made a rather curious statement when he said that "[s]omewhat associated with the ethical standards required of a fiduciary

---

[175] *Supra* note 7 at 408:

> ... [T]he government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

Note also the following statement made by the Royal Commission on Aboriginal Peoples:

> ... [T]he government cannot treat Aboriginal people as if they were adversaries. On the contrary, it must be mindful of the trust-like relationship with them and recognize and protect their Aboriginal rights as a trustee would protect them.

Ottawa, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, Vol. II, Part I, Restructuring the Relationship* (Ottawa: Minister of Supply & Services Canada, 1996) at 24-25.

[176] See *e.g. Marshall No. 1*, *supra* note 9.

in the context of the Crown and Aboriginal peoples is the need to uphold the 'honour of the Crown'".[177] What, precisely, this means, is uncertain; the ethical standards of a fiduciary in the context of Crown-Native relations require, at a minimum, the upholding of the Crown's honour.[178] Such an assertion is, indeed, axiomatic. Describing the Crown's ethical standards as a fiduciary as "somewhat associated" with the "honour of the Crown" is akin to saying that a corpse is "somewhat dead". More importantly, it suggests that the Supreme Court still views Crown fiduciary duties to Aboriginal peoples and the need to uphold the honour of the Crown in its dealings with Aboriginal peoples as rather distinct entities.

What may fairly be said about the *Wewaykum* judgment, then, is that for its divergence from previous Crown-Native fiduciary jurisprudence, it is, in many important ways, no different in result or implication. Consequently, much work remains to be done in this matter of vital and over-arching importance to Crown-Native interaction. Indeed, the post-*Guerin*, post-*Sparrow* fiduciary "work-in-progress" remains a work-in-progress after *Wewaykum*, only on somewhat different terms.

---

[177] *Wewaykum*, *supra* note 1 at para. 80.

[178] See *Arnot*, *supra* note 18 at 67, who states that "'the honour of the Crown' is not limited to the interpretation of legislation, or the application of treaties. Rather, I propose that 'the honour of the Crown' also refers to the same essential commitment that First Nations echo when they call for 'justice'."