Halcrow v. Canada (Attorney General), 2003 FCT 782, [2003] 4 FC 1043

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T-2178-00

2003 FCT 782

Treaty Eight Grand Chief Halcrow, Treaty Seven Grand Chief Shade, and **Treaty Six Grand Chief Eric Gadwa** (*Applicants*)

v.

The Attorney General of Canada and **The Minister of Indian Affairs and Northern Development** (*Respondents*)

Indexed as: Halcrow v. Canada (Attorney General) (T.D.)

Trial Division, Dawson J.--Edmonton, December 4, 5, 2002 and May 6, 7, 2003; Ottawa, June 25, 2003.

Constitutional Law -- Aboriginal and Treaty Rights -- Application for declaration Regulations Amending Indian Bank Election and Referendum Regulations contravene Aboriginal, treaty rights guaranteed by Constitution Act, 1982, s. 35(1) -- Amendment necessitated by S.C.C. decision in Corbiere v. Canada (Minister of Indian and Northern Affairs) -- Consultation process, government funded, discussed -- Indian Grand Chiefs say genuine consultations mandatory due to: (1) S.C.C. direction in Corbiere; (2) legitimate expectation; (3) always duty to consult Aboriginal groups in making decisions affecting their interests -- Application denied -- Crown's fiduciary duty to Indians discussed -- Steps in s. 35(1) claim analysis -- No evidentiary basis to find duty to consult as treaty right -- Aboriginal rights claim must not be overly broad -- Applicants' claim of right to control own society, government, community matters, insufficiently precise identification of Aboriginal right -- Right to self-government not Aboriginal right asserted in notices of application, constitutional question -- No evidentiary basis for Aboriginal right to consultation arising from culturally significant practice, custom, tradition going back to pre-contact times -- Applicants not meeting onus to adduce evidence on which to find Aboriginal right infringed by manner in which Regulations enacted -- Crown's judiciary duty does not exist at large, only in relation to specific Indian interests -- Applicants impermissibly asserting fiduciary duty at large -- No basis for concluding Governor in Council, in amending Regulations, exercised discretion in way to invoke responsibility in nature of private law duty -- Even if there was fiduciary jury to consult, it was met -- Breach of duty to consult First Nations not independent ground of challenge to law, government action -- Corbiere did not impose duty to consult, just afforded opportunity to do so.

Native Peoples -- Elections -- Indian Grand Chiefs seeking declaration Regulations amending Indian Band

Election, Referendum Regulations contravene Aboriginal treaty rights -- Regulations amended due to S.C.C. decision (Corbiere v. Canada (Minister of Indian and Northern Affairs)) holding words "and is ordinarily resident on the reserve" in Indian Act, s. 77(1) contravened Charter, s. 15(1) -- Off-reserve members no longer excluded from voting at band elections -- Corbiere adding 190,000 to electorate -- Judicial review application denied.

Administative Law -- Judicial Review -- Declarations -- Indian Grand Chiefs seeking declaration Regulations amending Indian Band Election, Referendum Regulations contravene constitutionally guaranteed Aboriginal , treaty rights -- One of arguments: legitimate expectation of meaningful consultations due to Minister's speech -- Legitimate expectation doctrine part of procedural fairness rules governing administrative bodies -- Has no application to process of primary or delegated legislation -- F.C.A. questioning whether doctrine applies to Cabinet in exercising regulation-making power -- Minister cannot bind Governor in Council in exercise of regulation-making power.

In this application for judicial review, three Indian Grand Chiefs sought a declaration that the recently adopted *Regulations Amending the Indian Band Election Regulations* and *Regulations Amending the Indian Referendum Regulations* contravene Aboriginal and treaty rights guaranteed by *Constitution Act, 1982*, subsection 35(1). These Regulations were brought into force following the judgment of the Supreme Court of Canada in *Corbiere v. Canada (Minister of Indian and Northern Affairs)* in which it was held that the words "and is ordinarily resident on the reserve" in *Indian Act*, subsection 77(1) contravened Charter, subsection 15(1) (equality rights). The effect of the Court's declaration was to remove the restriction excluding off-reserve members from voting in band elections.

After the Supreme Court's decision in *Corbiere* was handed down, the Minister contacted the First Nations and Aboriginal organizations and attended a meeting of the Assembly of First Nations Confederacy at which a two-stage strategy for dealing with both the short- and long-term implications of the decision was announced. An information package was mailed to all First Nations communities. This package noted that *Corbiere* could add some 190,000 people to the electorate. At the meeting with the Assembly, the Minister gave a commitment to fund and conduct a consultation process on *Corbiere*. In fact, four national Aboriginal organizations were funded as were regional consultations. A condition of the funding was that the organizations try to reach as many of their members as possible within the time and monetary limits. A Technical Working Group was created and it undertook a series of meetings which resulted in the draft of a "Minimum Requirements Paper", a discussion paper intended to encourage further analysis. It suggested that the Regulations be amended in certain specified respects. In June, 2000, a "Corbiere Day" took place in Winnipeg, attended by some 1,800 people representing most of the First Nations. The Minimum Requirements Paper was handed out at this day-long session. Draft regulations were prepared in July and in the following month DIAND conducted a meeting in Calgary at which the draft regulations were reviewed clause by clause. In September, the Regulations were pre-published in the *Canada Gazette* together with a notice soliciting input within 30 days. They were also faxed to First Nations, including the three Chiefs who are the applicants herein. An electoral officers training session was also held.

The applicants asserted that genuine consultations with the native peoples prior to enactment of the Regulations was mandatory in that: (1) the Supreme Court had so directed in *Corbiere*; (2) a legitimate expectation of such had arisen; (3) there is always a duty to consult with Aboriginal groups when making decisions that will affect their interests. The issues for determination were whether a duty to consult existed and if so, had it been breached.

Held, the application should be dismissed.

There was no doubting that the Crown has a responsibility, arising from the trust relationship created by history, treaties and legislation, to protect Indian rights. Aboriginal rights were affirmed by *Constitution Act, 1982*, subsection 35(1). That the Government had to act in a fiduciary capacity with respect to Aboriginal peoples was made clear by the Supreme Court in its judgment in *R. v. Sparrow*. The honour of the Crown is implicated. The fiduciary relationship was incorporated into the Constitution by the wording of subsection 35(1). In a subsection 35(1) claim analysis, a court has first to determine whether claimant has demonstrated that he acted pursuant to an Aboriginal right. If so, and if the right has not been extinguished, the court moves on to determine whether the right has been infringed. The final question is whether the infringement was justified.

There being no evidentiary basis upon which to find a duty to consult as a treaty right, the Court went on to consider Aboriginal rights. These flow from the customs and traditions of the Aboriginal people. A fundamental

aspect of the court's inquiry is to precisely identify the nature of the activity claimed to constitute a right. The claimed right must not be overly broad. Applicants argued that they had a right to control "their own society, governmental matters, local and community matters" but this was an insufficiently precise identification of a claimed Aboriginal right. Furthermore, the right to self-government was not the Aboriginal right which the applicants asserted in their amended notice of application and of constitutional question. A more fundamental problem for applicants was the absence of an evidentiary basis for an Aboriginal right to consultation arising out of a practice, custom or tradition of cultural significance to their society going back to pre-contact times. Grand Chief Halcrow said that he relied on a government news release along with a speech by the Minister in forming the belief that he would be consulted directly and in a meaningful way. Grand Chief Gadwa's affidavit indicated that the consultation process and timelines imposed by the government prevented meaningful consultation with Treaty No. 6 members. Applicants had not met the onus of adducing evidence upon which the Court could determine that these Aboriginal communities possess an Aboriginal right infringed by the manner in which the Regulations were enacted.

It has been held that relief by fiduciary remedies is not restricted to situations analogous to those recognized in *Sparrow* and *Guerin et al. v. The Queen et al.* but can be called upon "to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples". Even so, the Supreme Court made it clear in *Wewaykum Indian Band v. Canada* that the Crown's fiduciary duty does not exist at large but in relation to specific Indian interests. In his reasons for judgment in that case, Binnie J. noted that our courts have had to deal with a flood of fiduciary duty claims by Indian bands since *Guerin* and added that the creation of a fiduciary relationship depends upon the identification of a cognizable Indian interest along with the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility in the nature of a private law duty. Applicants' submissions on this issue impermissibly asserted a fiduciary duty at large. The observation of Lamer C.J. in *Delgamuukw v. British Columbia*, that there is always a duty of consultation, ought not to be taken out of context. If a fiduciary duty exists, a failure to consult may breach that duty. The question was whether, by the Regulation-amending process, the Crown undertook discretionary control in a way that invoked responsibility in the nature of a private law duty. Given the public law nature of the duty (the proclamation of regulations) and the lack of evidence of the degree of discretionary control assumed in the past, there was no basis upon which to conclude that, in amending the Regulations following *Corbiere*, the Governor in Council had exercised a discretion in such a way as to invoke responsibility in the nature of a private law duty. A fiduciary obligation to consult had not been established. But even if there was such an obligation, it had been met by the steps taken by government herein.

Applicants had asserted a free-standing ground upon which government action may be challenged. But it has been held that breach of a duty to consult with First Nations is not an independent ground on which a law or government action can be challenged: Ontario Court of Appeal decision in *TransCanada Pipelines Ltd. v. Beardmore (Township)*.

Nor could the Court accept applicants' arguments based on the doctrine of legitimate expectation. That doctrine forms part of the rules of procedural fairness which govern administrative bodies but has no application to the process of legislation, primary or delegated. The Federal Court of Appeal has expressed serious reservations as to whether the doctrine applies to Cabinet in the exercise of its regulation-making power. Applicants say that their legitimate expectation arose from the Minister's conduct but the Federal Court of Appeal has held that a minister cannot bind the Governor in Council in the exercise of its regulation-making power.

The Court could not agree with the submission that the *Corbiere* decision imposed a positive duty upon the Minister to consult with First Nations peoples. The Supreme Court was simply affording to the government an opportunity to consult by suspending the declaration of invalidity. The Court's intention was not to create a legally enforceable obligation to consult.

statutes and regulations judicially

considered

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 15(1).

Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 35(1).

Federal Court Act, R.S.C., 1985, c. F-7 , s. 57 (as am. by S.C. 1990, c. 8, s. 19).

Federal Court Rules, 1998, SOR/98-106, Tariff B.

Indian Act, R.S.C., 1985, c. I-5 , ss. 76(1), 77(1) (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 14).

Indian Band Election Regulations, C.R.C., c. 952.

Indian Referendum Regulations, C.R.C., c. 957.

Regulations Amending the Indian Band Election Regulations, SOR/2000-391.

Regulations Amending the Indian Referendum Regulations, SOR/2000-392.

cases judicially considered

followed:

Apotex Inc. v. Canada (Attorney General), 2000 CanLII 17135 (F.C.A.), [2000] 4 F.C. 264; (2000), 24 Admin. L.R. (3d) 179; 6 C.P.R. (4th) 165; 255 N.R. 319 (C.A.).

applied:

R. v. Sparrow, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075; (1990), 70 D.L.R. (4th) 385; [1990] 4 W.W.R. 410; 46 B.C.L.R. (2d) 1; 56 C.C.C. (3d) 263; [1990] 3 C.N.L.R. 160; 111 N.R. 241; *R. v. Van der Peet*, 1996 CanLII 216 (S.C.C.), [1996] 2 S.C.R. 507; (1996), 137 D.L.R. (4th) 289; [1996] 9 W.W.R. 1; 80 B.C.A.C. 81; 23 B.C.L.R. (3d) 1; 109 C.C.C. (3d) 1; [1996] 4 C.N.L.R. 177; 50 C.R. (4th) 1; 200 N.R. 1; 130 W.A.C. 81; *R. v. Pamajewon*, 1996 CanLII 161 (S.C.C.), [1996] 2 S.C.R. 821; (1996), 138 D.L.R. (4th) 204; 109 C.C.C. (3d) 275; [1996] 4 C.N.L.R. 164; 50 C.R. (4th) 216; 199 N.R. 321; *Delgamuukw v. British Columbia*, 1997 CanLII 302 (S.C.C.), [1997] 3 S.C.R. 1010; (1997), 153 D.L.R. (4th) 193; 99 B.C.A.C. 161; [1998] 1 C.N.L.R. 14; 220 N.R. 161; *Wewaykum Indian Band v. Canada*, 2002 SCC 79 (CanLII), [2002] 4 S.C.R. 245; (2002), 220 D.L.R. (4th) 1; [2003] 1 C.N.L.R. 341; 297 N.R. 1; *Squamish Indian Band v. Canada* (2000), 207 F.T.R. 1 (F.C.T.D.); *TransCanada Pipelines Ltd. v. Beardmore (Township)* 2000 CanLII 5713 (ON C.A.), (2000), 186 D.L.R. (4th) 403; [2000] 3 C.N.L.R. 153; 137 O.A.C. 201 (Ont. C.A.), leave to appeal to S.C.C. refused, [2000] 2 S.C.R. xiv; *Reference re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (S.C.C.), [1991] 2 S.C.R. 525; (1991), 83 D.L.R. (4th) 297; [1991] 6 W.W.R. 1; 58 B.C.L.R. (2d) 1; 127 N.R. 161; *Bates v Lord Hailsham of St Marylebone*, [1972] 3 All ER 1019 (Ch. D.).

distinguished:

Haida Nation v. British Columbia (Minister of Forests) 2002 BCCA 462 (CanLII), (2002), 216 D.L.R. (4th) 1; [2002] 10 W.W.R. 587; 172 B.C.A.C. 75; 5 B.C.L.R. (4th) 33; [2002] 4 C.N.L.R. 117 (B.C.C.A.); *Delgamuukw v. British Columbia*, 1997 CanLII 302 (S.C.C.), [1997] 3 S.C.R. 1010; (1997), 153 D.L.R. (4th) 193; 99 B.C.A.C. 161; [1998] 1 C.N.L.R. 14; 220 N.R. 161 (on existing Aboriginal title issue).

considered:

Corbiere v. Canada (Minister of Indian and Northern Affairs), 1999 CanLII 687 (S.C.C.), [1999] 2 S.C.R. 203; (1999), 173 D.L.R. (4th) 1; [1999] 3 C.N.L.R. 19; 239 N.R. 1; *Ross River Dena Council Band v. Canada*, 2002 SCC 54 (CanLII), [2002] 2 S.C.R. 816; (2002), 213 D.L.R. (4th) 193; [2002] 9 W.W.R. 391; 168 B.C.A.C. 1; 3 B.C.L.R. (4th) 201; [2002] 3 C.N.L.R. 229; 289 N.R. 233.

referred to:

Guerin et al. v. The Queen et al., 1984 CanLII 25 (S.C.C.), [1984] 2 S.C.R. 335; (1984), 13 D.L.R. (4th) 321; [1984] 6 W.W.R. 481; 59 B.C.L.R. 301; [1985] 1 C.N.L.R. 120; 20 E.T.R. 6; 55 N.R. 161; 36 R.P.R. 1; *R v. Badger*, 1996 CanLII 236 (S.C.C.), [1996] 1 S.C.R. 771; (1996), 181 A.R. 321; 133 D.L.R. (4th) 324; [1996] 4 W.W.R. 457; 37 Alta. L.R. (3d) 153; 105 C.C.C. (3d) 289; [1996] 2 C.N.L.R. 77; 195 N.R. 1; 116 W.A.C. 321.

APPLICATION for judicial review seeking a declaration that the amended *Indian Band Election Regulations* and *Indian Referendum Regulations* contravened constitutionally guaranteed Aboriginal and treaty rights in having been drafted without meaningful consultation with First Nations peoples. Application dismissed.

appearances:

Robert W. Hladun, Q.C. and *David N. Kamal* for applicants.

Michele E. Annich and *Rose Marie Zanin* for respondents.

solicitors of record:

Hladun & Company, Edmonton, for applicants.

Deputy Attorney General of Canada for respondents.

The following are the reasons for order and order rendered in English by

[1]Dawson J.: On May 20, 1999, the Supreme Court of Canada declared the words "and is ordinarily resident on the reserve" found in subsection 77(1) [as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 14] of the *Indian Act*, R.S.C., 1985, c. I-5 (Act) to be inconsistent with subsection 15(1) of the *Canadian Charter of Rights and Freedoms*.[1] The effect of this declaration was to remove the restriction which had excluded off-reserve members of an Indian band from the right to vote in band elections conducted pursuant to subsection 77(1) of the Act. In order to permit the development of an electoral process which would balance the rights of off-reserve and on-reserve band members, the Supreme Court suspended the implementation of the declaration of invalidity for 18 months. The decision of the Supreme Court is reported as *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (S.C.C.), [1999] 2 S.C.R. 203.

[2]Subsequently, on October 20, 2000 regulations were brought into force amending both the *Indian Band Election Regulations*, C.R.C., c. 952 and the *Indian Referendum Regulations*, C.R.C., c. 957 in light of the decision in *Corbiere*. The amendments were contained in *Regulations Amending the Indian Band Election Regulations*, SOR/2000-391 and *Regulations Amending the Indian Referendum Regulations*, SOR/2000-392 (together the Regulations).

[3]In this application for judicial review the applicants seek, among other relief, a declaration that the Regulations contravene Aboriginal and treaty rights guaranteed under subsection 35(1) of the *Constitution Act, 1982* [Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]], because they were drafted and passed into law without full and meaningful consultation first being conducted with First Nations peoples, particularly without full and meaningful consultation being conducted with the applicants. The applicants seek an order in the nature of *certiorari* quashing the Regulations.

BACKGROUND FACTS

[4]Each applicant is a Grand Chief of a confederacy of Alberta First Nations. Treaty No. 8 comprises 23 First Nations, of which four conduct their elections under the Act. Treaty No. 7 comprises seven First Nations, one of which conducts its elections under the Act. Treaty No. 6 comprises 16 First Nations, of which five conduct their elections under the Act.

[5]On June 16, 1999, following the decision of the Supreme Court, the then Minister of Indian Affairs and Northern Development sent a letter to all First Nations, national Aboriginal organizations, friendship centres, native women's groups, Aboriginal media, and provincial government counterparts informing them of the *Corbiere* decision. Thereafter, on December 9, 1999 at a meeting of the Assembly of First Nations Confederacy, the Minister of Indian Affairs, announced a two-stage strategy to deal with both the short- and the long-term implications of the *Corbiere* decision. An information package was distributed at this meeting, which was also mailed out to all First Nations communities. The information package noted that the *Corbiere* decision could add in the order of 190,000 individuals to the electorate. Thus, the need for extensive consultations with national and

regional Aboriginal organizations, their members, and other interested parties was expressly referenced in the information package.

[6]Stage one of the two-stage process was described in the following terms:

On November 20, 2000, off-reserve members will have the same right to vote in section 77(1) elections as on-reserve members. Therefore, the first, interim stage will require amending the *Indian Band Election Regulations* and *Indian Band Referendum Regulations* to facilitate voting in elections by off-reserve members. (At the time these regulations were originally put into place, voting by off-reserve Band members was not contemplated.) Consultations will begin immediately with the Assembly of First Nations, the Native Women's Association of Canada, the Congress of Aboriginal Peoples, and the National Association of Friendship Centres regarding amendments to these regulations. Equal funding will be provided to allow these organizations to consult with their members. Funding will also be provided to regional Aboriginal organizations to conduct consultations at the grassroots level.

It can be seen that at this stage, Aboriginal organizations were relied upon to conduct the consultations.

[7]Stage two was described as follows:

Stage two will involve moving forward with more substantive consultations with First Nations partners and other Aboriginal organizations on integrated and sustainable electoral reform. In proceeding with Stage Two, the Court's view that Band election systems can distinguish between on- and off-reserve interests provided these systems are *Charter*-compliant, will be a major consideration. The electoral regime developed as a result of Stage Two consultations may therefore entail further adjustments to voting rights.

At the December 9, 1999 meeting, the Minister made a commitment to conduct, and to fund, a consultation process on *Corbiere*.

[8]In addition to funding the four national Aboriginal organizations referred to above to conduct consultations (each in the amount of $200,000), a number of the regional offices of the Department of Indian Affairs and Northern Development (DIAND), including the Alberta regional office, were engaged to undertake consultations on a more grassroots level. The Alberta regional office of DIAND received $160,000 for the purpose of funding regional consultations. Regionally funded consultation reports were to be submitted by May 31, 2000 (although Mr. Eyahpaise, who was DIAND's "Special Adviser on Corbiere", swore in an affidavit in this proceeding that consultation reports continue to be received after the deadline).

[9]While the adequacy of the consultation process is at issue in this proceeding, the following is a brief description of some of the steps taken in the process which led to the making of the Regulations.

[10]In January of 2000, a document entitled "Parameters Document" was distributed to the four national Aboriginal organizations referenced above. This document set out a number of conditions which formed part of the contract between DIAND and each national organization funded to conduct the *Corbiere* consultations. One condition was that the organizations conducting the consultations must endeavour to reach as many of their members as possible within existing time and monetary limits.

[11]A Technical Working Group (TWG) was formed, comprised of representatives from the Assembly of First Nations (AFN), Native Women's Association of Canada (NWAC), National Association of Friendship Centres (NAFC) and DIAND. This group was formed to supplement the national and regional consultations. The TWG had its first meeting on April 19, 2000.

[12]The TWG engaged in a series of meetings which resulted in the draft of a document entitled "Minimum Requirements Paper". This document described itself to be a discussion paper to promote further analysis. It contained a summary of the *Corbiere* decision, a discussion of the immediate impact of the decision on the existing regulations, and proposed that it would be prudent to amend the regulations, at minimum, in a number of specified respects.

[13]On June 9, 2000, a day-long special session entitled "Corbiere Day" was held as part of a four-day national

Aboriginal gathering in Winnipeg, Manitoba. Approximately 1,800 people from most First Nations attended. Attendees were provided with a copy of the Minimum Requirements Paper and breakout sessions were chaired by group facilitators in order to obtain feedback from participants. On cross-examination, each applicant confirmed that the Minimum Requirements Paper was received by them. Grand Chief Halcrow and Grand Chief Gadwa confirmed their receipt of the document in June or July 2000.

[14]Draft regulations were prepared at the end of July 2000.

[15]On August 28 and 29, 2000, DIAND conducted a meeting in Calgary to introduce and complete a clause-by-clause review of the draft *Indian Band Election Regulations* and to provide a general overview of the *Indian Referendum Regulations*. Participants included representatives from DIAND, the AFN, NAFC and the Congress of Aboriginal Peoples (CAP).

[16]On September 2, 2000, the Regulations were pre-published in the *Canada Gazette*, Part I (pre-published Regulations). A notice accompanied the pre-published Regulations which called for input on the Regulations within 30 days.

[17]On or about September 12, 2000, a copy of the pre-published Regulations, with request for comments, was faxed to First Nations across the country, including the respective Chiefs of Treaties Nos. 6, 7 and 8.

[18]Thereafter, DIAND began to receive comments on the pre-published Regulations. Mr. Eyahpaise swore that these comments were reviewed and some of them were incorporated into the final version of the Regulations.

[19]On September 18 and 19, 2000, a clause-by-clause review of the pre-published *Indian Referendum Regulations* was completed in Ottawa with the First Nations Land Manager's Association, individual First Nations, and representatives from the national Aboriginal organizations. Mr. Eyahpaise swore that some of the resulting feedback was incorporated into the final Regulations.

[20]An electoral officers training session was held in Winnipeg, Manitoba during the week of September 18, 2000. Mr. Eyahpaise swore that this session was held to provide First Nations and DIAND an opportunity to discuss the draft election Regulations and to provide training with respect to how upcoming elections could be conducted in order to reflect the draft Regulations. During this session comments were received on the draft Regulations, some of which, Mr. Eyahpaise swore, were incorporated into the final version of the Regulations.

[21]As noted above, the Regulations came into force on October 20, 2000. While the applicants assert that the "Regulations came into force as published in the Canada Gazette on September 2, 2000" a clause-by-clause review of the pre-published Regulations and the Regulations shows that a number of changes were made.

PROCEDURAL HISTORY OF THIS APPLICATION

[22]This matter first came on for hearing over two days in December of 2002. On the morning of the second day, counsel for the applicants was asked whether a notice of constitutional question had been served. Counsel confirmed that no notice had been served. Counsel for the applicant was then asked if, in his view, that posed any difficulty in light of the requirement of section 57 [as am. by S.C. 1990, c. 8, s. 19] of the *Federal Court Act*, [R.S.C., 1985, c. F-7] that where the constitutional validity, applicability or operability of regulations under an Act of Parliament are put in issue, the regulations shall not be adjudged to be invalid, inapplicable or inoperable unless a notice of constitutional question has been served.

[23]After a brief adjournment to consider the matter, and particularly whether a constitutional question was raised in this proceeding, counsel sought and obtained an adjournment of the matter for the purpose of serving a notice of constitutional question.

[24]Such a notice was subsequently duly served, the notice of application was amended to include the claim for declaratory relief (in addition to the existing claim for *certiorari*) and the matter came on again for hearing in May of 2003.

THE ISSUES

[25]From the outset, the applicants have asserted that meaningful and genuine consultations with First Nations' members prior to the enactment of the Regulations was mandatory for at least three reasons:

(i) directions to do so were given by the Supreme Court in *Corbiere*;

(ii) a legitimate expectation of such consultation arose; and

(iii) there is always a duty to consult with Aboriginal groups when making decisions that will affect First Nations' interests.

[26]The notice of constitutional question which was served framed the basis of the constitutional question to be:

That the failure of the Government of Canada to fully and meaningfully consult in this matter with First Nations peoples, and specifically with the members and representatives of Treaties 6, 7, and 8, is an abrogation of the fiduciary duty owed by the Government of Canada to First Nations peoples and thereby violates Aboriginal and Treaty rights guaranteed under section 35 of the Constitution Act, 1982.

[27]Accordingly, the issues to be determined on this application are, in my view:

1. Did a duty to consult exist arising out of:

(i) a constitutional obligation recognized or affirmed by subsection 35(1) of the *Constitution Act, 1982*?;

(ii) a fiduciary obligation or duty?;

(iii) the doctrine of legitimate expectation?; or

(iv) the directions given by the Supreme Court of Canada in *Corbiere?*

2. If so, was the duty to consult breached?

ANALYSIS

(i) Was there a duty to consult?

[28]There is an undoubted responsibility on the Crown to protect the rights of Indians. This arises from the special trust relationship created by history, treaties and legislation: see *Guerin et al. v. The Queen et al.*, 1984 CanLII 25 (S.C.C.), [1984] 2 S.C.R. 335. Aboriginal rights are recognized and affirmed in subsection 35(1) of the *Constitution Act, 1982* which provides:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[29]In *R. v. Sparrow*, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075, at page 1108 the Supreme Court of Canada articulated the general guiding principle applicable to subsection 35(1) of the *Constitution Act, 1982*. That guiding principle is that the Government has a responsibility to act in a fiduciary capacity with respect to Aboriginal peoples. Thus, the relationship between the Government and Aboriginal peoples was expressed to be trust-like, rather than adversarial, and to implicate the honour of the Crown. It followed, in the words of the Court, that contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship.

[30]In *Sparrow* the Court also observed that the words used in subsection 35(1) of the *Constitution Act, 1982* incorporate the fiduciary relationship. The Court conveyed this as follows at page 1109:

There is no explicit language in [subsection 35(1)] that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be

reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick, supra*, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen*, *supra*.

[31]In *Sparrow*, the Court established the basis upon which claims advanced pursuant to subsection 35(1) of the *Constitution Act, 1982* are to be analysed. In *R. v. Van der Peet*, 1996 CanLII 216 (S.C.C.), [1996] 2 S.C.R. 507, at paragraph 2 this test was cited with approval as follows. First, a court must determine whether an applicant has demonstrated that he or she was acting pursuant to an Aboriginal right. If so, the court must move to consider whether that right has been extinguished. If not extinguished, the court must determine whether the right was infringed. Finally, if satisfied that an existing right has been infringed, the Court must determine whether the infringement is justified.

[32]The starting point for the analysis is the demonstration of an Aboriginal right. I turn therefore to consider whether the applicants in the case at bar have demonstrated the existence of an Aboriginal right so as to ground the subsection 35(1) analysis. I will consider first whether any treaty or Aboriginal right was demonstrated, and then whether any broader right founded on the fiduciary nature of the relationship was established.

(A) Treaty Rights

[33]Treaty rights are those rights contained in official agreements between the Crown and the Aboriginal people. See: *R. v. Badger*, 1996 CanLII 236 (S.C.C.), [1996] 1 S.C.R. 771, at paragraph 76.

[34]In the case at bar none of Treaty No. 6, 7 or 8 was before the Court, and no specific provision of those treaties was relied upon by the applicants to assert that a treaty right had been infringed. In the words of counsel for the applicants in oral argument "[t]here is no treaty that's been referenced and pointed to in terms of that as being a right within the treaty".

[35]In the result there is no basis in the evidence upon which to find a duty to consult as a treaty right.

(B) Aboriginal Rights

[36] Aboriginal rights flow from the customs and traditions of the Aboriginal people. In order to be an Aboriginal right "an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right". See: *R. v. Van der Peet, supra*, at paragraph 46.

[37]In *Van der Peet*, the Supreme Court of Canada described the nature of the inquiry a court must undertake when considering a claim to an Aboriginal right. Fundamental is the need to precisely identify the nature of the activity claimed to be a right. In the words of the then Chief Justice Lamer writing for the majority (at paragraph 52) "[t]he nature of an applicant's claim must be delineated in terms of the particular practice, custom or tradition under which it is claimed".

[38]In *R. v. Pamajewon*, 1996 CanLII 161 (S.C.C.), [1996] 2 S.C.R. 821 the Supreme Court considered a claim to an Aboriginal right to a broad right to manage the use of reserve lands. All of the judges concluded that such a claimed right was overly broad. Chief Justice Lamer, writing for the majority, discussed the broad nature of the right claimed at paragraph 27 in the following terms:

The appellants themselves would have this Court characterize their claim as to "a broad right to manage the use of their reserve lands". To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right. The factors laid out in *Van der Peet*, and applied, *supra*, allow the Court to consider the appellants' claim at the appropriate level of specificity; the characterization put forward by the appellants would not allow the Court to do so.

[39]In *Delgamuukw v. British Columbia*, 1997 CanLII 302 (S.C.C.), [1997] 3 S.C.R. 1010, at paragraph 170, Chief Justice Lamer, writing again for the majority, noted that to advance a right to self-government in broad terms was

to advance a claim in "a manner not cognizable under s. 35(1)".

[40]To correctly characterize a claimed right, a court is to consider factors such as the nature of the action which the applicant is claiming is, or should be, done pursuant to an Aboriginal right, the nature of the impugned government action, and the practice, custom or tradition relied upon to establish the right. The practices, customs and traditions which constitute Aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to European contact. Where a practice, custom or tradition arose solely as a response to European influences, such practice, custom or tradition will not support recognition of an Aboriginal right. See: *Van der Peet*, at paragraphs 53-73.

[41]The onus of proving an Aboriginal right lies upon the person challenging the government action.

[42]Turning to the application of those principles to the case at bar, the applicants, in oral submissions, attempted to establish an Aboriginal right to governance by alluding to the right to control "their own society, governmental matters, local and community matters".[2]

[43]I am not satisfied that this represents a proper and sufficiently precise identification of a claimed Aboriginal right. Aboriginal rights are not to be determined on a general basis. Moreover, the right to self-government is not the Aboriginal right which the applicants asserted in their amended notice of application, notice of constitutional question and written materials. Rather, in those materials the applicants simply argued they were denied the right to be meaningfully consulted prior to the amendment of the Regulations.

[44]However, in my view, a more fundamental difficulty faces the applicants. That is the absence of an evidentiary basis to support a claim that these Grand Chiefs or the organizations they represent have an Aboriginal right to consultation arising out of a practice, custom or tradition of cultural significance to their society, which practice custom or tradition has continuity with pre-contact practices, customs or traditions.

[45]The evidence before the Court relied upon by the applicants consists of the affidavits sworn by each applicant. Each swore to his belief that the Minister and DIAND would consult with the First Nations directly before amending the Regulations.

[46]Grand Chief Halcrow says he relied upon the representations in the federal government's news release dated December 9, 1999, entitled "First Nation Voting Regulations to be Amended after Consultations", and the speech made by the Honourable Robert Nault, Minister of Indian Affairs and Northern Development of the same day, in forming his belief that he would be consulted directly in a meaningful way with respect to amendments to the Regulations. Both of these sources promised two-phase consultations with First Nations, dealing first with the amendments to the Regulations under the *Indian Act*, and eventually with amendments to the *Indian Act* itself. The balance of Grand Chief Halcrow's evidence deals with the nature of the consultation process, or lack thereof.

[47]Grand Chief Halcrow takes particular exception to not being consulted and not agreeing to those portions of the Regulations which deal with mail-in ballots, phone-in nominations and the circumstances surrounding the compilation of voter lists. Each of those subjects is said to be a source of vote fraud.

[48]Grand Chief Halcrow exhibits to his affidavit numerous documents that provide evidence that the federal government did undertake to consult First Nations with respect to the amendment of the Regulations. He also provides documents along with the answers to undertakings given at the cross-examination on his affidavit that show members of Treaty No. 8 were dissatisfied with the consultation process that the federal government eventually implemented, particularly with regard to the manner in which funding was distributed.

[49]Chief Grand Halcrow provides no evidence with respect to the issue of treaty rights or Aboriginal rights to consultation. Treaty No. 8 is not in evidence, nor is any document or testimony regarding custom, tradition or practice that would support the claim to Aboriginal right to be consulted when the federal government and the Governor in Council amends regulations enacted pursuant to the *Indian Act*.

[50]The affidavit of Grand Chief Chris Shade is similar in content to that of Grand Chief Halcrow. Chief Shade swears that, in addition to receiving the *Corbiere* December 9, 1999 news release, he attended the meeting where the Honourable Robert Nault promised to consult the First Nations. Minister Nault personally assured Grand Chief

Shade that the Chiefs, as leaders, would be included in consultations with respect to the proposed amendments to the Regulations. Grand Chief Shade indicates in his affidavit that neither he nor his Band was meaningfully consulted in the amendment process, and had no input with respect to the draft amendments.

[51]Grand Chief Shade expresses the identical concern about mail-in ballots, phone-in nominations, and the compilation of voter lists.

[52]Treaty No. 7 is not in evidence through the affidavit of Grand Chief Shade. There is also no evidence of practice, tradition, or custom to support the contention that Treaty No. 7 members have a treaty, Aboriginal , or inherent right to be consulted by the federal government and the Governor in Council when amendments are made to the regulations enacted pursuant to the *Indian Act*.

[53]Grand Chief Gadwa's affidavit is very similar to those of Grand Chief Halcrow and Grand Chief Shade. He swears that the consultation process and timelines imposed by the federal government resulted in no meaningful consultation between the federal government and Treaty No. 6 members with respect to the amendments to the Regulations.

[54]As the Supreme Court of Canada noted in *Van der Peet, supra*, at paragraph 69:

Courts considering a claim to the existence of an aboriginal right must focus specifically on the practices, customs and traditions of the particular aboriginal group claiming the right. In the case of *Kruger*, *supra*, this Court rejected the notion that claims to aboriginal rights could be determined on a general basis. This position is correct; the existence of an aboriginal right will depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right. As has already been suggested, aboriginal rights are constitutional rights, but that does not negate the central fact that the interests aboriginal rights are intended to protect relate to the specific history of the group claiming the right. Aboriginal rights are not general and universal; their scope and content must be determined on a case-by-case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.

[55]In the present case, the applicants have failed to meet the onus upon them to adduce evidence which would allow the Court to determine whether these Aboriginal communities have an Aboriginal right which was infringed by the manner in which the Regulations were enacted.

(C) Fiduciary Duty

[56]In *Wewaykum Indian Band v. Canada*, 2002 SCC 79 (CanLII), [2002] 4 S.C.R. 245, at paragraphs 78 and 79, the Supreme Court of Canada considered the *sui generis* fiduciary duty owed by the federal Crown. The Court noted that in *Sparrow*, the *sui generis* fiduciary duty recognized in *Guerin* was expanded to include protection of Aboriginal and treaty rights within subsection 35(1) of the *Constitution Act, 1982*. The Court further noted that in *Ross River Dena Council Band v. Canada*, 2002 SCC 54 (CanLII), [2002] 2 S.C.R. 816 it was accepted that potential relief by way of fiduciary remedies is not limited to situations analogous to those recognized in *Sparrow* and *Guerin*, but that the fiduciary duty "where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of Aboriginal peoples".

[57]Notwithstanding the scope of the fiduciary duty owed by the Crown, the Supreme Court took care in *Wewaykum* to state that the Crown's fiduciary duty does not exist at large, but rather exists in relation to specific Indian interests. The duty does not, in the words of the Court [at paragraph 81], exist "as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship".

[58]In order to determine whether a fiduciary obligation exists in any particular case, a reviewing court is to consider the asserted obligation and then consider whether the Crown has assumed discretionary control in relation to that obligation in a fashion which grounds a fiduciary obligation. This was expressed in the following way by Mr. Justice Binnie writing for the Court at paragraphs 82, 83 and 85 in *Wewaykum*:

Since *Guerin*, Canadian courts have experienced a flood of "fiduciary duty" claims by Indian bands across a whole

spectrum of possible complaints, for example:

(i) to structure elections (*Batchewana Indian Band (Non- resident members) v. Batchewana Indian Band*, 1996 CanLII 3885 (F.C.A.), [1997] 1 F.C. 689 (C.A.), at para. 60; subsequently dealt with in this Court on other grounds);

(ii) to require the provision of social services *(Southeast Child & Family Services v. Canada (Attorney General)*, 1997 CanLII 11528 (MB Q.B.), [1997] 9 W.W.R. 236 (Man. Q.B.));

(iii) to rewrite negotiated provisions *(B.C. Native Women's Society v. Canada*, 1999 CanLII 9368 (F.C.), [2000] 1 F.C. 304 (T.D.));

(iv) to cover moving expenses *(Paul v. Kingsclear Indian Band* reflex, (1997), 137 F.T.R. 275); *Mentuck v. Canada*, reflex, [1986] 3 F.C. 249 (T.D.); *Deer v. Mohawk Council of Kahnawake*, reflex, [1991] 2 F.C. 18 (T.D.));

(v) to suppress public access to information about band affairs *(Chippewas of the Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)* reflex, (1996), 116 F.T.R. 37, aff'd (1999), 251 N.R. 220 (F.C.A.); *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)*, reflex, [1989] 1 F.C. 143 (T.D.); *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* 1997 CanLII 5125 (F.C.), (1997), 132 F.T.R. 106);

(vi) to require legal aid funding (*Ominayak v. Canada (Minister of Indian Affairs and Northern Development)*, reflex, [1987] 3 F.C. 174 (T.D.));

(vii) to compel registration of individuals under the *Indian Act* (rejected in *Tuplin v. Canada (Indian and Northern Affairs)* 2001 PESCTD 89 (CanLII), (2001), 207 Nfld. & P.E.I.R. 292 (P.E.I.T.D.));

(viii) to invalidate a consent signed by an Indian mother to the adoption of her child (rejected in *G. (A.P.) v. A. (K.H.)* reflex, (1994), 120 D.L.R. (4th) 511 (Alta. Q.B.)).

I offer no comment about the correctness of the disposition of these particular cases on the facts, none of which are before us for decision, but I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals, supra*, at p. 597), and that this principle applies to the relationship between the Crown and Aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

. . .

I do not suggest that the existence of a public law duty necessarily excludes the creation of a fiduciary relationship. The latter, however, 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", as discussed below.

[59]Turning again to the application of those principles to the evidence before me, the applicants assert in their written argument that:

22. The roots of the obligation to consult lie in the trust-like relationship which exists between the Crown and the Aboriginal peoples. This relationship is usually expressed as a fiduciary duty owed by both the federal and Provincial Crown to the Aboriginal people, and grounds a general guiding principle of section 35 of the *Constitution Act, 1982*. It would be contrary to that principle to interpret s.35(1) to mean that before an Aboriginal or treaty right could be recognized and affirmed, it had to be made the subject of legal proceedings.

R. v. Sparrow, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075 [Tab 17]

Haida Nation v. British Columbia (Minister of Forests), 2002 BCCA 147 (CanLII), [2002] 2 C.N.L.R. 121

23. The fiduciary duty of the Crown, federal or provincial, is a duty to behave towards the Indian people with utmost good faith and put the interests of the Indian people under protection of the Crown.

Guerin v. The Queen, 1984 CanLII 25 (S.C.C.), [1984] 2 S.C.R. 335
Halfway River First Nation v. British Columbia (Minister of Forests) 1999 BCCA 470 (CanLII), (1999), 178 D.L.R. (4th) 666 (B.C.C.A.)
Haida Nation v. British Columbia (Minister of Forests) [2002] B.C.J. No. 1882

[60]In oral argument, in response to the question "what gives rise to a fiduciary obligation to consult?" counsel for the applicants responded that "[t]he fiduciary duty to consult is simply because there is a constitutional right to governance and land. This impacts First Nations".

[61]Reliance was placed upon the observation of Chief Justice Lamer in *Delgamuukw* at paragraph 168 that "[t]here is always a duty of consultation".

[62]With respect, however, the submissions appear to impermissibly assert a fiduciary duty at large. Chief Justice Lamer's remark in *Delgamuukw* cannot be taken out of its context. In *Delgamuukw* there was an existing Aboriginal title and one issue was the test for justification of an infringement of that title. After noting that Aboriginal title encompasses a right to choose to what ends a piece of land could be put, Chief Justice Lamer wrote [at paragraph 168:]:

This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. [Underlining added.]

[63]The point to be made was that consultation is required where an existing Aboriginal right is infringed in order to determine if such infringement was justified. Similarly, where a fiduciary duty exists, a failure to consult may breach that duty.

[64]In *Guerin*, the Court recognized that the existence of a public law duty is not mutually exclusive to undertaking, in the discharge of the public law duty, an obligation in the nature of a private law duty. Mr. Justice Dickson, as he then was, explained this as follows at page 385:

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

[65]This explains the requirement in *Wewaykum* that the Crown must undertake discretionary control over the interest at issue in a way that invokes responsibility in the nature of a private law duty.

[66]Turning now to the requirement in *Wewaykum* that there be a particular obligation or interest and the assumption by the Crown of discretionary control in relation thereto, in response to the question as to what the specific interest or obligation was said to be, counsel for the applicants responded:

I believe in the affidavits of the three grand chiefs, they discuss the phone-in, mail-in, and the membership lists so that matters of consultation dealt with a variety of subjects, some of which, again, were highlighted by Madam Justice L'Heureux-Dubé. And the failing of the consultation and the fiduciary duty was that there wasn't a meeting of the minds in terms of Treaty 6, 7, and 8 on specifically what those amendments would entail to change the election and referendum regulations as they then sat.

[67]It seems to me that the interest asserted by the applicants is an interest in the content of the Regulations, as the content of those Regulations touched upon allowing band members who lived off-reserve to vote in elections and referenda. Having articulated that interest, the analysis then turns to whether in respect of the process of amending the Regulations, the Crown undertook discretionary control in a way that invokes responsibility in the nature of a private law duty.

[68]There was no historic evidence before the Court as to the circumstances surrounding the proclamation of the original regulations, or the circumstances surrounding any other amendments to the regulations. There was no historic evidence adduced at all.

[69]It is conceded by the applicants that the proclamation of regulations is a public law duty. As such, as a matter of law, the Crown is subject to supervision by the courts through the exercise of public law remedies. For example, regulations may be challenged on the basis that they are *ultra vires* the jurisdiction of the maker, or inconsistent with a provision of the Constitution.

[70]Given the public law nature of the duty here being exercised by the Governor in Council and the absence of any evidence of the degree of discretionary control assumed in the past, I find that there is no basis in the evidence before me from which I am able to conclude that in amending the Regulations in light of the decision of the Supreme Court in *Corbiere*, the Governor in Council exercised a discretion in a way that invokes responsibility "in the nature of a private law duty". As Madam Justice Simpson of this Court observed in *Squamish Indian Band v. Canada* (2000), 207 F.T.R. 1 (F.C.T.D.), at paragraph 521:

It cannot be the case that each time legislation gives the Crown discretion to act, a Private Law Fiduciary Duty or even a *sui generis* fiduciary duty applies. This must be so because, in matters of public law, there will generally not be a reasonable expectation that the Crown is acting for the sole benefit of the party affected by the legislation. For this reason, it is my conclusion that, in matters of public law, discretion and vulnerability can exist without triggering a fiduciary standard. There would have to be special circumstances, other than those created by the legislation, to justify the imposition of a fiduciary duty on the Crown.

[71]Accordingly, I conclude that the applicants failed to establish the fiduciary obligation to consult that they assert. A different conclusion might be reached on a different evidentiary record.

[72]If I am wrong in this conclusion, and there was a fiduciary obligation to consult with the applicants, I will consider briefly whether a breach of that duty has been established.

[73]I begin from the premise that not all fiduciary obligations are identical. The content of the duty will vary with the nature and importance of the interest to be protected. This has been noted to be particularly important where the fiduciary is the government and where it may owe fiduciary obligations to a number of entities whose interests may not coincide, and whose interests may in fact be opposed.

[74]In order to determine the content of the fiduciary duty, should it exist in the present circumstance, I note that the Governor in Council was carrying out its regulation-making powers specifically conferred by subsection 76(1) of the Act. At issue was the need to balance the rights of both on-reserve and off-reserve band members in elections, in accordance with the decision of the Supreme Court of Canada in *Corbiere*.

[75]By analogy with *Wewaykum*, I conclude that in that circumstance, the imposition of a fiduciary duty would attach obligations of loyalty, good faith, full-disclosure appropriate to the matter at hand, reasonable diligence, impartiality between the interests of those to whom the duty is owed, and acting with a view to the best interest of the beneficiaries.

[76]As to whether that duty was met, the evidence establishes that:

(i) The government gave notice by letter dated July 16, 1999 to all First Nations, and to other Aboriginal groups, informing them of the *Corbiere* decision, stating it was vital that First Nations and the Government of Canada work together to determine the full implications of the ruling and to find the best way to implement the decision, and expressing the commitment of the Government of Canada to work in partnership and consultation with First Nations.

(ii) In the time available the Government took steps to inform itself of the views of the affected parties. Funding was provided to four national Aboriginal organizations to conduct consultations and to report back, and regional DIAND offices were engaged to conduct consultation at a more grassroots level. The TWG was formed to supplement the national and regional consultations.

(iii) The Minimum Requirements Paper was prepared by the TWG and distributed as a discussion paper to promote further feedback. The document listed a number of specific respects in which the existing regulations should be amended. The document concluded by stating it was drafted with the intention of providing stakeholders with an opportunity to focus the discussion on amendments to the Regulations. Each applicant received a copy of this document.

(iv) Draft regulations were prepared on the basis of the consultation reports received by the Government and upon the Minimum Requirements Paper.

(v) A clause-by-clause review of the draft *Indian Band Election Regulations* was conducted with representatives of three national Aboriginal organizations on August 28 and 29, 2000.

(vi) The draft regulations were pre-published for comment and were faxed to First Nations across the country. Each applicant was sent a copy.

(vii) A clause-by-clause review of the *Indian Referendum Regulations* was conducted on September 18 and 19, 2000 with the First Nations Land Manager's Association, individual First Nations and representatives from national organizations.

(viii) The Crown made changes to the proposed regulations following the clause-by-clause review on August 28 and 29; following the receipt of comments on the pre-published Regulations; following the clause-by- clause review of the *Indian Referendum Regulations*; and following an electoral officer's training session held during the week of September 18, 2000.

[77]In so acting, the Crown provided notice that it intended to amend the existing regulations, gathered and shared relevant information, funded and afforded an opportunity for consultations, and made changes to the proposed regulations based on information obtained through consultations. The Crown was operating within the 18-month period of suspension ordered by the Supreme Court of Canada and this was the first-stage of a two-stage process.

[78]If a fiduciary obligation to consult existed, I find that in so acting the Crown's conduct complied with the obligations imposed upon it.

(D) Conclusion on the duty to consult

[79]For the reasons set out above, I have concluded that the applicants have not established that the Crown owed a legal duty to consult with them. In my view, the case as framed by the applicants asserts a free-standing ground upon which government action may be challenged. Such a free-standing ground is not, in my view, supported by the jurisprudence and was rejected by the Ontario Court of Appeal in *TransCanada Pipelines Ltd. v. Beardmore (Township)* 2000 CanLII 5713 (ON C.A.), (2000), 186 D.L.R. (4th) 403; October 19, 2000 leave to appeal dismissed, [2000] 2 S.C.R. xiv. Particularly apposite are the comments of the Court at paragraphs 112 and 120 as follows:

In my view, O'Driscoll J. incorrectly applied the concept of the Crown's duty to consult with First Nations in setting aside the restructuring proposal on the ground of loss of jurisdiction. As I will explain, he elevated the Crown's duty to consult with First Nations from merely being one, of several, justifactory requirements to be met

by the Crown when a challenge is mounted to a law, or government action, on the ground that it unduly interferes with Aboriginal rights or treaty rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*, to an independent ground on which such a law, or government action, may be challenged.

. . .

As Lawrence and Macklem point out at p. 262, "in most cases involving the assertion of Aboriginal or treaty rights, the First Nation in question is simultaneously attempting to establish the existence of its rights and prevent interference with those rights by the Crown or a third party". As the decisions of the Supreme Court illustrate, what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. It is at this stage of the proceeding that the Crown is required to address whether it has fulfilled its duty to consult with a First Nation if it intends to justify the constitutionality of its action. [Underlining added.]

[80]While the applicants rely upon the decision of the British Columbia Court of Appeal in *Haida Nation v. British Columbia (Minister of Forests)* 2002 BCCA 462 (CanLII), (2002), 216 D.L.R. (4th) 1 to argue that "you don't have to prove infringement in the context of these consultation cases", in *Haida* what was at issue was whether there is an obligation on the Crown to consult with an Aboriginal people, who specifically claim an Aboriginal right, about potential infringements, before the Aboriginal right has been determined by a court of competent jurisdiction. The decision did not, in my view, create a new obligation to consult when Aboriginal title or Aboriginal rights or some other right affirmed by subsection 35(1) of the *Constitution Act, 1982* is not at issue.

(ii) Doctrine of legitimate expectation

[81]The applicants say that through the Minister's pronouncements in the December 9, 1999 news release and speech, the Minister declared a process of procedural fairness that would involve a full and meaningful consultation with the stakeholders. The Minister is said to have acknowledged that he understood his responsibilities and would follow the directions out of the Supreme Court and consult with First Nations members. The applicants say, as a result, that the Minister thereby gave a legitimate expectation of consultation to the applicants that the process would be fair and open to all those reasonably affected by the proposed amendments to the regulations.

[82]In my view, this argument must fail for the following reasons.

[83]First, in *Reference re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (S.C.C.), [1991] 2 S.C.R. 525 the Supreme Court of Canada characterized the doctrine of legitimate expectation as being part of the rules of procedural fairness which govern administrative bodies, and noted that the rules governing procedural fairness do not apply to a body exercising purely legislative functions. While the Supreme Court had before it a challenge to legislation introduced into the House of Commons, in reaching its conclusion the Court relied upon the comments of Mr. Justice Megarry in *Bates v Lord Hailsham of St Marylebone*, [1972] 3 All ER 1019 (Ch. D.). There, Mr. Justice Megarry wrote at page 1024:

Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. [Underlining added]

[84]This suggests that the conclusion of the Supreme Court of Canada that the rules governing procedural fairness do not apply to the process of legislation extends to delegated legislation.

[85]More recently, the majority of the Federal Court of Appeal expressed serious reservations as to the applicability of the doctrine of legitimate expectation to the Cabinet in the exercise of its regulation-making power. See: *Apotex Inc. v. Canada (Attorney General)*, [2002] 4 F.C. 264 (C.A.), at paragraph 21.

[86]The second reason for rejecting the applicants' arguments with respect to legitimate expectation is that while the legitimate expectation here asserted is said to arise from the conduct of the Minister, the action challenged is that of the Governor in Council in making the Regulations. In *Apotex*, the majority of the Court wrote as follows at paragraph 18:

A minister can make an undertaking having some legal consequences only with respect to a decision which is his, and his alone to make. Absent statutory authority such as that found in subsection 101(2) of the Act or, arguably, absent authority expressly delegated to a minister by the Governor in Council, a minister cannot bind the Governor in Council in the exercise of its regulation-making power. It may be useful to recall that the Governor in Council, as defined by section 35 of the *Interpretation Act*, is "the Governor General of Canada acting by and with the advice of . . . the Queen's Privy Council for Canada", an obvious reference to sections 11, 12 and 13 of the *Constitution Act, 1867*. [Footnotes omitted and underlining added.]

[87]I am bound by this decision, and counsel for the applicants was unable to distinguish it. The Minister could not bind the Governor in Council in the exercise of its regulation-making power. The claim founded upon legitimate expectation must therefore fail.

(iii) The comments of the Supreme Court in *Corbiere*

[88]The applicants argue that the *Corbiere* decision placed a positive duty on the Minister to consult with First Nations peoples in arriving at a reasonable and practical solution to the required amendments to the Regulations in order to be Charter compliant.

[89]I have not been persuaded that the decision of the Supreme Court created an enforceable duty to consult for the following reasons.

[90]First, it was not suggested by the applicants that the Court formally or expressly ordered such consultation. Rather, reliance was placed on certain passages in the Court's reasons for judgment, particularly passages in the reasons of Madam Justice L'Heureux-Dubé writing for herself.

[91]Second, in my view, a proper reading of the reasons for judgment reveals that the Court was simply affording to the government an opportunity to consult. The Court expressly recognized that the opportunity to consult, given by the suspension of the declaration of invalidity, might not be followed up. This is reflected in the reasons of the majority at paragraph 23:

Where there is inconsistency between the *Charter* and a legislative provision, s. 52 of the *Constitution Act, 1982* provides that the provision shall be rendered void to the extent of the inconsistency. We would declare the words "and is ordinarily resident on the reserve" in s. 77(1) of the *Indian Act* to be inconsistent with s. 15(1) but suspend the implementation of this declaration for 18 months. We would not grant a constitutional exemption to the Batchewana Band during the period of suspension, as would normally be done according to the rule in *Schachter*. The reason for this is that in the particular circumstances of this case, it would appear to be preferable to develop an electoral process that will balance the rights of off-reserve and on-reserve band members. We have not overlooked the possibility that legislative inaction may create new problems. Such claims will fall to be dealt with on their merits should they arise. [Underlining added.]

and is reflected as well in the reasons of Madam Justice L'Heureux-Dubé at paragraph 119:

I recognize that suspending the effect of the declaration, combined with the extension of the suspension for such a long period is, in the words of the Chief Justice in *Schachter, supra*, at p. 716, "a serious matter from the point of view of the *Charter*. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the *Charter* to persist for a time despite the violation". However, this best embodies the principles of respect for *Charter* rights and respect for democracy that should guide remedial considerations. Should Parliament decide to change the scheme, it will have an extended period of time in which to consult with those affected by the legislation and balance the affected interests in a manner that respects Aboriginal rights and all band members' equality interests. Should Parliament not change the scheme, off-reserve band members will gain voting rights within the existing scheme. [Underlining added.]

[92]Therefore, it is not reasonable to conclude that the Supreme Court of Canada through its reasons created a legally enforceable obligation to consult.

CONCLUSION AND COSTS

[93]For these reasons, the application for judicial review will be dismissed.

[94]The respondents seeks their costs, and counsel for the applicants did not seriously argue that costs should not follow the event. Therefore, the applicants shall pay one set of costs to the respondents. If not agreed, such costs should be assessed on the basis more particularly set out in the order which follows.

ORDER

[95]IT IS HEREBY ORDERED THAT:

1. The application for judicial review is dismissed.

2. The applicants shall pay to the respondents one set of costs. If not agreed, such costs shall be assessed in accordance with the middle of column III of the table to Tariff B of the *Federal Court Rules, 1998* [SOR/98-106].

[1] Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44].

[2] In oral argument the Aboriginal right claimed to be infringed was described as follows by counsel for the applicants:

THE COURT: What, first of all, is the precise nature of any Aboriginal right that is claimed to be infringed?

MR. HLADUN: Governance. And governance in a context that it's recognized prior to 1982, and it could under the heading of sui generis, being that whole bundle of rights.

THE COURT: Well, *sui generis* means unique.

MR. HLADUN: Unique to the extent that the *Indian Act* recognizes chief and council in a form of governance that has a chief and council unique to Aboriginal people. And that, in *Corbiere*, was looked to and addressed as well in the context of governance, and that being community, local. And I understood that to be in the context of cultural, societal--cultural, societal, things which are peculiar and particular and perhaps sui generis to First Nations and Aboriginal people. Governance.

THE COURT: So more specifically, though, the nature of the Aboriginal right that is claimed to be infringed is what aspect of governance?

MR. HLADUN: The aspect on how off-reserve First Nations people will balance their right, new right to vote on reserve with on-reserve First Nation members. And those portions of *Corbiere*, in particular Madam Justice L'Heureux-Dube, that recognizes the sort of context. And by "context" I mean the sort of issues as to you now have the communital [*sic*] affairs of Aboriginal people influenced by the rights of a whole other group of people that now will join in and have a right to vote that they otherwise did not. Words such as "local matters" or "community matters" were referenced by the Court. So those would obviously be impacted and affected, because clearly, they did not have the right to vote before, recognized under Section 77. In the amendments now they do.

. . .

THE COURT: So again, what is the precise nature of the Aboriginal right enjoyed by Treaty 6, 7, and 8 that is claimed to be infringed?

MR. HLADUN: The right to control their own society, governmental matters, local and community matters are now impacted by people living off the reserve. But the reserve and the land in *Delgamuukw* and *Corbiere* being recognized as the parameter, and it's always discussed. I mean, there's rights, of course, that are rights that travel,

and then there's rights attached to the land. And in this discussion the referendum amendments, of course, clearly do impact, because now the referendum on surrender of land or those issues around that under Section 39 are now affected and impacted by off-reserve First Nation members being entitled to vote.