HUNTING FOR ANSWERS IN A STRANGE KETTLE OF FISH: UNILATERALISM, PATERNALISM AND FIDUCIARY RHETORIC IN *BADGER* AND *VAN DER PEET*

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The Crown's fiduciary duty to the Aboriginal peoples of Canada is a fundamental part of the special, *sui generis* Crown-Native relationship. It requires that the Crown act selflessly, with honesty, integrity and the utmost good faith towards its Aboriginal beneficiaries' interests. This duty, which is binding upon both federal and provincial levels of government,[1] also entails that the Crown must avoid placing itself or being placed in situations that would compromise the Aboriginal peoples' interests. While the extent of the Crown's fiduciary duty has not yet been judicially considered, it arguably permeates virtually every aspect of Crown-Native relations.[2]

The Crown's fiduciary duty to Aboriginal peoples has been a judicially-recognised element of Crown-Native relations for little more than a decade. In that brief period of time, it has become a firmly entrenched, vital aspect of Canadian Aboriginal rights jurisprudence. Indeed, since the fiduciary nature of Crown-Native relations was first articulated by the Supreme Court of Canada in *Guerin* v. *R.*,[3] fiduciary doctrine has been present in a substantial number of that court's Aboriginal rights decisions — the most notable being *R.* v. *Sparrow* in 1990.[4] The *Sparrow* decision made clear that the Crown's fiduciary duty to Aboriginal peoples applies to Crown-Native relations generally; that it exists as a guiding principle in the consideration of the Aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982*; and that the duty is, itself, an entrenched element of section 35(1).[5]

As a result of its decision in *Sparrow*, the Supreme Court effectively dictated that all future judicial considerations of the Aboriginal and treaty rights encompassed within section 35(1) had to take into account the existence of the Crown's fiduciary obligations. The majority of post-*Sparrow* Aboriginal rights cases have incorporated fiduciary rhetoric into their discussions of Aboriginal and treaty rights.[6] The limited discussion of fiduciary doctrine and its application to the points in dispute in those cases suggest, however, that post-*Sparrow* judicial references to the Crown's fiduciary duty demonstrate a profound reluctance to apply and enforce the Crown's obligations. While Canadian courts may feel obliged to make use of fiduciary rhetoric, their sense of obligation appears to begin and end at recognising the Crown's duty and its incorporation in section 35(1). The recent Supreme Court of Canada decisions in *R.* v. *Badger*[7] and *R.* v. *Van der Peet*[8] are clear examples of this phenomenon.

The Supreme Court's discussion of the Crown's fiduciary duty in *Badger* and *Van der Peet* was limited to its recognition as an interpretive principle to guide the Court's analysis of the facts and issues arising in each case. In neither of these cases did the Supreme

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1 For greater discussion of this point, see L.I. Rotman, "Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility" (1994) 32 Osgoode Hall L.J. 735; Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) [hereinafter "*Parallel Paths*"].

2 It should be noted that the Crown's duty is comprised of both general and specific duties, as discussed *infra*.

3 (1984), 13 D.L.R. (4th) 321 (S.C.C.).

4 (1990), 70 D.L.R. (4th) 385 (S.C.C.). Note also *Paul* v. *Canadian Pacific Ltd.* (1989), 53 D.L.R. (4th) 487 (S.C.C.); *Roberts* v. *Canada* (1989), 57 D.L.R. (4th) 197 (S.C.C.).

5 On these points, see *ibid.* at 406-8. See also Rotman, *Parallel Paths*, *supra* note 1.

6 See, for example, *Ontario (A.G.)* v. *Bear Island Foundation* (1991), 83 D.L.R. (4th) 381 (S.C.C.); *Quebec (A.G.)* v. *Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)* (1995), 130 D.L.R. (4th) 193 (S.C.C.).

7 (1996), 133 D.L.R. (4th) 324 (S.C.C.).

8 S.C.C. No. 23803, [1996] S.C.J. No. 77.

Court canvass the existence of the Crown's fiduciary obligations as they pertain directly to the respective points in issue. In *Badger*, for example, the Court failed to consider the effect of the Crown's actions on its existing fiduciary obligations under Treaty No. 8. Meanwhile, in *Van der Peet*, the Court did not consider the impact of its conclusions on the Crown's fiduciary obligations to Aboriginal peoples generally. A closer analysis of the manner in which fiduciary doctrine was used in these decisions strongly indicates that the Supreme Court's invocation of fiduciary rhetoric was more symbolic than real.

R. v. *Badger*

In *Badger*, three Treaty No. 8 Indians were charged under the Alberta *Wildlife Act*[9] while hunting on privately-owned land within the boundaries of tracts surrendered under the treaty. All three claimed a treaty right to hunt.[10] In the course of its judgment, the Supreme Court held that the federal government possessed the ability to override or alter treaty rights guaranteed to Aboriginal peoples by way of unilateral enactments. Specifically, the Court held that the Alberta *Natural Resource Transfer Agreement, 1930* (hereinafter "NRTA"),[11] an amendment to the Canadian Constitution, could override existing treaty rights guaranteed to the Aboriginal signatories to Treaty No. 8 where the treaty's terms were inconsistent or incompatible with the NRTA. This occurred via the "merger and consolidation" of the rights existing within both Treaty No. 8 and the NRTA.

Treaty No. 8, signed in 1899, guaranteed the Aboriginal signatories the right to continue their hunting practices "as usual" over the entirety of the tracts surrendered in the treaty. In *R.* v. *Horseman*, the Supreme Court had determined that those rights included the right to hunt for commercial purposes.[12] The terms of the treaty provided, however, that such rights were subject to future, unspecified regulation; the exercise of those rights was also excepted from those tracts that were deemed to be "taken up" by the Crown for other purposes. The NRTA, meanwhile, broadened and expanded Aboriginal hunting rights beyond the scope of the territories encompassed within the treaties signed in Alberta, but contemplated hunting over those expanded territories only for food. When these "competing" considerations were merged and consolidated, the commercial hunting rights in Treaty No. 8 were deemed to be eliminated because they conflicted with the NRTA.[13]

The *Badger* case clearly indicates that treaty rights are considered by the Supreme Court of Canada to be inferior to unilateral constitutional enactments, such as the NRTA. Justice Cory, departing from his majority judgment in *Horseman*, held that the NRTA modified treaty rights where they came into conflict with the NRTA, but did not supplant those rights.[14] In a separate, concurring judgment — and consistent with Cory J.'s majority judgment in *Horseman* — Sopinka J. determined that the NRTA entirely replaced Treaty No. 8 rights:[15]

> To characterize the NRTA as modifying the Treaty is to treat it as an amending document to the Treaty. This clearly was not the intent of the NRTA.... If the NRTA merely modified the Treaty, an Indian hunting on Treaty lands could claim the right under the Treaty while an Indian hunting in other parts of the province could claim only under the NRTA.... It might be suggested that the NRTA both amended the Treaty and, as an independent constitutional document, amended the Constitution. If this were the intent, it is difficult to understand why all the terms of the Treaty relating to

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9 S.A. 1984, c. W-9.1.

10 For a more complete discussion of the *Badger* decision, see C. Bell, "*R.*v. *Badger*: One Step Forward and Two Steps Back?" (1996) 8 Constitutional Forum 21; L.I. Rotman, "Aboriginal Rights Law Year in Review: The 1995-96 Term" (1997) 12 J.L. & Social Pol'y (forthcoming).

11 S.C. 1930, c. 3.

12 [1990] 1 S.C.R. 901.

13 While the discussion of the Aboriginal right to hunt for food or commercial purposes was an integral element of the *Horseman* decision, the *Horseman* precedent on this point was expressly upheld in *Badger*. See the judgments of Sopinka J., *supra* note 7 at 330, and Cory J., *ibid.* at 342.

14 As he explained in *Badger*, *supra* note 7 at 342-3:

> [T]he existence of the NRTA has not deprived Treaty No. 8 of legal significance. Treaties are sacred promises and the Crown's honour requires the Court to assume that the Crown intended to fulfil its promises. Treaty rights can only be amended where it is clear that effect was intended.... [T]he Treaty No. 8 right to hunt has only been altered or modified by the NRTA to the extent that the NRTA evinces a clear intention to effect such a modification .... Unless there is a direct conflict between the NRTA and a treaty, the NRTA will not have modified the treaty rights.

15 *Ibid.* at 330. Indeed, as Sopinka J. explained, *ibid.* at 331, "the Treaty rights have been subsumed in a document of a higher order."

the right to hunt for food were replicated in the NRTA.

Whether adopting the conclusions of Cory or Sopinka JJ., the Supreme Court's analysis in *Badger* explicitly approves the notion that the Crown may enact legislation that infringes upon or eliminates treaty rights without the need to consult or negotiate with Aboriginal peoples or, more importantly, to obtain their consent. What is troubling about this conclusion is that the Court came to it without first considering the effects of the Crown's fiduciary obligations to the Treaty No. 8 signatories. While Canadian courts have held that it was within the Crown's legislative ability to extinguish, modify, or alter treaty rights prior to 17 April 1982, those courts have never answered whether taking such action offends the Crown's pre-existing fiduciary obligations to the Aboriginal peoples.

In its decision in *Guerin*, the Supreme Court found that the Crown's fiduciary obligations to Aboriginal peoples were rooted in the *Royal Proclamation of 1763*.[16] Consequently, it cannot presently be questioned whether the Crown possessed fiduciary obligations to the Aboriginal peoples when it promulgated the NRTA. Even if the Crown was unaware of the fiduciary nature of its obligations in 1930 — given the fact that those duties were only described as fiduciary in 1984 — it should have recognised that the solemn nature of Aboriginal treaties carried with them legally binding obligations. These treaty obligations ought to have prevented the Crown from unilaterally altering its historical treaty commitments. It should be noted, though, that the Canadian judiciary generally did not recognise treaty obligations as binding in law at that time.[17]

By virtue of the *Guerin* and *Sparrow* decisions, contemporary courts are obliged to render the application of the NRTA subject to the Crown's fiduciary obligations even though the Crown may not have been aware of the fiduciary nature of its duties at that time. While this may appear to be a historical anachronism created by the common law, what is important to consider in this context is not the precise name given to the Crown-Native relationship, but the ramifications of the parties' interaction and whether that gave rise to legally enforceable obligations. This notion is consistent with the theoretical underpinnings of fiduciary doctrine. A relationship's dynamics are what truly causes it to be described as fiduciary, not whether it fits into already-established categories of fiduciary relations.[18] On this basis, it is legitimate to hold the Crown to fiduciary obligations relating to the NRTA's effect on treaties in the present day since the Crown ought to have been aware in 1930 that it could not depart from its treaty promises without being legally bound to account for such a breach.

By upholding the Crown's ability to unilaterally eliminate or override existing treaty rights, the Supreme Court in *Badger* effectively sanctioned the Crown's breach of its general fiduciary duty to act in the best interests of Aboriginal peoples as well as its specific obligations under Treaty No. 8.[19] It is simply not possible for the Crown to have maintained fidelity to its fiduciary duty to act in the best interests of the Aboriginal peoples while it was unilaterally eliminating rights guaranteed to them in treaties. Maintaining the honour of the Crown and avoiding sharp practice in all dealings with the Aboriginal peoples, principles explicitly endorsed in *Badger*,[20] are clearly offended by

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16 R.S.C. 1985, App. II, No. 1. On this point, see *Guerin*, *supra* note 3 at 340.

17 See, for example, the commentary by Lord Watson in *Attorney-General of Ontario* v. *Attorney-General of Canada: Re Indian Claims* (the *Robinson Treaties Annuities* case), [1897] A.C. 199 at 133 (P.C.): "Their Lordships have had no difficulty in coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities ... beyond a promise and agreement, which was nothing more than a personal obligation by its governor ..." Lord Watson's characterisation was expressly adopted around the time of the NRTA's promulgation in *R.* v. *Wesley*, [1932] 4 D.L.R. 774 at 788 (Alta. C.A.): "In Canada the Indian treaties appear to have been judicially interpreted as being mere promises and agreements. See *A.-G. Can.* v. *A.-G. Ont.* (Indian Annuities case), [1897] A.C. 199 at 213."

18 See L.I. Rotman, "Fiduciary Doctrine: A Concept in Need of Understanding" (1996) 34 Alta L. Rev. 821 at 829-31.

19 Briefly put, the Crown owes fiduciary obligations of a general nature pursuant to its historical relationship with the Aboriginal peoples in Canada while it owes specific fiduciary obligations stemming from individual events or occurrences, such as the signing of individual treaties. These ideas are discussed more fully in Rotman, *Parallel Paths*, *supra* note 1.

20 See *Badger*, *supra* note 7 at 331, per Sopinka J.: "[T]reaties should be interpreted in a manner that maintains the integrity of the Crown, particularly the Crown's fiduciary obligation toward aboriginal peoples." See also *ibid.* at 340, per Cory J.:

> [A] treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred.... [T]he honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of

finding that the NRTA may, without consultation or consent, override or alter the nature of solemn, pre-existing agreements.[21] The Crown's actions in this regard contradict the solemn and binding nature of Crown-Native treaties, as well as the representations of the Crown therein and in the negotiations leading up to their conclusion. Equally important, the constitutional affirmation and protection of Aboriginal and treaty rights in section 35(1), which incorporates the Crown's fiduciary duty to Native peoples, is itself offended by the Crown's powers as described in *Badger*.

R. v. Van der Peet

More recently, the Supreme Court made reference to the Crown's fiduciary obligations in *Van der Peet*, an Aboriginal fishing rights case, where a member of the Sto:lo nation had been charged with selling ten salmon for $50 while fishing under the authority of an Indian food fishing licence. In the course of determining whether the appellant possessed an Aboriginal right to sell fish, Lamer C.J.'s majority judgment held that an activity could only be considered an Aboriginal right if it was an element of a practice, tradition or custom integral to the distinctive culture of the Aboriginal group claiming the right; moreover, that right had to be traceable to pre-contact practices. Under this formulation of Aboriginal rights, any activity arising after contact with Europeans was incapable of being classified as a constitutionally-protected Aboriginal right under section 35(1).[22]

In establishing the framework for his analysis of the right claimed by the appellant, Lamer C.J. emphasised the importance of adopting a purposive approach to section 35(1), as suggested by the Supreme Court in *Sparrow*.[23] He found that this purposive approach, which entailed giving section 35(1) a generous and liberal interpretation in favour of the Aboriginal peoples, stemmed from the fiduciary nature of the relationship between the Crown and Aboriginal peoples. Additionally, he stated that this approach was intended to inform the court's analysis of the purposes underlying section 35(1), as well as that section's definition and scope.[24] Chief Justice Lamer held that the Crown's fiduciary relationship with the Aboriginal peoples required that any doubt or ambiguity as to what ought to properly fall within the scope and definition of section 35(1) was to be resolved in favour of the Aboriginal peoples.[25] Above all, he determined that the fiduciary nature of Crown-Native relations meant that the honour of the Crown was at stake in its dealings with Aboriginal peoples.

Chief Justice Lamer's finding that the appellant did not possess an Aboriginal right to sell fish because that practice was initiated entirely in response to non-Aboriginal settlement contradicts his own statements regarding the fiduciary nature of Crown-Native relations. Arbitrarily limiting the definition of Aboriginal rights to pre-contact practices prohibits the creation of new Aboriginal rights arising from the necessity to maintain the viability of distinctive Aboriginal cultures in the face of European interference with traditional Aboriginal ways of life. This is inconsistent with maintaining the honour of the Crown.

It is circular reasoning to suggest that Aboriginal rights must encompass only those practices that are integral to the distinctive cultures of Aboriginal societies and then, when the presence of European settlement interferes with or renders those practices ineffective, prevent the recognition as Aboriginal rights those new practices arising in response to that European settlement. Insofar as Aboriginal rights are dynamic and evolving, they ought not be restricted to their "primeval simplicity and vigour."[26] Rather, they must be allowed

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"sharp dealing" will be sanctioned.

21 This concern was expressed by the additional reasons provided by Kerans J.A. in the Alberta Court of Appeal's disposition of *Badger* (1993), 8 Alta. L.R. (3d) 354 at 361 (C.A.):

> My concern is that whatever happened in 1930 happened without the participation of one party to the Treaty. The aboriginal Canadians were not invited to participate in the negotiations leading to the 1930 agreement. I incline to the view that they did not believe they were changing any native rights. I fear the notion of "merger and consolidation" is the result of a patina applied by a later generation of judicial interpretation. That is the reason for my disquiet, and for these additional reasons.

22 *Van der Peet*, *supra* note 8 at para. 73: "... [W]here the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right." See discussion in J. Borrows, "The Trickster: Integral to a Distinctive Culture" (1996) 8 Constitutional Forum 27.

23 *Ibid.* at para. 20-1.

24 *Ibid.* at para. 24.

25 *Ibid.* at para. 25.

26 See B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 782, where he explained that the notion of "existing" aboriginal rights "suggests that the rights in question are affirmed in a contemporary form rather than in their primeval simplicity and vigour." This statement was quoted with approval by the Supreme Court of Canada in *Sparrow*, *supra* note 4 at 397.

to adapt to changing circumstances. If, as in *Van der Peet*, the fact of European settlement created the cultural and physical need for the Sto:lo people to engage in the sale or barter of fish, then that activity ought to be regarded as a protected Aboriginal right regardless of whether it was induced and driven by European influences. To hold otherwise would be to deny the purposive application of the interpretive principles derived from the Crown's fiduciary obligations to Aboriginal peoples.

Chief Justice Lamer's determination in *Van der Peet* that "incidental" Aboriginal practices that "piggyback" on Aboriginal rights are not deserving of constitutional protection also has the potential of allowing the Crown to escape its fiduciary obligations to protect fundamental Aboriginal rights.[27] It presents the possibility that Aboriginal rights that are dependent on conditions precedent may be indirectly denied simply by refusing to protect those prior conditions. Where an Aboriginal group has a recognised right to fish, protecting that right necessitates protecting the means necessary for the realisation of that right. Such a requirement would prevent, for example, allowing a marina to be built upstream from where those fishing rights are exercised that destroys the fishing stock.[28] To hold otherwise would render any protection of the right meaningless.

Chief Justice Lamer's analysis of incidental rights in *Van der Peet* appears to contradict the Supreme Court's unanimous judgment in *Simon* v. *R.*,[29] where the Court held that the right of an Aboriginal person exercising a treaty right to hunt included the ability to engage in "those activities reasonably incidental to the act of hunting itself, an example of which is travelling with the requisite hunting equipment to the hunting grounds."[30] The flexible interpretation of Aboriginal treaties articulated by the Supreme Court of Canada in cases such as *Simon* or, for that matter, the language of generous and liberal interpretation of Aboriginal rights invoked by Lamer C.J. in *Van der Peet*, requires that so-called "incidental" rights be protected because they are vital to the exercise of the rights that are explicitly protected. Where seemingly extraneous matters are vital to the adequate exercise of Aboriginal or treaty rights, they must be included as parts of those rights. These sentiments would appear to accord with Lamer C.J.'s professed adherence to giving section 35(1) a generous and liberal interpretation in favour of Aboriginal peoples.

The dissenting judgments of L'Heureux-Dubé and McLachlin JJ. in *Van der Peet* are more faithful to the recognition and enforcement of the Crown's fiduciary obligations than the majority judgment of Lamer C.J. Justice L'Heureux-Dubé recognised that the definition of Aboriginal rights must take place within "the broader context of the historical aboriginal reality in Canada,"[31] one aspect of which entails that Aboriginal rights must be construed in light of the special fiduciary relationship that exists between the Crown and Aboriginal peoples in Canada.[32] Justice McLachlin emphasised that the determination of whether a practice constituted an Aboriginal right had to "remain true to the position of the Crown throughout Canadian history as trustee or fiduciary for the first peoples of this country."[33] In paying heed to the fiduciary nature of Crown-Native relations, both dissenting judgments found that the existence of Aboriginal rights could not be arbitrarily limited to practices arising prior to contact.

CONCLUSION

The *Badger* and *Van der Peet* cases illustrate that 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.

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27 It should be noted that the judiciary's compartmentalisation of Aboriginal practices into "integral" rights and "incidental" rights demonstrates a profound inability or reluctance to recognise that aboriginal rights ought to be understood as broad, theoretical constructs. This notion is recognised in L'Heureux-Dubé J.'s dissenting judgment in *Van der Peet*, *supra* note 8 at para. 156, where she states that aboriginal rights are notionally incapable of being encapsulated by particular practices, traditions, or customs, but are more abstract and profound concepts from which specific practices, traditions, or customs are derived. The compartmentalisation of aboriginal rights in the manner exhibited by the majority judgment in *Van der Peet* deflects attention from what ought to be the true issue at hand, namely the ability of aboriginal peoples to determine the precise methods by which they will make use of or implement their larger, abstract rights.

28 See *Saanichton Marina Ltd.* v. *Claxton* (1989), 36 B.C.L.R. (2d) 79 (C.A.).

29 (1985), 24 D.L.R. (4th) 390 (S.C.C.).

30 *Ibid.* at 403.

31 *Van der Peet*, *supra* note 8 at para. 105.

32 *Ibid.* at para. 144.

33 *Ibid.* at para. 232.

Sanctioning the NRTA's effect on existing treaty rights, as in *Badger*, or the ability of the Crown to circumvent the recognition of legitimate Aboriginal rights, as in *Van der Peet*, is inconsistent with the Crown's historical undertakings towards Aboriginal peoples and their rights. It also trivialises the Crown's fiduciary duty to the point where it appears as nothing more than empty rhetoric.

The judicial treatment of fiduciary doctrine as a mandatory, yet peripheral element of Aboriginal rights jurisprudence is an affront to the centrality of fiduciary doctrine in Canadian law and derogates from the dictates of the *Sparrow* decision. The fiduciary nature of Crown-Aboriginal relations exists at the very heart of Crown-Native interaction. It may be traced to the formative period of relations between Britain and the Aboriginal peoples from the time of their initial contact until shortly after the signing of the *Treaty of Niagara* in 1764. While the precise nature of Crown-Aboriginal relations may have changed since that time, the fiduciary nature of those relations remains rooted in the notions of reciprocity and mutuality that were characteristic of pre-colonial relationships between the Crown's representatives and the Aboriginal peoples.[34]

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. It prescribes onerous obligations on the part of the Crown in its dealings with the Aboriginal peoples. It also provides the Aboriginal peoples with legally enforceable means to ensure either that the Crown lives up to its obligations or furnishes them with remedies where the Crown is found to have breached those obligations. Since the Crown's duty is entrenched within section 35(1), the Canadian judiciary is bound to enforce the Crown's obligations. This constitutional imperative requires more of the courts, rather, than the proliferation of empty rhetoric offered by the Supreme Court of Canada in *Badger* and *Van der Peet*.❑

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[34] For more detailed discussion of this argument, see L.I. Rotman, *Solemn Commitments: Fiduciary Obligations, Treaty Relationships, and the Foundational Principles of Crown-Native Relations in Canada*, unpublished S.J.D. dissertation, University of Toronto (forthcoming).