THE FIDUCIARY OBLIGATIONS OF THE CROWN TO ABORIGINES: LESSONS FROM THE UNITED STATES AND CANADA

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I. INTRODUCTION

The concept of a fiduciary or trust obligation owed by the state to indigenous people is firmly entrenched in the United States of America, where the origins of the doctrine can be traced back to 1831. In Canada a fiduciary obligation has also been enforced against the Crown. The possibility of a special fiduciary responsibility to Aboriginal people has, however, received little attention in Australia. The *Mabo v Queensland*[1] judgment has touched upon this complex topic, therefore it is timely to undertake comparative studies of how the concept has been dealt with by other post-colonial jurisdictions. In this article the two main Australian cases that have dealt with the fiduciary obligation to Aborigines will be

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1 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

briefly reviewed.[2] The cases concerning fiduciary obligation in the United States and Canada will be outlined and the implications of these North American precedents for the relationship between the Australian Government and Aboriginal people considered.

II. AUSTRALIA

A. *NORTHERN LAND COUNCIL v THE COMMONWEALTH*

In this litigation the Northern Land Council (NLC) claimed, inter alia, breach of fiduciary duty, duress, undue influence and unconscionable conduct on the part of the Commonwealth in relation to an agreement under s 44 (2) of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). The agreement concerned compensation payments[3] from the Commonwealth to the NLC in relation to the Ranger uranium mine which was on Aboriginal land.[4] In *Northern Land Council v The Commonwealth (No 2)*[5] the High Court considered certain questions on a stated case.

The Court (in a joint judgment) found there was nothing "in the bare terms of s 44(2)"[6] which suggested that the Commonwealth came under a fiduciary duty to a Land Council with which it negotiates a s 44(2) agreement. But as the judgment itself states, "this view does not resolve the real issues in the case"[7] because a fiduciary obligation may arise in other ways. The judgment continues with these obiter remarks:

> If the Commonwealth carries on negotiations with an intending miner and with a Land Council with a view to the conclusion of an agreement which would result, and which is intended by all parties to result, in the miner undertaking the actual burden of the payments, terms and conditions...so that the Commonwealth would be the conduit for the benefits to be provided by the miners...the Commonwealth may come under a fiduciary duty in its negotiations with the Land Council. That depends on issues of fact and, perhaps, on the nature of the interests of the Aboriginals (whether statutory or common law interests) in the land the subject of the negotiations... It has often been pointed out that the categories of fiduciary

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2 For completeness the 1978 decision of the Privy Council *The Corporation of the Director of Aboriginal and Islanders Advance v Peinkinna and Others* (1978) 52 ALJR 286 is noted, but the case concerned the construction of a particular statutory trust. It was unnecessary to consider the possibility of a special fiduciary obligation to Aborigines.

3 As well as certain other terms and conditions.

4 That is, Aboriginal land as defined by s 3(1) of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth).

5 (1987) 61 ALJR 616.

6 *Ibid* at 619.

7 *Id.*

> relationship are not closed... Whether the nature of the relationship at common law between an identified group of Aboriginal people and the unalienated Crown lands which they have used and occupied historically and still use and occupy is such as to found a fiduciary relationship or trust of some kind is a question of fundamental importance which has not been argued on the present stated case. Likewise, the question whether other allegations in the amended statement of claim might give rise to a fiduciary relationship should not be determined in the abstract but should be determined in the light of the facts found at trial.[8]

A finding of breach of fiduciary obligation is still open. The hearing of the case proper has been held up pending judgment on an interlocutory matter. If it proceeds, the High Court may be provided with its first post-*Mabo (No 2)* opportunity to consider a claim of breach of fiduciary duty to Aboriginal people.

B. *MABO V QUEENSLAND (NO 2)*

The question of fiduciary obligation arose in *Mabo v Queensland (No 2)*,[9] (*Mabo*), as the plaintiffs submitted that if they failed to establish native or traditional title to the lands claimed on the Murray Islands, then either:

> ...the Defendant is under a fiduciary duty, or alternatively bound as a trustee, to the Meriam People, including the Plaintiffs, to recognise and protect their rights and interests in the Murray Islands.[10]

As the plaintiffs succeeded on the first basis there was no real need for the judges to consider the second. However fiduciary obligation was mentioned in all judgments except that of Deane and Gaudron JJ who discussed equitable relief more generally (see below).

Justice Brennan (with whom Mason CJ and McHugh J agreed) made very brief mention of fiduciary obligation to say:

> If native title were surrendered to the Crown in expectation of a grant of tenure to the indigenous title holders, there may be a fiduciary duty on the Crown to exercise its discretionary power to grant a tenure in land so as to satisfy the expectation, but it is unnecessary to consider the existence or extent of such a fiduciary duty in this case.[11]

These remarks suggest a very narrow conception of fiduciary obligation. But it is not certain that Brennan J intended to suggest that a fiduciary duty would arise *exclusively* in the hypothetical scenario he describes.

Justices Deane and Gaudron found that:

> Actual or threatened interference [with the enjoyment of native title] can, in appropriate circumstances, attract the protection of equitable remedies. Indeed...the

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8 *Ibid* at 620.

9 Note 1 *supra*.

10 *Ibid* at 199. A declaration sought by the plaintiffs, quoted in the judgment of Toohey J.

11 *Ibid* at 60.

> appropriate form of relief [may be] the imposition of a remedial constructive trust framed to reflect the incidents and limitations of the rights under the common law native title.[12]

Their Honours would appear to leave open the possibility of a claim based on fiduciary duty in circumstances of actual or threatened interference with native title rights.[13] But as in the judgment of Brennan J, the issue is given very little attention.

Justice Dawson gave more attention to the possibility of a fiduciary obligation, but drew an adverse conclusion. His Honour found that "the obligation is dependent upon the existence of some sort of aboriginal interest existing in or over the land" and since, in his judgment "aboriginal title did not survive the annexation of the Murray Islands", he concluded that "there is no room for the application of any fiduciary or trust obligation...".[14] Justice Dawson expressed no opinion on the converse argument that a fiduciary or trust obligation *may* exist if there *is* a form of Aboriginal interest in the land, which of course has now been established by his fellow judges.

Justice Toohey gave the issue most detailed consideration.[15] His Honour held that the "kinds of relationships that can give rise to a fiduciary obligation are not closed"[16] and quoted from *Hospital Products Ltd v United States Surgical Corporation*:[17]

> The critical feature of [fiduciary] relationships is that the fiduciary undertakes or agrees to act on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.[18]

Relying on *Guerin v The Queen*[19] his Honour held that:

> ...if the Crown in right of Queensland has the power to alienate land the subject of the Meriam people's traditional rights and interests...and if the Meriam people's power to deal with their land is restricted in so far as it is inalienable, except to the

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12 *Ibid* at 113.

13 See R Blowes "Settlement of Australia Phase II: Aboriginal Land Rights in Australia After *Mabo v The State of Queensland*" (1992) *Australian Environmental Law News* 36 at 42.

14 Note 1 *supra* at 166-67.

15 *Ibid* at 199-205.

16 *Ibid* at 200 per Toohey J, citations omitted.

17 (1984) 156 CLR 41.

18 *Ibid* at 96-7, cited in *Mabo* note 1 *supra* at 200 per Toohey J.

19 Note 100 *infra*.

> Crown, then this power and corresponding vulnerability give rise to a fiduciary obligation on the part of the Crown.[20]

Moreover his Honour held that if he were wrong in finding that the relationship between the Crown and the Meriam people with respect to traditional title was sufficient basis alone for a fiduciary obligation, then an obligation would alternatively be created both by the course of dealings by the Queensland Government with respect to the Islands since annexation and the exercise of control over the islanders by welfare legislation.[21]

The fiduciary obligation was expressed to be "in the nature of the obligation of a constructive trustee".[22] The content of the fiduciary obligation (or constructive trust) would be tailored to the circumstances of the relationship from which it arises, but in general, a fiduciary must act for the benefit of the beneficiaries.[23]

"The obligation of the Crown in the present case" his Honour found, was "to ensure that traditional title is not impaired or destroyed without the consent of or otherwise contrary to the interests of the titleholders."[24] His judgment is ambiguous as to whether the parliament as well as the executive government would be so obligated.

> A fiduciary obligation on the Crown does not limit the legislative power of the Queensland Parliament, but legislation will be a breach of that obligation if its effect is adverse to the interests of the titleholders, or if the process it establishes does not take account of those interests.[25]

If Toohey J is suggesting that extinguishment of native title by clear and plain legislation would involve a breach of a fiduciary obligation owed by the Crown, then he has gone beyond the United States' decisions. The suggestion would also appear to be at odds with his Honour's treatment of extinguishment earlier in his judgment.[26]

Another question arising is whether, in Justice Toohey's view, the obligation of not impairing or destroying native title, is the full extent of the fiduciary obligation. He implies it may not be so limited by saying that this particular obligation arises "in the present case"[27] and by discussing how a different sort of obligation may

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20 Note 1 *supra* at 203.

21 *Id.*

22 *Ibid* at 204.

23 *Id.* His honour elaborated: "On the one hand, a fiduciary must not delegate a discretion and is under a duty to consider if a duty should be exercised. And on the other hand, a fiduciary is under a duty not to act for his or her own benefit or for the benefit of any third person."

24 *Id.*

25 *Ibid* at 205.

26 *Ibid* at 192-97 per Toohey J, in particular his statement, at 195, that "[w]here the legislation reveals a clear and plain intention to extinguish native title, it is effective to do so."

27 *Ibid* at 204.

result from particular action or promises by the Crown.[28] Furthermore, as discussed above, his Honour suggests that an alternative basis for the fiduciary obligation would be the Queensland Government's course of dealings with Aboriginal people and a history of regulation via welfare legislation.[29] Whether this broad *source* of a fiduciary obligation would affect the *scope* of the resulting obligation may warrant further exploration.

(i) Mabo and extinguishment of native title

On the questions of extinguishment of native title and compensation the High Court had a clear opportunity to discuss the fiduciary obligation of the Crown and the United States' cases, but the judges, apart from Toohey and Dawson JJ, declined to do so. The majority finding that native title could be extinguished by a grant of land by the Crown that was inconsistent with the continuation of native title would appear to be inconsistent with the United States' decisions, for example *Lane* and *Cramer* discussed below, which found that trust responsibility would limit the authority of the executive government to dispose of tribal lands by granting it to others. Of course, the power of state governments to alienate native title land was held to be subject to valid laws of the Commonwealth including the *Racial Discrimination Act* 1975 (Cth).[30] So the end result may not be greatly different, at least at the state level.

(ii) Conclusion: the effect of Mabo

In *Mabo* the end result was that one judge (Toohey J) found in favour of a fiduciary obligation on the Crown to ensure that traditional or native title is not impaired or destroyed, one judge (Dawson J) who found there was no fiduciary obligation - but on the incorrect basis that Aboriginal people had no surviving title in the land - and five judges (Mason CJ, Brennan, Deane, Gaudron and McHugh JJ) said very little about the issue. One could not conclude that the High Court has displayed great enthusiasm for developing a discrete cause of action of breach of fiduciary duty toward Aboriginal people;[31] on the other hand the issue was not squarely raised in *Mabo*.

The careful consideration given to the question in the judgments of Dawson and Toohey JJ will be of great assistance in the difficult task of applying the North American jurisprudence to Australia. The legal debate over a trust or fiduciary

28 *Ibid* at 204-5, citing *Delgamuukw* note 123 *infra*.
29 *Ibid* at 203.
30 *Ibid* at 71 per Brennan J.
31 See F Brennan note 128 *infra* on this point.

responsibility to indigenous people that began in the United States in the 1830s has unquestionably reached Australian shores.

III. UNITED STATES

The trust relationship between the United States Government and Indians living within the United States has been described as "one of the primary cornerstones of Indian law".[32] In 1975 Congress established the American Indian Policy Review Commission (AIPRC) to review the historical and legal developments underlying the federal trust responsibility.[33] The AIPRC pronounced the trust responsibility to be "one of the *most important* as well as *most misunderstood* concepts in Federal-Indian relations".[34] One source of confusion has been the uncertain *legal basis* of the trust responsibility. Furthermore, the *application* of the trust doctrine has taken some dramatic turns over the years. Chambers points out: "One would not expect monolithic unity in a doctrine that spans 150 years, and it is not surprising that courts in different periods have interpreted the trust responsibility in the context of then contemporary dominant attitudes".[35]

The origin and history of the United States trust responsibility doctrine is reviewed below, concluding with a summary of its current status.

A. ORIGIN OF THE TRUST DOCTRINE: *CHEROKEE NATION v GEORGIA*

The birth of the trust doctrine is generally traced back to the decision of Chief Justice Marshall in the historic 1831 Supreme Court decision of *Cherokee Nation v Georgia*.[36] His Honour found that:

> ...the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else... It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations...they are in a state of

32 LB Leventhal "American Indians - The Trust Responsibility: An Overview" (1985) 8 *Hamline Law Review* 625 at 625.

33 *Ibid* at 631-2.

34 American Indian Policy Review Commission *Final Report* (1977) p 125 (emphasis added). Quoted in Leventhal note 32 *supra* at 632.

35 RP Chambers "Judicial Enforcement of the Federal Trust Responsibility to Indians" (1975) 27 *Stanford Law Review* 1213 at 1246.

36 30 US (5 Pet) 1 (1831).

> pupilage. Their relation to the United States resembles that of a ward to his guardian.[37]

This formulation left open more questions than it answered. What was the basis of the guardian-ward relationship declared by Marshall CJ? He cited neither cases, statutes nor the United States Constitution in support. Two elements in the judgment are manifestly at odds: on one hand an apparently paternalistic analogy is drawn to a guardian-ward relationship, which appears to suggest that Indians should be protected like children, but in the same passage Marshall CJ held that the Indian tribes had nationhood status.

Is the trust obligation between the United States Government and Indian people based on a relationship of parent-to-child or nation-to-nation? The seeming contradiction has never really been reconciled. Rather, one or other of these two elements of the judgment have been emphasised by judges and commentators at different times resulting in shifting applications of the principle, as the following sections demonstrate.

B. THE *KAGAMA* AND *LONE WOLF* DECISIONS

Questions of the scope and meaning of the trust or guardianship responsibility did not reach the Supreme Court again for over five decades after the *Cherokee* decisions. In the intervening period the fate of the Indians had been determined primarily by political and military processes, with the *Indian Removal Act*,[38] followed by renegotiation of treaties and tribal land cessions ending in a dramatic reduction in Indian land holdings.[39]

As Chambers points out, given the *fait accompli* in relation to Indian lands, it is not surprising that the courts in this later period "confirmed the exercise of federal power over Indians, including a power to abrogate treaty rights".[40] The 'Marshallian' guardianship concept was recast as a *source* of federal power rather than a *restraint* on the exercise of that power.[41]

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37 *Ibid* at 16-17, quoted in DM Johnston "A Theory of Crown Trust Toward Aboriginal Peoples" (1986) 18 *Ottawa Law Review* 307 at 320.

38 2 Stat 411 (1830), referred to in RP Chambers note 35 *supra* at 1223.

39 To deal with nineteenth century United States in one paragraph is, of course, to gloss over a very large chapter of the tragic history of United States/Indian relations. Chambers records that the Cherokees, for example, concluded a new treaty only three years after their success in *Worcester v Georgia* which permitted the bulk of the tribe to be marched westward on its famous 'trail of tears'. See note 35 *supra* at 1223 and the references at footnotes 47, 48 and 49 on that page.

40 Note 35 *supra* at 1223.

41 *Id.*

The approach of the period is illustrated by *United States v Kagama*.[42] Kagama was prosecuted for murdering another Indian on the Hoopa Valley Reservation under recently enacted federal legislation, the *Major Crimes Act*.[43] Federal criminal law had not previously extended to Indians committing crimes against other Indians on Indian land. Kagama challenged the constitutionality of the statute. The Supreme Court agreed that the constitutional power to regulate trade with the Indian tribes did not authorise the Act, but nonetheless upheld its constitutionality by reliance on the Federal-Indian fiduciary relationship, proclaiming:

> ...these Indian Tribes are the wards of the Nation. They are Communities dependent on the United States... From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.[44]

In other words, the duty of protection required commensurate federal power, and an extra-constitutional power to legislate for Indian tribes was created on the sole basis of the fiduciary or trust obligation.

Subsequent cases made clear that the scope of this new federal power was extensive. Chambers records, for example, that statutes granting easements and leases over Indian lands without either consent or a requirement of compensation were sustained under the 'plenary' power.[45]

The notorious decision of *Lone Wolf v Hitchcock*[46] went further to say that the 'plenary' power of Congress "in respect to the care and protection of Indians"[47] would allow Congress to unilaterally abrogate or modify a treaty. *Lone Wolf* involved a statute which distributed reservation land to individual Kiowas and Comanches and authorised the sale of undistributed reservation lands, thereby breaking up the reservation. Tribal members brought the action in an attempt to stop implementation of the statute, claiming it was in conflict with a treaty that expressly prohibited the further cession of tribal lands without tribal consent. The Court declined to uphold the claim.

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42 118 US 375 (1886) quoted in RP Chambers *ibid* at 1224. The synopsis of facts is also based on Chambers at 1224.

43 18 USC 1153 (1970) quoted in RP Chambers *id.*

44 Note 42 *supra* at 383-84 (emphasis in original), quoted in DM Johnston note 37 *supra* at 321.

45 *Cherokee Nation v Hitchcock* 187 US 294 (1902) (dealing with leases); *Cherokee Nation v Southern Kan Ry* 135 US 641 (1890) (dealing with easements), referred to in RP Chambers note 35 *supra* at 1224 and footnote 46 in that text.

46 187 US 553 (1903), referred to in RP Chambers *ibid* at 1225. The synopsis of facts is based on Chambers at 1225 and DM Johnston note 37 *supra* at 322.

47 *Lone Wolf v Hitchcock*, *ibid* at 564, quoted in RP Chambers *id.*

United States judicial interpretation reached a hypocritical high point with these decisions. Disenfranchisement of the Indians was held to be an *application* rather than a breach of the trust obligation.

The *Lone Wolf* decision has been tempered by subsequent cases placing constitutional limitations on the power of Congress. In 1937 the Supreme Court held that just compensation must be paid if treaty rights were abrogated.[48] Furthermore, a principle was established in later cases that statutes should be construed liberally in favour of Indians wherever possible so as not to result in the loss of Indian property or the abrogation of treaty rights.[49]

In a third line of decisions from 1919, discussed below, the United States' federal courts moved away from the *Kagama/Lone Wolf* line of interpretation that was so unfavourable to the Indians. The trust responsibility was utilised instead to place limits on the scope of federal executive power.

C. PROTECTION OF INDIAN PROPERTY AND RESOURCES

There is a huge body of cases relating to Indian property and resources that refer to trust responsibilities to Indians, however they must be reviewed critically. Cases concerning the protection of Indian rights very often arose under specific treaties, statutes or executive orders and agreements.[50] Many claims were brought under special jurisdictional statutes. One commentator observes: "some of these cases are gold mines of favourable language regarding the government's trust responsibilities... Nevertheless they are doubtful precedents, for the jurisdictional acts have been regarded as creating claims in and of themselves..."[51]

Other cases were brought under the *Indian Claims Commission Act*, passed in 1946, which conferred jurisdiction on the Indian Claims Commission to hear and decide claims, including claims that the Federal Government acted in a manner that was "less than fair and honourable".[52] Bartlett observes that the passage of the

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48 *Shoshone Tribe v United States* 299 US 476 (1937), referred to in RP Chambers *ibid* at 1229, footnote 77.

49 Note 35 *supra* at 1229-30, citing a number of cases in footnote 78, including the leading case of *United States v Santa Fe Pacific Ry* 314 US 339 (1941), where, according to Chambers, at 354 of the case, "a unanimous Court...declined to construe various statutes as abrogating Indian property rights to lands on which the railroad claimed a right of way. The Court held that 'an extinguishment (of Indian title) cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards'".

50 *Ibid* at 1214.

51 NJ Newton "Enforcing the Federal-Indian Trust Relationship after *Mitchell*" (1982) 31 *Catholic University Law Review* 635 at 636, footnote 10. Associate Professor Newton gives the example of *Menominee Tribe v United States* 67 F Supp 972 (1946) where the statute permitted the court to adjudicate claims based on treaty, statute or agreement *or* arising from the mismanagement of property or money. It also instructed the court to apply the same standards applicable to a private trustee.

52 See *Gila River Pima v United States* 140 F Supp 776 (1956), footnote 40 at 776-78, quoted in RH Bartlett "The Fiduciary Obligation of the Crown to the Indians" (1989) 53 *Saskatchewan Law Review* 301 at 310.

Indian Claims Commission Act made it unnecessary for the courts to consider for some years whether "federal accountability arose apart from such special jurisdiction".[53]

Nonetheless there remains a number of decisions that have held that the fiduciary responsibility of the United States to Indians standing alone created legally enforceable duties for federal officials.[54] Two early decisions of the Supreme Court were *Lane v Pueblo of Santa Rosa*,[55] (*Lane*), in 1919 and *Cramer v United States*,[56] (*Cramer*), in 1923. In *Lane*, the Secretary of the Interior was restrained from disposing of tribal lands under the general public land laws. The decision signalled a change of direction for the Supreme Court: it held that the power of the executive government was *restrained* rather than *sustained* by the guardianship responsibility. The guardianship doctrine, the Court found, "would not justify...treating the lands of the Indians as public lands of the United States, and disposing of the same under the Public Land Laws" for "[t]hat would not be an exercise of guardianship, but an act of confiscation."[57]

In *Cramer*,[58] the Supreme Court voided a federal land patent[59] which had purportedly transferred Indian-occupied land to a railway. Relying on the trust responsibility and the national policy of protecting Indian rights of occupancy, the Court held that Indian possessory rights over the land were protected although those rights were not covered by any treaty or statute. The Court held that the trust responsibility limited the authority of federal officials to issue the land patent.[60]

A subsequent Supreme Court decision to elaborate on these principles was the 1935 decision *United States v Creek Nation*.[61] The Creeks were awarded damages for the misappropriation of land from their reserve which was sold to non-Indians following an incorrect federal survey of reservation boundaries. The Court held that:

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and

53 RH Bartlett *ibid* at 310.

54 Note 35 *supra* at 1215.

55 249 US 110 (1918), referred to in DM Johnston note 37 *supra* at 322.

56 261 US 219 (1923), referred to in DM Johnston *id.*

57 Note 55 *supra* at 113, quoted in RP Chambers note 35 *supra* at 1230.

58 Synopsis of facts based on RP Chambers *ibid* at 1230-1231 and DM Johnston note 37 *supra* at 322.

59 That is, a land grant conveyed by means of a land patent document.

60 Note 35 *supra* at 1231.

61 295 US 103 (1935), referred to in DM Johnston note 37 *supra* at 322 and RP Chambers *ibid* at 1231-32. Synopsis of facts based on these two sources. It should be noted that *Creek Nation* was commenced in the Court of Claims pursuant to a special jurisdictional statute and accordingly the dicta in relation to trust responsibility could relate to that jurisdictional statute only. However, the Court suggests that the remedy may have been available anyway (at 110), therefore at least arguably the case establishes principles of general application. See RP Chambers *ibid* at 1231, footnote 85.

> management of the government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal land to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that "would not be an exercise of guardianship, but an act of confiscation".[62]

Two decisions at the District Court level decided in 1973 also found the Federal Government liable for breach of the fiduciary relationship.

In *Pyramid Lake Paiute Tribe of Indians v Morton*[63] the Court found a fiduciary obligation on the US Secretary of the Interior to respect Indian water rights to Pyramid Lake. The Secretary had issued regulations implementing a federal dam and reclamation project which reduced the level of water in Pyramid Lake, thereby endangering the lake's fishery and generally reducing the value of the lake as an asset.

The water diversions for the dam did not breach any treaty or statute, but were held to violate the government's trust responsibility to the tribe.[64] In relation to the source or authority for the finding of a trust responsibility the court declared that "the vast body of case law which recognises this trustee obligation is amply complemented by the *detailed statutory scheme* for Indian affairs set forth in Title 25 of the United States Code".[65] The decision highlighted the 'duty of loyalty' of government officials as an aspect of trust responsibility. The implementation of a federal project which harmed Indian interests was seen by the Court to be a conflict of duty and interest for the government.

The 'duty of loyalty' was not held to require the Secretary to ignore all other legitimate interests. The Court recognised that the Secretary in making a decision about water diversions would have to take into account (a) the contractual rights of the Irrigation District, (b) certain applicable court decrees; as well as (c) the Secretary's trust responsibility to the Indians. But the Court was satisfied that sufficient water could be made available for Pyramid Lake without offending the existing decrees and contracts. Accordingly the Court ordered the Secretary to submit new regulations consistent with his fiduciary duty to preserve the water. As a number of commentaries suggest, the case is significant in finding an affirmative

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62 *United States v Creek Nation, ibid* at 109-10, quoted in RH Bartlett note 52 *supra* at 309-310.

63 354 F Supp 252 (1973), referred to in RH Bartlett *ibid* at 310-311, DM Johnston note 37 *supra* at 326-327 and RP Chambers note 35 *supra* at 1233-1234.

64 *Pyramid Lake Paiute Tribe Indians v Morton, ibid* at 256-57 (emphasis added), quoted in RP Chambers *ibid* at 1233-1234 and footnote 99. The Court stated that the Secretary was obligated by his trust responsibility to deliver to the fullest extent of his statutory authority sufficient water to preserve the level of the lake and maintain the Indian fishery.

65 *Ibid* at 256, quoted in RH Bartlett note 52 *supra* at 310.

duty owed by the Federal Government to protect tribal property from injury by other federal projects.[66]

In *Manchester Band of Pomo Indians v United States*[67] the government was held liable for mismanagement of Band trust funds. The District Court held that the United States held the funds under a "fiduciary obligation" to the Band and that "the conduct of the Government is measured by the same standards applicable to private trustees".[68] The Court found the government had breached its duty "to use reasonable care and skill to make the trust property productive"[69] and was liable to pay damages.

In summary, the cases relating to a trust responsibility to protect Indian property and resources have established:

- the executive government will be held to the standards of a private trustee in the administration of Indian funds (see *Manchester Band of Pomo Indians v United States* above);
- the executive government is liable for the disposal of Indian land without compensation: for example, disposing of Indian land under general public land laws in *Lane*; conveying Indian occupied land to a railway by land patent in *Cramer*; or selling parts of a reservation after an incorrect survey of boundaries in *United States v Creek Nation.*

Protection of Indian resources was also considered in the 1983 decision *United States v Mitchell* discussed below. Here the Supreme Court, in a broad application of the concept of fiduciary duty, found the executive government liable for the mismanagement of Indian property or resources where the government has a pervasive or comprehensive control in the management of those resources.

D. *UNITED STATES V MITCHELL*

In *United States v Mitchell*,[70] (*Mitchell II*), the Supreme Court affirmed a Court of Claims decision holding the government accountable for breach of fiduciary

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66 DM Johnston note 37 *supra* at 327 and RP Chambers note 35 *supra* at 1234. The injury may, however, be specifically authorised by the legislature, as Chambers points out. The trust responsibility places limits on executive rather than legislative action.

67 363 F Supp 1238 (1973), referred to in RH Bartlett note 52 *supra* at 311, RP Chambers *ibid* at 1233, DM Johnston *ibid* at 324-5 and NJ Newton note 51 *supra* at 646.

68 *Manchester Band of Pomo Indians v United States, ibid* at 1245, quoted in RH Bartlett *id.*

69 *Id.*

70 103 S Ct 2961 (1983), referred to in DM Johnston note 37 *supra* at 328 and RH Bartlett *ibid* at 312. It should be noted that, quoting Johnston at 328 footnote 139, in *United States v Mitchell* 445 US 535 (1980) (*Mitchell I*): "the Supreme Court reversed the Court of Claims ruling that the *Indian General Allotment Act* (25 USC 332 (1970) created a fiduciary duty on the United States to manage timber resources...The Supreme Court remanded the case for consideration of alternative grounds for liability. On remand, the Court of Claims ruled

duties in its management of timber resources on the Quinault Reservation.[71] The Court reviewed the history of the statutes and regulations which vested control of the timber lands in the government, and described the Secretary of the Interior's control as 'comprehensive' and 'pervasive'.[72] The Court stated that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians"[73] and concluded:

> [T]he statutes and regulations now before us clearly give the Federal government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.[74]

The *Mitchell II* decision has been hailed by a number of commentators as providing "an equitable and coherent theory of [governmental] responsibility...".[75] Bartlett suggests "[n]o consistent explanation for the source of the fiduciary duty had emerged" until the Supreme Court decision in *Mitchell II* "clari[fied] the source of the duty."[76] Bartlett concludes:

> In the United States...it is now clear that the government has a fiduciary responsibility in relation to Indian lands. *Mitchell I* and *Mitchell II* ground that liability in the power and discretion of the government. The mark of accountability is the presence of a 'pervasive' and 'comprehensive' control in the management or disposition of the lands and resources.[77]

In a similar vein to *Mitchell II*, it was held in *Jicarilla Apache Tribe v Supron Energy Corporation*[78] that a fiduciary obligation arose from the pervasive role and comprehensive responsibility of the United States in relation to oil and gas leases over Indian land, and damages were awarded for mismanagement.

The United States cases so far discussed have involved executive government accountability for the management and disposition of Indian land and resources. A further question is whether the government's trust or fiduciary obligation may have a more general application. Two particular questions that have arisen are, firstly, whether there is a governmental obligation to protect the well-being of indigenous people, for example by providing health and education services. The second

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that timber management statutes and regulations imposed fiduciary duties and implicitly required compensation for...breach... This ruling was affirmed in *Mitchell II*."

71 DM Johnston *id.*

72 *Mitchell II* note 70 *supra* at 2970, quoted in RH Bartlett note 52 *supra* at 312.

73 *Mitchell II*, *ibid* at 2971-2, quoted in RH Bartlett *ibid* at 313.

74 *Mitchell II*, *id*, quoted in RH Bartlett *ibid* at 312-13.

75 DM Johnston note 37 *supra* at 331, see also RH Bartlett *id* and KT Ellwanger "Money Damages for Breach of the Federal-Indian Trust Relationship After Mitchell II" (1984) 59 *Washington Law Review* 675 at 686.

76 RH Bartlett *ibid* at 312.

77 *Ibid* at 313.

78 479 F Supp 536 (1979), rehearing granted 728 F 2d 1555 (1984), affirmed 782 F 2d 855 (1986), referred to in RM Bartlett *ibid* at 312-13.

question that has received attention is whether the United States Government has an obligation to protect indigenous political autonomy or self-government. These issues are taken up below.

E. EXTENT OF THE TRUST RESPONSIBILITY

(i) Duty to provide services?

> We can and should, without further delay, extend to the Indian the fundamental rights of political liberty and local self-government and the opportunities of education and economic assistance that they require in order to attain a wholesome American life. This is but the obligation of honour of a powerful nation toward a people living among us and dependent upon our protection.[79]

In His letter from President FD Roosevelt to Congressman Howard, contained in a report to Congress, 1934, President Roosevelt's 'obligation of honour' appears to have been treated as a moral rather than legally enforceable obligation in the United States. There are very few examples of the courts enforcing a trust responsibility to protect non-proprietary interests such as 'local self-government' or educational or other 'opportunities'.

The possibility of a trust obligation to provide particular levels of government services to indigenous people has arisen in a handful of cases discussed below. Only in *White v Califano*[80] were the claimants successful, however the case appears likely to be confined to its facts (discussion follows).

In *Gila River Pima-Maricopa Indian Community v United States*[81] the Court of Claims upheld a decision by the Indian Claims Commission refusing damages for breach of the government's "general obligation as guardian of the Indians"[82] to provide adequate educational and medical facilities. The Court found there was no obligation to provide these services in the absence of express provision in a treaty, agreement, order or statute.[83]

Morton v Ruiz,[84] a case sometimes cited in support of the principle that the trust responsibility extends to the provision of services and benefits to Indians, held that the United States Bureau of Indian Affairs was obliged to pay social security benefits to two unemployed Papago Indians. However the issue was whether

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79 As quoted in *Morton v Mancari* (1973) 417 US 535 at 542 footnote 10 (quoting HR REP No 1804, 73d Cong, 2D Sess, 8 (1934)).

80 581 F 2d 697 (1978).

81 427 F 2d 1194 (1970).

82 *Ibid* at 1195.

83 *Gila River* note 52 *supra* at 1198. RP Chambers note 35 *supra* suggests, at 1245, that *Gila River* "may simply represent a determination that Congress did not confer jurisdiction on the Indian Claims Commission to award damages for such a claim", however, the plaintiffs were proceeding under a special jurisdictional statute and it would have been more rather than less difficult to bring the claim before a court of general jurisdiction.

84 415 US 199 (1974), and see RP Chambers *ibid* at 1245-46.

benefits were payable to Indians living off the reservation as well as to those living on the reservation, and the result turned on a number of administrative law and other issues rather than on a general trust responsibility owed by the government.[85]

The Court of Appeal found in *White v Califano*[86] that the Federal Government was required to pay the hospital costs of Ms Florence Red Dog, an Oglala Sioux committed to a state hospital by a tribal court suffering severe mental illness. The facts were compelling, as Newton points out: "emergency hospitalisation was required, the tribe had no medical facilities and both the federal and state governments were refusing to pay."[87] The Court found that since in the circumstances there was no duty on the state to assist, responsibility fell to the United States. The following statement of the District Court was affirmed:

> We think that Congress has unambiguously declared that the federal government has a legal responsibility to provide health care to Indians. This stems from the "unique relationship" between Indians and the federal government, a relationship that is reflected in hundreds of cases and is further made obvious by the fact that one bulging volume of the US Code pertains only to Indians.[88]

It is difficult to know how far the responsibility to provide health care extends beyond the fairly unique facts in *White v Califano*. The decision does not appear to have been followed by cases asserting a more general responsibility.

In summary there is very little in the way of American precedents to suggest that a trust obligation to furnish government services to Indians is enforceable.[89]

(ii) Protection of autonomy or self-government

Although the protection of tribal self-government appeared to be an underlying purpose of the trust doctrine as originally articulated by Chief Justice Marshall,[90] "no court" according to Chambers "has suggested that federal officials can be enjoined from actions which interfere with tribal authority".[91]

Some commentators have argued that the trust responsibility *should* encompass protection of the right to self-government. The arguments are framed with reference to the *Cherokee* decisions, by analogy to international law or more generally on the basis of the indigenous-government relationship:

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85 See RP Chambers *ibid* at 1246.

86 Note 80 *supra*.

87 NJ Newton note 51 *supra* at 649.

88 Note 80 *supra* at 698.

89 But see RP Chambers note 35 *supra* at 1243-46 for an argument that the trust responsibility should include a duty to provide services.

90 In *Cherokee Nation v Georgia* note 36 *supra*.

91 Note 35 *supra* at 1242-43. Chambers was writing in 1975 but research has not located any case since then which finds otherwise.

> ...the most just and sensible interpretation of the trust doctrine would require the United States, as the Indian tribes' trustee, to afford the tribes enough political autonomy to enable them to chart their own economic, social, and cultural development.[92]

This position was said to be supported both by moral principle[93] and by the *Cherokee* decisions: "Marshall's intention was not to limit the tribes' autonomy, but to affirm the United States' duty to protect it."[94]

Canadian writers McMurtry and Pratt draw an analogy between Indian nations and trust territories as found in international law where the "inherent self-governing powers of a trust territory are held in a protective trust".[95] They suggest the inherent right to self government of the Indian nations "is held in a similar protective trust-like fiduciary relationship cognizable by [a court]".[96] But, as they themselves observe, an international law concept is useful by analogy, but is not determinative.[97] They also base their argument on the history of Indian-government relations:

> ...Indian people have a special status derived from their pre-existing occupation of the soil, their pre-existing self-government and their pre-existing power to deal with other sovereigns peacefully or with hostility. Today, the Indian people are descendents of nations who refrained from hostility in express reliance upon the self-imposed protection of the Crown, that reliance must be respected, as must the retained sovereign powers (albeit impaired) of those nations.[98]

That is a powerful contention, and conceivably a similar line of argument could be developed in Australia. This aspect of fiduciary obligation clearly warrants further study.[99] This paper goes no further than to note that, to date, neither the North American judiciary, nor the Australian, have shown much sign of moving to develop a trust responsibility to protect indigenous autonomy or self-government.

F. SUMMARY OF UNITED STATES CASES

While some commentators, as discussed above, have argued for a broader conception of the trust doctrine to encompass a duty on the government to provide

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92 Anon "Note: Re-thinking the Trust Doctrine in Federal Indian Law" (1984) *Harvard Law Review* 422 at 429-30.

93 *Id.*

94 *Ibid* at 434-35, discussing *Cherokee Nation v Georgia* note 36 *supra.*

95 WR McMurtry and A Pratt "Indians and the Fiduciary Concept, Self-Government and the Constitution: *Guerin* in Perspective" (1986) 3 *Canadian Native Law Reporter* 19 at 40.

96 *Ibid* at 41.

97 *Id.*

98 *Id.*

99 See for example, for discussion of this issue in the Canadian context, B Slattery "First Nations and the Constitution: a Question of Trust" (1992) 71 *Canadian Bar Review* 261 and F Cassidy (ed) *Aboriginal Title in British Columbia: Delgamuukw v The Queen* (1992).

adequate levels of funding and services to Indian communities, and to protect rights of self-government, such a broad view has not received judicial recognition or endorsement. An appropriate legal basis to support this broad duty would need to be found if such a duty is to be pursued in judicial as opposed to political forums.

The United States courts have, however, held the executive government accountable for its management and disposition of Indian lands and assets - a narrower but nonetheless important application of the trust doctrine.

V. CANADA

Unlike in the United States, in Canada there is not a large body of cases concerning a trust or fiduciary obligation by the Crown to indigenous people. However over the last decade there have been some important decisions in which the United States trust cases have been applied and the concept of a fiduciary or trust obligation further developed. Three of the leading decisions are discussed below in some detail.

A. *GUERIN v THE QUEEN*

Canada's leading case in relation to the fiduciary obligations to indigenous people is the 1984 Supreme Court decision of *Guerin v The Queen,*[100] (*Guerin*). The decision has been analysed in a number of Canadian articles.[101]

The facts in *Guerin* were that the Musqueam Indian Reserve included some very valuable land situated within the City of Vancouver. The Shaughnessey Heights Golf Club was interested in a portion of the reserve land for a golf club and in 1955 officials of the Indian Affairs branch proposed to the Musqueam band that the land be surrendered and then leased to the golf club for the benefit of the band.

A proposal from the golf club in relation to the terms of the lease was not given to the band, although some of the terms were outlined. The band resolved to accept the surrender. The rent for the initial lease period of the 75 year lease was agreed in a meeting between representatives of the band council, the golf club and the Department of Indian Affairs, but it later transpired that other terms of the lease bore little resemblance to those discussed with the Musqueam band and were disadvantageous to the band. The trial judge found as a fact that the band would

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100 (1984) 13 DLR (4th) 321.

101 See generally note 95 *supra*, DM Johnston note 37 *supra*, RH Bartlett note 52 *supra*, RH Bartlett "You Can't Trust the Crown: The Fiduciary Obligation of the Crown to the Indians: *Guerin v The Queen*" (1984-5) 49 *Saskatchewan Law Review* 367 and J Hurley "The Crown's Fiduciary Duty and Indian Title: *Guerin v The Queen*" (1985) 30 *McGill Law Journal* 559.

not have assented to the surrender if they had known all the terms of the lease.[102] Furthermore the band was not given a copy of the lease and did not receive one until 12 years later in 1970.

The trial judge found there had been a breach of trust by the federal Crown as trustee of the surrendered lands and awarded the band $10,000,000 in damages. The trial judgment was reversed by the Federal Court of Appeal but subsequently restored by the Supreme Court of Canada.

(i) The basis of the decision: Justice Dickson

Justice Dickson (with whom Beetz, Chouinard and Lamer JJ concurred) did not agree with the trial judge that a trust had been created between the Crown and the Musqueam band, although he considered that the Crown had an equitable obligation that was very close to a trust:

> This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.[103]

According to Dickson J the fiduciary obligation was based on the existence of native title to land, and its restricted alienability:

> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in land does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.
>
> An Indian band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763 (RSC 1970, App II, No 1). It is still recognised in the surrender provisions of the *Indian Act*.[104]

Justice Dickson concluded that the Crown was in breach of its fiduciary duty to the Musqueam and liable to pay the $10,000,000 damages assessed by the trial judge.

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102 Note 100 *supra* at 330.
103 *Ibid* at 334.
104 *Id.*

(ii) Justice Wilson

Justice Wilson (with whom Ritchie and McIntyre JJ concurred) also found a fiduciary obligation in the Crown with respect to Indian land.[105] Her Honour started with the same premise as Dickson J, that the fiduciary obligation "...has its roots in the aboriginal title of Canada's Indians...".[106] From that point on, however, her reasoning differs in some important respects.

Justice Wilson found that:

> ...the Indian bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it... The bands do not have the fee in the lands; their interest is a limited one. But it is an interest which cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree. I believe that in this sense the crown has a fiduciary obligation to the Indian bands with respect to the uses to which reserve land may be put and that s 18 is a statutory acknowledgement of that obligation.[107]

Justice Wilson is here referring to s 18(1) of the *Indian Act*[108] which states in part that "reserves shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart...".[109] Significantly for Australian observers, Wilson J found that s 18 did not itself create a fiduciary obligation in the Crown, but rather s 18 recognised the existence of the fiduciary obligation which had more ancient origins in aboriginal or native title.[110]

Justice Wilson then found that the general fiduciary duty of the Crown to hold the reserve land for the use and benefit of the band crystallised on the surrender of the 162 acres of reserve land for lease to the golf club into "an express trust of specific land for a specific purpose".[111] Her Honour went on to say:

> There is no magic to the creation of a trust... I think that in the circumstances of this case as found by the learned trial judge the Crown was compelled in equity upon the surrender to hold the surrendered land in trust for the purpose of the lease which the band members had approved as being for their benefit. [112]

In the end result Wilson J agreed with Dickson J that the trial judgment and damages award should be reinstated, but on the slightly different basis that the

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105 The remaining judge, Estey J, in a much criticised judgment analysed the Crown-Indian relationship to be one of agent and principal.

106 Note 100 *supra* at 356.

107 *Ibid* at 357.

108 *Indian Act* RSC 1952 c 149.

109 *Ibid* s 18(1), cited in *Guerin* note 100 *supra* at 356.

110 Note 100 *supra* at 356.

111 *Ibid* at 361.

112 *Id.*

Crown had acted in breach of trust rather than in breach of a *sui generis* fiduciary duty.

One question raised by *Guerin* is whether the decision would apply only to tribal reserve lands. According to Dickson J it made no difference, for the purpose of finding a fiduciary obligation, whether one was dealing with an Indian reserve or traditional tribal lands as the Indian interest was the same in both cases.[113] In both cases there was Indian or aboriginal or native title.

It is not so clear from the judgment of Wilson J whether a fiduciary obligation could be found with respect to both reserve and traditional lands. Her Honour did not refer specifically to non-reserve (or traditional) Indian lands, and the case before her did not require it. Justice Wilson's finding that "[t]he [fiduciary] obligation has its roots in the aboriginal title of Canada's Indians...",[114] however, would suggest that her analysis could apply equally to reserve and traditional lands.

A further question is whether a fiduciary or trust obligation will only arise on the surrender of aboriginal land to the Crown. An important difference between the judgments of Dickson J and Wilson J, was that Wilson J found that there was a general fiduciary obligation owed by the Crown based on the nature of the Indian interest in land, which, in the circumstances of *Guerin* crystallised into a trust when the land was surrendered by the band to the Crown. Justice Dickson, on the other hand, appears to hold that the fiduciary obligation did not arise until the land was surrendered.[115]

This very narrow conclusion of Dickson J would restrict considerably the ambit of the Crown's fiduciary obligations. This aspect of his judgment has been criticised.[116] In *Mabo* for example Toohey J cites the judgment of Dickson J with approval in finding a fiduciary obligation on the part of the Crown, but he clearly does not consider that the obligation arises only in the narrow circumstances of a surrender of land from Aborigines to the Crown.

(iii) Significance of Guerin

In one sense *Guerin* is a very narrow decision. It arose out of a fact situation where the role played by the Crown had very clearly been less than honourable. However, some broad principles were decided that extend beyond the facts in *Guerin*. The case established authoritatively that in Canada, as in the United States, the Crown may be held accountable for its role in the management and

113 *Ibid* at 336-37.
114 *Ibid* at 356.
115 *Ibid* at 339 and 342.
116 See for example RH Bartlett (1984-5) note 101 *supra* at 372.

disposition of aboriginal land and resources. The Court split over whether a fiduciary obligation would arise only when land was surrendered to the Crown (four judges held this view), or whether the obligation was a more general one for the Crown to protect aboriginal land interests (three judges held this view).

It is suggested the broader view would have greater support from the American authorities, and when the *Guerin* decision was applied in the later Canadian Supreme Court decision of *R v Sparrow*,[117] (*Sparrow*), it was the broader formulation of the fiduciary obligation that was approved:

> In *Guerin*...[t]his court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation...the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary aboriginal rights must be defined in light of this historic relationship.[118]

The decision in *R v Sparrow* is now considered in further detail.[119]

B. *R v SPARROW*

The appellant Ronald Sparrow had been convicted under Canada's *Fisheries Act* 1970 for the offence of fishing with a drift net longer than permitted by the Indian food fishing licence issued to his band, the Musqueam of British Columbia. Sparrow's defence was that he was exercising his aboriginal right to fish, and he called in aid s 35(1) of the *Constitution Act* 1982:

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

After deciding that the aboriginal right to fish had not been extinguished by the *Fisheries Act* or the regulations under the Act, the Court went on to fashion an approach to determining whether legislation which affects the exercise of aboriginal rights is contrary to s 35(1). Of significance here is the importance accorded to the Crown's fiduciary obligation to aboriginal peoples in this process.

"The honour of the Crown is at stake in dealing with aboriginal peoples"[120] the Court held. "The special trust relationship and the responsibility of the government

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117 (1990) 70 DLR (4th) 385.

118 *Ibid* at 408.

119 In relation to this decision see generally G Nettheim "*Sparrow v The Queen*" (1991) 2 *Aboriginal Law Bulletin* 12 and F Cassidy "The Spirit of *Sparrow*: Aboriginal Rights and 'The Honour of the Crown'", paper presented at Symposium entitled "The Sparrow Case: Aboriginal Rights and the Constitution" 19 November 1990, Victoria, Canada. Both sources have been drawn on in the following synopsis of the case.

120 Note 117 *supra* at 413.

vis-a-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified."[121]

The Court found that the onus was on the Crown to show adequate justification of regulatory measures. This would involve both establishing a valid legislative objective and dealing with issues involving 'the honour of the Crown'. The kind of questions to be addressed would include (in a case such as *Sparrow*):

> ...whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measure being implemented.[122]

The Court held that aboriginal rights are not absolute; the exercise of aboriginal rights could validly be regulated. In striking that balance the Court found a guiding principle that federal power must be reconciled with federal duty. In other words that federal power to extinguish rights must be balanced against the Crown's trust or fiduciary obligations to aboriginal peoples. The Court went on to say that the best way to reconcile federal power and duty was to require the Crown to justify any government regulation that infringed or denied aboriginal rights.

The judges in *Sparrow* appeared to be saying that in a modern plural society Indian rights must be balanced against competing interests. But there are historical considerations that require an important factor weighing in the balance is a responsibility to aboriginal people. The responsibility requires that aboriginal rights be protected unless substantial and compelling policy objectives require their limitation.

Clearly Canada is different to Australia in that aboriginal rights have been given constitutional protection under s 35(1). Without such protection in Australia it is more problematic to reconcile the concepts of fiduciary obligation and parliamentary sovereignty. Nonetheless, *Sparrow* gives authoritative recognition to the principle of a general fiduciary or trust obligation to indigenous people and shows how this principle can be used in the difficult task of balancing indigenous and settler interests.

C. *DELGAMUUKW AND OTHERS v THE QUEEN*

In 1991 McEachern CJ of the Supreme Court of British Columbia dismissed all claims of the Gitksan and Wet'suwet'en plaintiffs in the controversial decision of *Delgamuukw and Others v The Queen*,[123] (*Delgamuukw*). The plaintiffs had

121 *Id.*
122 *Ibid* at 416-7.
123 (1991) 79 DLR (4th) 185.

claimed aboriginal title, including ownership and jurisdiction over approximately 22 000 square miles of British Columbia.[124]

The major issues for decision were whether aboriginal title could be established and whether it had been extinguished, but his Honour McEachern CJ also made findings in relation to the fiduciary obligations of the Crown. The decision requires cautious interpretation as it has been widely criticised[125] and is currently on appeal to the British Columbia Court of Appeal with an assumption by all parties that the issues will ultimately be resolved by the Supreme Court of Canada.[126]

Although the plaintiffs sought no declaration with respect to fiduciary obligations, the Chief Justice made the following findings (the only findings at all positive to the plaintiffs):

> 30. ...The Crown promised the Indians of the colony...that they (along with all other residents), but subject to the general law, could continue to use the unoccupied or vacant Crown land of the colony for purposes equivalent to aboriginal rights until such lands were required for an adverse purpose...
>
> 34. ...The province has a continuing fiduciary duty to permit Indians to use vacant Crown lands for aboriginal purposes. The honour of the Crown imposes an obligation of fair dealing in this respect upon the province which is enforceable by law.
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> 35. The plaintiffs, on behalf of the Gitksan and Wet'suwet'en people are accordingly entitled to a Declaration confirming their legal right to use vacant Crown land for aboriginal purposes subject to the general law of the province.[127]

As commentators have noted,[128] the right declared by McEachern CJ to use vacant Crown land has no great substance as it may be taken away by ordinary legislation or by the Crown dedicating the land for another purpose. For the purposes of the debate in relation to fiduciary obligations, however, it was nonetheless significant that his Honour based a fiduciary obligation to ensure no arbitrary interference with aboriginal sustenance practices on "[t]he unilateral extinguishment of aboriginal interest" and the "general obligation of the Crown to care for its aboriginal peoples"[129] as well as the Crown's promise to the people in that particular case.

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124 My description of the facts draws on the case note by PR Grant "*Delgamuukw and Others v The Queen*" (1991) 2 *Aboriginal Law Bulletin* 26.

125 See *ibid* at 26, RH Bartlett "Delgamuukw and Bear Island: The Affirmation of Aboriginal Rights in Canada" (1991) 2 *Aboriginal Law Bulletin* 7, and F Cassidy note 119 *supra* at 2.

126 Note 124 *supra* at 27. [NB: The decision of the full court of the Supreme Court of Canada was handed down on 25 June 1993, the decision has not been reported as at 1 August 1993]

127 Note 123 *supra* at 197-8.

128 RH Bartlett (1991) note 125 *supra* at 8 and F Brennan "*Mabo* and the *Racial Discrimination Act* 1975: The Limits of Native Title and Fiduciary Duty Under Australia's Sovereign Parliaments" (1993) 15 *Sydney Law Review* 206.

129 Note 123 *supra* at 197-8.

Furthermore, while discussing the question of extinguishment of aboriginal title and rejecting the Crown submission that many of the areas claimed had been abandoned by the relevant indigenous people, the Chief Justice:

> ...stressed that the onus of showing abandonment was on the Crown, and in considering if that onus had been met, regard must be had to the honour of the Crown - the "Court cannot permit the Crown to pounce too quickly" (p 462). He refused to consider that any particular time would be sufficient, but rather emphasised the need to look at all the circumstances - the "Court must look objectively at what may be a subjective state of mind." The evidence on abandonment before the Court was of Indians leaving the land and migrating to villages for over 90 years, although many still hunted, fished and picked berries by hand on the land. The Chief Justice concluded (p 473): "I do not think that I can safely conclude that the intention to use these lands for aboriginal purposes has been abandoned even though many Indians have not used them for many years..."[130]

As Bartlett points out, in Australia the question of abandonment of traditional lands by Aboriginal people is likely to be emphasised by the states[131] (and territories) in settling all *Mabo* style claims. In *Delgamuukw*, McEachern CJ gives authority to the view that a conservative approach to finding abandonment should be taken: an approach tempered by the concept of 'the honour of the Crown' requiring that the Crown not be too quick in jumping in to allege abandonment.

D. SUMMARY OF THE CANADIAN DECISIONS

The decision in *Guerin* established that when the government negotiates a lease or other agreement with a third party over aboriginal land or resources they are held to the standard of a trustee, or in any case a very similar standard. Where government officials fail to act in the best interests of aboriginal people, or contrary to their wishes, and fail to disclose important information - as in *Guerin* - they will be in breach of their trust or fiduciary duty. More generally, the decision establishes that the government has a duty to protect aboriginal land interests.

In *Sparrow,* the concept of fiduciary obligation was applied in a very different situation, but the decision was based on the same principle as in *Guerin*, that governmental power to extinguish or regulate aboriginal rights is tempered by a fiduciary obligation to act for the benefit of aboriginal people. *Sparrow* held that a proper balance could be sought by putting the onus on the government to justify incursions on aboriginal rights through a procedure detailed in the decision.

In *Delgamuukw*, McEachern CJ found that the idea of governmental obligation to aboriginal people or 'the honour of the Crown' was a restraint on the Crown

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130 RH Bartlett (1991) note 125 *supra* at 8.
131 *Id.*

alleging traditional lands had been abandoned - and hence traditional or native title had been extinguished.

V. IMPLICATIONS AND CONCLUSIONS

Finally it is left to consider how the North American case law may possibly be utilised and applied in Australia.

The firmest basis for a fiduciary obligation is where the government has direct control over Aboriginal funds or land. For example where the government holds funds such as mining royalties or compensation moneys. With respect to land a fiduciary obligation will most clearly arise in situations such as the Canadian case of *Guerin* where indigenous owned land is surrendered to the Crown - because it is not able to be alienated except to the Crown - so that it may be leased for a commercial purpose as a source of revenue for the indigenous land owners. This kind of situation may now arise in Australia as we start to have areas of land held under native title.

The principle espoused in the United States case *Mitchell II* that the government may be held accountable where it has comprehensive control over the management of Aboriginal land or resources may be significant, particularly in relation to national parks on Aboriginal land. It may also be relevant in relation to Aboriginal reserves over which governments very often have pervasive control.

A further question is whether the fiduciary obligation could be used to restrain government activities that are not *on* Aboriginal land but nonetheless have a detrimental effect on Aboriginal owned land or perhaps rights such as hunting or fishing rights. Could limits be placed, for example, on an up-river government project that was badly affecting down-river fishing rights, as in the United States case of *Pyramid Lake Paiute Tribe of Indians v Morton*? This possibility requires further examination, as does the general question of the extent to which the fiduciary duty is an affirmative duty to *protect* Aboriginal land and resources, as some of the cases seem to suggest.[132]

The overall conclusion from the North American cases is that the concept of a fiduciary or trust obligation has generally been used to hold the government accountable for its involvement in the management and disposition of indigenous property and resources, including incidents of native title such as usufructuary rights. Arguments have been put for a broader conception of the duty to include a responsibility for the well being of indigenous people to be exercised by providing services and funding, or a responsibility to develop rights of self government. Such

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132 See for example *Guerin* note 100 *supra* per Wilson J.

claims have not been very successful to date in the courts. However, these ideas are being developed, particularly in Canada.

On close examination the fiduciary obligation of governments to indigenous people has been applied, to date, in a relatively narrow set of circumstances. Even so, it may be useful to utilise those precedents in Australia. Developments in the application of the fiduciary obligation in North America should also be watched with interest.