Duty, breach and remedy:
A fiduciary argument for government funding of Aboriginal health

by

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Abstract

This thesis argues that there is a fiduciary duty on the Government of Canada to provide extended health benefits to Aboriginal peoples. These benefits are the legal remedy for the Crown’s multiple breaches of its fiduciary duty to Aboriginal peoples. The duty is rooted in the status of Aboriginal peoples as original inhabitants of Canada and who never ceded their sovereignty, which included a right to maintain traditional ways of life. The Crown acknowledged this duty in the Royal Proclamation of 1763, whose protective language is evocative of fiduciary obligations. The Crown breached its obligation through sharp practice in the negotiation of and failure to implement treaties, introduction of the Indian Act, and in the establishment of the residential schools system. These acts of omission or commission led to a dispossession of Aboriginal peoples from traditional lands and to the appalling levels of health in Aboriginal communities today.
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Chapter 1: The Non-Insured Health Benefits program – federal benevolence or fiduciary obligation?

This thesis argues that there is a fiduciary obligation on the federal government to provide the Non-Insured Health Benefits program (NIHB), the extended health plan provided to Inuit and status Indians by the Government of Canada. Such an argument has long been made both politically by organizations such as the Assembly of First Nations (AFN) \(^1\) and by others.\(^2\) However, it is an argument that has been asserted rather than developed. Too often, the efforts become bogged down in categorization – how to characterize particular claims so as to increase the chances of finding favour with the courts in a bid to receive the judicial stamp of fiduciary approval. Were there a more elaborated case for legal recognition, it would be possible for First Nations to take a more muscular approach at the table with the Government of Canada since there would be a credible threat of litigation if no comprehensive response to NIHB problems were forthcoming.

Often, the argument that there is such a fiduciary duty to provide the NIHB and other health care is made with a certain wistfulness. For example, Constance MacIntosh in her assessment of the possible legal avenues finds merit in approaches based on treaty obligations and the *Royal Proclamation of 1763*\(^3\). However, she concludes that “[a]n argument based on fiduciary duty obligations, while more difficult to make, would result in benefits for many more Aboriginal people.”\(^4\) The objective of this thesis is to advance the worthy objective identified by MacIntosh.

This is not only an intellectual and legal project but very much a health project. With the Government of Canada single-mindedly focused on a goal of cost containment, coverage and reimbursement issues related to the NIHB have become ever more acute.

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\(^3\) *Royal Proclamation 1763 (UK)*, reprinted in RSC 1985, App II, No 1 (*Royal Proclamation*).

and are felt very intimately by First Nations and Inuit needing pharmaceuticals and health services but not being able to obtain them. Whereas before the argument that there is a fiduciary obligation was ancillary to the political argument for the NIHB, it now commands a new urgency as the political process has proven unable to stop the erosion of the existing NIHB program. These unfortunate circumstances offer a propitious moment in which to consider and reconsider the fiduciary argument as it has been made in relation to the legal obligation to provide the NIHB, and to critically consider assumptions about health and the *sui generis* fiduciary duty on the Crown to Aboriginal peoples that is a centrepiece of Canada's new constitutional order.

**In the beginning, Guerin**

The fiduciary argument for the NIHB and generally as it has developed to this point emerges out of the decision of Dickson J (as he then was) in *Guerin v R*[^5], in which he relied on a *sui generis* fiduciary duty to Aboriginal peoples as a way to find a compromise on a badly divided court struggling to resolve an issue of a lease by the Crown to a golf club of Aboriginal land at less than the market value. Whereas Estey and Wilson JJ relied on agency and trusts approaches respectively to resolve the issue, Dickson J looked to the nature of Aboriginal land interests, which were unique and therefore deserving of a different treatment. “The situation of the Indians is entirely different,” Dickson declared. “Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision.”[^6]

As Dickson’s biographers point out, his decision was surprising not only for its novelty (he reached it “without regard to any statute or treaty”), but also for the fact that “six years earlier he had avoided recognizing such a pre-existing aboriginal legal right in another case from British Columbia.”[^7] In side-stepping the issue in that case, he stated: “Claims to aboriginal title are woven with history, legend, politics and moral obligations.”[^7]

[^5]: [1984] 2 SCR 335, 12 DLR 4th 321 [*Guerin*].
[^7]: *Kruger*, *ibid* at para 109.
However, as I observe later, although it has been celebrated as an important breakthrough for Aboriginal legal rights, *Guerin* is a limited decision, both in its ability to relate the *sui generis* duty to the fiduciary duty generally, and in its appreciation of the relationship between Aboriginal people and their traditional land. In *Guerin*, Dickson J found that the nature of the legal right gives rise to a fiduciary duty, because Indians could not themselves transfer title of their land but first had to transfer it to the Crown. “The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.” As Sharpe and Roach observe:

Dickson sought to avoid some of the paternalistic overtones of the fiduciary duty approach. He stressed that the crown had breached the fiduciary duty not because it had misjudged what was in the band’s best interests but because it had not consulted the band about the terms of the golf-course lease. Viewed in this light, the imposition of a fiduciary duty was not a paternalistic edict to take care of the Indians, but rather a means to ensure that Aboriginal people were consulted and could participate before the crown made decisions that affected their interests.

There is some evidence that Dickson himself harboured paternalistic views. Justice Gerard La Forest, who served with Dickson and later co-authored *R v Sparrow* with him, told Dickson’s biographers that he “thought that Dickson believed that aboriginal people ‘needed to be taken care of in a way’ and that sometimes Dickson ‘was too good to them for their own good.’”

However, in the three decades since *Guerin* was decided, this aspect of the case – the supposed departure from earlier jurisprudential and other paternalism toward Aboriginal people – has received much positive commentary. It has, for example, been contrasted with earlier cases, such as Rand J’s decision in *St. Ann’s Island Shooting & Fishing Club Ltd. v R*, in which he stated that the *Indian Act* “embod[ed] the accepted view that these aborigines are...wards of the state, whose care and welfare are a political

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8 *Guerin*, supra note 5 at 376.
9 *A Judge’s Journey*, supra note 6 at 446.
10 [1990] 1 SCR 1075, 70 DLR 4th 385 [Sparrow].
11 *A Judge’s Journey*, supra note 6 at 446.
12 [1950] SCR 211, [1950] 2 DLR 225 [St Ann’s Island].
13 RSC 1985, c I-5.
trust of the highest obligation.”\textsuperscript{14} The vision of Aboriginal people articulated in \textit{St. Ann’s} is suggestive of more common forms of fiduciary duty (parent-child, for example) in which the protective aspect is fundamental to the duty.

In this thesis, I reconsider the merits of the Dicksonian view that the fiduciary duty owing to Aboriginal people is unique. Rather, I argue that the classic fiduciary duty is also applicable to many aspects of the relationship between the Crown and Aboriginal people. Furthermore, I suggest that the \textit{sui generis} fiduciary duty has suffered stunted growth because of the decision in \textit{Wewaykum Indian Band v Canada}\textsuperscript{15} by Binnie J, who has done more than anyone to prevent the development of an expansive concept of the \textit{sui generis} fiduciary duty. In contrast, fiduciary law in the non-Aboriginal area has continued to develop, in particular in the crafting of remedies to respond to equitable wrongs.\textsuperscript{16}

I suggest that the vision of Aboriginal peoples as “sovereign” implicit in \textit{Guerin} is more aspirational than actual, and has been disadvantageous rather than beneficial to Aboriginal peoples. As I argue, the Crown made certain undertakings – notably in the \textit{Royal Proclamation of 1763}\textsuperscript{17} – to be protective of the land and traditional ways of living of Aboriginal peoples. These undertakings gave rise to fiduciary duties to protect land and tradition, which were subsequently breached in multiple instances. The breach of these fiduciary duties to protect now gives rise to certain fiduciary remedies, one of which is the provision of health services necessary to put Aboriginal peoples in the state of health they would have been in had the Crown not breached its fiduciary duty. As I argue in Chapter 4, the responsibility to provide health benefits is fundamentally related to a failure by the Crown to fulfil responsibilities undertaken in the \textit{Royal Proclamation}, which included the promise to be protective of Aboriginal peoples’ relationship with their traditional territory, on which health and well-being as understood in Indigenous contexts is ultimately dependent.\textsuperscript{18}

\begin{itemize}
  \item \textsuperscript{14} \textit{St Ann’s Island}, \textit{supra} note 12 at 232.
  \item \textsuperscript{15} 2002 SCC 79, [2002] 4 SCR 245.
  \item \textsuperscript{16} See discussion in Chapter 2 \textit{infra} at note 19 and accompanying text at the evolution of fiduciary duty in the commercial context.
  \item \textsuperscript{17} \textit{Royal Proclamation}, \textit{supra} note 3.
  \item \textsuperscript{18} See discussion in Chapter 4 \textit{infra} at note 44 and accompanying text for authorities on the connection between land and “health” as it is understood in Aboriginal contexts.
\end{itemize}
Along with the tensions in the *sui generis* version of fiduciary duty applied to the Crown in its dealings with Aboriginal peoples, there are the theoretical deficiencies in legal thinking about fiduciary duty. In reviewing the historical development of the concept of fiduciary duty, I note that the concept has not evolved into a coherent whole but has developed piecemeal, the concerns to which it has been called upon to respond accreting over time, leading to the construction of a shaky and uneven edifice.

"We have shown an overwhelming reluctance to define or in any way 'pin down' the fiduciary relationship," Shepherd writes, owing to the "intrinsically non-rational" nature of the fiduciary concept and resulting in a "tendency in the courts to rely very heavily on specific rules rather than on general principles [and] the overly mechanical or technical application of those rules without any consideration of their underlying rationale."20

However, I suggest that the undefined nature of the duty is inherent in the nature of the notion of fiduciary duty and in the remedies that it makes available. As Canadian courts have found, "fiduciary duty" is a flexible notion ideal for crafting remedies which the law would not otherwise provide, which is entirely in keeping with the role of equity at the service of the "conscience of the courts."21

The NIHB – conceived in dispute and continuing so

Since the inception of the NIHB, there have been disputes between the Government of Canada and organizations such as the AFN about the legal status of the NIHB (and other benefit programs).22 Is the NIHB, as the Government claims, provided on a no-obligation, policy basis or is there a legal obligation to provide it?

Whether or not there is a legal obligation to provide the NIHB is significant not only legally but also to the immediate health needs of First Nations peoples and communities.

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As I describe further in the next chapter, the NIHB provides health services (such as vision and dental care and supplies for people with diabetes) not available through basic public healthcare, and also funds medical travel (vital to residents of fly-in communities). I suggest that the absence of a developed legal argument for the claim that there is an obligation to provide the NIHB is directly related to coverage and operational difficulties in the program, which are a major irritant in current relations with First Nations\textsuperscript{23} and the Government of Canada.\textsuperscript{24}

However, in order for there to be a viable argument for such a fiduciary remedy, we must also re-imagine the meaning of “health” as it concerns Aboriginal peoples and reconsider the place of the NIHB in efforts to improve the health and well-being of those who are covered by the program (currently status Indians). I argue that the meaning of health assumed by the NIHB – focused on pharmaceuticals, eye glasses, dental care and other standard medical services not covered by provincial medicare plans – does not adequately reflect traditional and culturally appropriate modes of health and wellness. Developing a more holistic approach to health – of which the NIHB would be a component but not the centrepiece – is key to not only improving overall health but crafting a viable argument that there is a fiduciary obligation on the federal government to provide such a system of expanded services.

Such an argument locates present health problems in a? historical context, in the dispossession of land that occurred post-contact through disregard of the Royal Proclamation of 1763\textsuperscript{25}, sharp practice in the negotiation and failure to implement the numbered treaties, introduction of the Indian Act\textsuperscript{26} without consultation, and introduction of residential schools. In each instance, First Nations peoples lost their relationship with

\textsuperscript{23} See, for example, “Concerns raised over Non-Insured Health Benefits program” (January 23, 2014), online: <http://www.wawataynews.ca/node/25321> [Wawatay News].

\textsuperscript{24} In May 2014, the Minister of Health announced a review of the NIHB. House of Commons, Standing Committee on Health, Evidence Number 28 (15 May 2014) 09:00 (Minister of Health Rona Ambrose).

\textsuperscript{25} Royal Proclamation, supra note 3.

\textsuperscript{26} Supra note 13.
their lands and consequently their sense of spiritual well-being which, in the Indigenous way of knowing, is inseparable from physical health.²⁷

Therefore, the project of crafting an argument that there is a legal argument on the federal government to provide the NIHB is not only a legal effort. We are also called upon to consider the place of conventional health care (of which the NIHB is a part) in the lives of First Nations people. In doing so, it is important to approach "health" in a way that respects the history of Aboriginal peoples, rather than unwittingly adopt a colonialist and assimilationist one. As the Royal Commission on Aboriginal People²⁸ (RCAP) pointed out two decades ago, "[c]lassic Aboriginal concepts of health and healing take the view that all the elements of life and living are interdependent and, by extension, well-being flows from balance and harmony among the elements of personal and collective life..."²⁹ Quoting a member of the Dogrib Treaty 11 Council, RCAP stated: "[Human beings] must be in balance with [their] physical and social environments...in order to live and grow."³⁰

Furthermore, RCAP stated, "the Aboriginal concept of the circle...links body, mind, emotions and spirit and each individual to the community and the land in which the human being is rooted."³¹In the space available in a thesis such as this, I briefly sketch some of the specific contexts in which indigenous peoples look to the land for practical healing strategies and a larger sense of well-being. The specificity is crucial to my argument. As RCAP has noted, the relationship of Aboriginal peoples to the land of their ancestors is fundamental to their health, sense of self and feeling of well-being. It is not land in general, but their land, which provides these benefits. It is only by understanding and conveying that profound relationship that we can appreciate the loss that came of the various forms of dispossession that I describe and that we can effectively argue for the remedy that I propose. At contact, the peoples who had lived for millennia in what is now known as Canada had intact societies, their own understandings of health and their own strategies for maintaining their health and well-being. An approach that put the NIHB at the centre

²⁷ See, for example, the discussion in Report of the Royal Commission on Aboriginal Peoples, Volume 3 — Gathering Strength (Ottawa: Minister of Supply and Services, 1996) at 243 and following [Gathering Strength]
²⁸ Ibid.
²⁹ Ibid.
³⁰ Ibid.
³¹ Ibid at 221.
of Indigenous conceptions of health and healing, as an end in itself, would be perpetuating a historic problem, rather than coming to terms with the alienation caused by the Crown’s breaches of its fiduciary duty.

From the vantage point of today’s more balanced approach to health, where there is an understanding that there is no strict barrier between the physical and the emotional/psychological, it is easier to appreciate the role of land in providing health and well-being. As RCAP noted, “the idea that true health comes from the connectedness of human systems, not their separate dynamics,” is shared by both “Aboriginal concepts of health [and] mainstream health sciences.” Aboriginal peoples have a more specific concept of this interconnectedness and the reasons for the health and social pathologies that are a part of the lives of so many of our people. “Aboriginal people have no doubt whatsoever that the destruction of their ways of life, including the multi-faceted rupture of their spiritual ties to the land, is a major factor,” RCAP stated.

The search for a fiduciary justification for the NIHB depends on relocating health in an Aboriginal context, rather than merely developing a narrow argument regarding only the NIHB, which, as I explain in the next chapter, the AFN has done in its political campaigns on health care. Issues related to the content and delivery of NIHB services is an immediate concern to the Inuit and First Nations peoples who are the beneficiaries. The challenge is to make that argument in a way that advances efforts to improve the NIHB while not undermining the quest for the larger goal of creating an understanding of health and well-being that includes Indigenous tradition.

**Locating the legal terrain for a health benefits fiduciary argument**

Ultimately, the success of the argument depends on finding a connection between health (broadly defined as the interconnected health of the body and mind) and the land,

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31 *Ibid* at 221.
32 *Ibid* at 195.
and expressing such claims in terms that are recognizable by the courts. In this regard, some judges have shown themselves to be receptive to and sympathetic to more novel concepts of rights in land.

McLachlin J, as she then was, in her dissent in *R v Van der Peet*,35 went to some lengths to counter the majority’s attempt to circumscribe the ambit of the Aboriginal rights protected under section 35 of the *Constitution Act, 1982*36. McLachlin J was concerned about a possible tyranny of the settlers’ law over Aboriginal tradition. She was looking at the issue of whether a right to catch salmon for commercial purposes could be seen as consistent with the tradition of the Aboriginal people concerned. Unlike the majority, she was not prepared to rely on narrow definitions in her reasoning, as the majority did in looking for and not finding evidence that the exchange of fish was an “integral” part of Sto:lo culture. McLachlin J found that “inferences as to the sort of things which may quality as aboriginal rights under s. 35.(1) should be drawn from history rather than attempting to describe *a priori* what an aboriginal right is.”37 More recently, the court in *Manitoba Métis Federation*38 relied on McLachlin’s dissent and stated that “the honour of the Crown...recognizes the impact of the ‘superimposition of European laws and customs’ on pre-existing Aboriginal societies.”39

In particular, the underlying conception of land in European legal approaches as property acquired through occupation does not sit well with Aboriginal understandings, a fact with which the court has struggled. For example, in cases involving the right of the Mi’kmaq of what is now Nova Scotia to cut timber without provincial authorization40, the court had to decide whether the Mi’kmaq were to be denied the rights they sought because they lived nomadic lives without the intensity of occupation needed to ground Aboriginal title. In concurring reasons, Lebel J. observed: “It is very difficult to introduce aboriginal conceptions of property and ownership into the modern property law

35 [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*].
37 *Van der Peet*, supra note 35 at para 261.
38 2013 SCC 14, [2013] 1 SCR 623 [*Manitoba Métis Federation*].
39 *ibid* at para 67.
concepts of the civil law and common law systems, according to which land is considered to be a stock in trade of the economy. Aboriginal title has been recognized by the common law and is in part defined by the common law, but it is grounded in aboriginal customary laws relating to land.41

As with understandings of land, there are also Aboriginal understandings of health that are significantly different from modern bio-medical assumptions. As Waldram et al42 note, traditional Aboriginal health systems, like all health approaches, have their own internal rationale, but "rationality" is a "culture-specific notion."43 "[C]ommon to Aboriginal healing systems [is that] the world is seen as a place in which harmony and balance exist between and among human beings and other spiritual or 'other-than-human' entities, and serious illness is indicative of a disruption in this balance..."44

In developing our argument for the NIHB, we must avoid contributing to the centrifugal forces of assimilation by prioritizing the western approach of which the NIHB is a part. After all, the NIHB has done little to undo the overall poor health conditions of Aboriginal Canadians. In fact, some components of the NIHB are part of the problem. Of the money spent by the program, 73 per cent goes to prescription drugs45, and prescription drug abuse (in many cases, drugs acquired under the NIHB and then re-sold illicitly) is at the same time one of the most pressing problems faced by Aboriginal communities.46 Some of the drugs that are on the NIHB formulary are the very same pharmaceuticals that wreak such damage in Aboriginal communities. As noted by Stan Beardy, AFN Regional Chief for Ontario, "The negative impacts related to prescription drug misuse are an ongoing concern..."47

41 Ibid at para 128.
42 James B Waldram et al, Aboriginal Health in Canada: Historical, Cultural, and Epidemiological Perspectives, 2nd ed (Toronto: University of Toronto Press, 2006).
43 Ibid at 40.
44 Ibid at 131.
47 Ibid.
Therefore, it is important that the argument begin with a recognition of the role that the NIHB plays in both the health and the ill-health of Aboriginal Canadians. Many of the components of the NIHB are crucial to serving the urgent health needs of First Nations and Inuit people (in particular, chronic health conditions such as diabetes). However, while a credible argument that there is a fiduciary duty to provide the NIHB would be helpful for organizations such as the AFN in their deliberations with the Government of Canada, such legal recognition of the program in its current form would do little to fundamentally improve the dire health indicators of First Nations and Inuit Canadians.

Health services as legal remedy

A discussion about the NIHB must take place in a larger context, not only because that is where meaningful health improvements lie but also because that is where we find the most compelling legal argument. The way forward, then, begins with but does not end with the NIHB. It inevitably leads to larger concerns about health, meanings of health and a re-definition of the content and delivery of health services to First Nations and Inuit people so that there is acknowledgement of traditional meanings of health and meaningful self-governance in the delivery of health services. Such an endeavour also provides an occasion to assess the development of the fiduciary duty in the context of Aboriginal peoples as it has developed (and, in some senses, not developed) since the concept of fiduciary obligations suddenly emerged in Guerin three decades ago. Much of the focus in that time has been narrowing the scope of the duty, often by indicating in specific terms what the duty does not include rather than working for a principled conclusion about what the duty does include.

This inability and/or unwillingness to deal with all the aspects of the past does not contribute to the goal of reconciliation of relationships between the first peoples and the Crown, which the Court has recognized as one of the goals of section 35, a constitutional provision that the court has interpreted as consistent with the fiduciary obligation on the Crown in its dealings generally with Aboriginal peoples. As the Court

48 See, for example, the discussion in Haida Nation v Canada (Minister of Forests) 2004 SCC 73, [2004] 3 SCR 511.
noted in Sparrow, borrowing the words of a lower court, "[T]here can be no doubt that over the years the rights of the Indians were often honoured in the breach."\textsuperscript{49} In failing to honour and/or enter into treaties regarding land, in actively trying to destroy Indigenous culture and tradition, in putting settler interests over those of the original occupants of the lands that became Canada, the Crown damaged both the spiritual and physical connection between Aboriginal peoples and their traditional lands.

In so doing, the Crown also set in motion relentless patterns of health decline among Aboriginal peoples. Such actions on the part of the Crown breached a fiduciary duty, which, consistent with the other forms of the duty, contains an element of protectiveness of indigenous peoples. In the spirit of reconciliation and having failed to meet its fiduciary obligations, there is an obligation on the Crown to participate in the rebuilding of what was – through acts of commission and omission – torn asunder.

That work begins with an assessment of how the NIHB can be reformed as per the requests of Aboriginal interlocutors with the federal health department, and proceeds to a consideration of how the NIHB can fit into an overall health strategy that respects Aboriginal views of health. That, I suggest, is an appropriate remedy for the Crown’s multiple and willful breaches of the Crown’s fiduciary duty to protect and nurture the relationship between Aboriginal peoples and their land.

How Métis and “non-status Indians” fit into the picture

It is First Nations organizations such as the AFN that have led efforts for legal recognition of a duty to provide the NIHB. Currently, neither Métis nor “non-status Indians” – that is, Aboriginal people who are not recognized as “Indians” under the terms of the

\textsuperscript{49} Supra note 10 at para 49.
Indian Act\textsuperscript{50} – are covered by the NIHB.\textsuperscript{51} That raises a preliminary issue in the matter before us – are they or should they be, according to either law or equity?

From the point of the current law, there is a strong argument that the M\text{\'}etis are covered. In \textit{Daniels v Canada (Minister of Indian Affairs and Northern Development)}\textsuperscript{52}, the Federal Court of Canada agreed with plaintiffs (led by the Congress of Aboriginal Peoples) that section 91(24) of the \textit{Constitution Act, 1867}\textsuperscript{53} applies to M\text{\'}etis and to some of the First Nations people who do not meet the requirements under the \textit{Indian Act} for status. The Federal Court of Appeal disagreed. Phelan J regarding non-status Indians but agreed with him with regard to the inclusion of M\text{\'}etis people. Phelan J found that, before Confederation, the Crown had shown intent to use a broad definition of “Indian.” At the time of Confederation, the purpose of section 91(24), which gave exclusive legislative authority to the federal government for matters concerning “Indians, and Lands reserved for Indians,” was the “assimilation” and “civilization” of “Indians.”\textsuperscript{54} The judge found that the Aboriginal population was “mixed, varied and inter-related.”\textsuperscript{55} People referred to as “half-breeds” were considered to be “closely associated” with Indians and there was no “bright line” between the two.\textsuperscript{56} The M\text{\'}etis, led by Louis Riel, were no less an obstacle to the government’s plans to settle the west and establish a transcontinental railroad.\textsuperscript{57}

Phelan J declined to grant a declaration that the federal government owed a fiduciary duty to M\text{\'}etis and “non-status Indians.” However, he did not preclude the possibility that such a duty might be found if an appropriate fact situation was established. “The Court is not asked to determine that there is a duty to do or not to do anything,” he wrote.\textsuperscript{58} Moreover, in light of the decision of the Supreme Court of Canada in \textit{Manitoba}

\begin{flushleft}
\textsuperscript{50} Supra note 13.
\textsuperscript{51} The Inuit are specifically excluded from the application of the \textit{Indian Act} by section 4(1) but Inuit are eligible for NIHB benefits.
\textsuperscript{52} 2013 FC 6, [2013] 2 FCR 268 [Daniels FC].
\textsuperscript{53} \textit{Constitution Act, 1867} [UK], 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.
\textsuperscript{54} ibid at para 278.
\textsuperscript{55} ibid at para 381.
\textsuperscript{56} Ibid.
\textsuperscript{57} ibid at para 412.
\textsuperscript{58} ibid at para 608.
\end{flushleft}
Métis Federation, Phelan J considered that the duty automatically flowed from the finding that the Métis were "Indians" pursuant to section 91(24).

In and of itself, Daniels does not guarantee Métis people access to the NIHB or to the expanded health services centred around traditional Aboriginal approaches to health that I am proposing as a remedy to the multiple breaches of fiduciary duty I describe in subsequent chapters. A group or individual could bring a claim for such expanded health services, but the federal government might still take the position that the NIHB is provided on a policy basis only, and that regardless of what it is permitted to do under section 91(24), it is not compelled to provide the NIHB, to First Nations or Métis people or to any other group of Aboriginal people.

Phelan J would also have included “non-status Indians”, in part because of the government’s willingness to move certain “non-status Indians” to status, as it did in 1984 when it recognized the Conne River people of Newfoundland as an Indian band and in 2008 when the Qalipu Mi’kmaq First Nation in Newfoundland, a “landless group of non-status Indians…became a recognized band.”

The Federal Court of Appeal disagreed with Phelan J’s reasoning, because, it said, “[t]he reasons for excluding people from Indian status are complex, far-ranging and often unrelated to one another.” For example, some people did not receive status because of problems with recording names during the treaty process. Some women lost status by marrying non-Aboriginal women. “[T]o determine the limits of the word ‘Indian’ as it pertains to non-status Indians under the division of powers it is necessary to analyze the reason of each class of individual was excluded from the Indian Act on a case-by-case basis.”

As regards the Métis, there is no principled reason why they should not receive the NIHB and the expanded system of services, including those of traditional healers, which I am proposing. Certainly, the mere fact that the Métis did not have the same legal

59 Supra note 38.
60 Supra note 35.
61 Daniels FC, supra note 52 at para 511.
62 Daniels v Canada (Minister of Indian Affairs and Northern Development), 2014 FCA 101.
63 Ibid at para 78.
arrangements regarding land as some First Nations would not seem to disqualify them. One notes that not all First Nations hold reserve land. As Phelan J pointed out, the Qalipu Mi’kmaq First Nation received status in 2008, although they do not have any reserve land. In the same regard, one notes that the recent decision of the Supreme Court of Canada in Tstlqhot'in Nation v British Columbia, awarded Aboriginal title to an area of what is now central British Columbia that has for centuries been the traditional territory of the Tstlqhot'in but for which no land claim or treaty had been negotiated. The Tstlqhot'in successfully argued that they had title because of occupation of the land that was sufficient, continuous and exclusive.

Status and interests in land and the rights that flow therefrom are, as Phelan J indicated, open-ended concepts. Frequently, they seem arbitrary, as does who qualifies for the financial benefits that come from "status". The Métis, whose rights are recognized in section 35 of the Constitution Act, 1982, do not have rights to the NIHB. The Qalipu Mi’kmaq First Nation and other landless bands, which, like the Métis, do not have a recognized land base, do have access to the NIHB. Such is the perverse product of the jurisdictional development of Aboriginal law and governmental jurisdiction, which has emerged out of governmental avoidance of responsibility rather than principled decision-making.

The path forward

In the next chapter, I briefly review the development of the NIHB and the jurisdictional context out of which it emerged, together with the efforts by Aboriginal organizations (legal and otherwise) to deal with its shortcomings. In Chapter 3, I critically examine the notion of fiduciary duty generally and the sui generis version of the duty as it has been articulated in regard to the relationship between the Crown and Aboriginal peoples, including as a basis for a legal obligation on the Crown to provide the NIHB. I suggest that, for all the celebration that met its initial articulation in Guérin, the subsequent development of the sui generis fiduciary duty has been both discordant with the

fundamental values of the duty generally and has provided a less robust tool for change than was initially anticipated.

In Chapter 4, I suggest an alternative basis for claiming the fiduciary duty that is consistent with the one laid out in Guerin but one that better resonates with the history of Aboriginal peoples and their profound relationship with traditional land — a relationship upon which health and well-being ultimately depends. I find that basis in the promises to Aboriginal peoples made by the Crown in the Royal Proclamation to be protective of the special relationship between indigenous peoples and traditional land. I also argue that sharp practice in negotiating and failure to implement the numbered treaties, introduction of the Indian Act68 and establishment of the residential schools system were breaches of that protective and fiduciary duty. In Chapter 5, I argue that the legal recognition of the duty to provide the NIHB as part of a constellation of services including health and healing is the legally appropriate remedy because it acknowledges breaches of duty of the past and puts in place some of the means for creating a healthier future for Aboriginal peoples, their health and well-being and their legal relationship with the Crown.

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68 Supra note 13.
Chapter 2: Constitutional confusion and the birth of the NIHB

The NIHB provides certain extended care benefits – that is, those that are not covered by public health care – to nearly 1 million status Indians and Inuit (of whom the former constitute 95 per cent of the “clients,” as they are known in Health Canada parlance.1 As the NIHB’s annual report states, the program provides “clients with access to a limited range of medically necessary health-related goods and services not otherwise provided through private insurance plans, provincial/territorial health or social programs.”2 To reinforce the message that there is no re-distributive intent, the annual report further states that the purpose of the program is to “support[] First Nations and Inuit in reaching an overall health status that is comparable with other Canadians.”3 Furthermore, NIHB will only pay if there is no other alternative: “When an NIHB-eligible client is also covered by another public or private health care plan, claims must be submitted to the client’s health care/benefits plan first.”4

Generally, NIHB benefits are inferior to many employee plans. Hearing aids, dental care, some pharmaceutical drugs and vision care are provided, although the allowable amount for items such as eye glasses are less than the market price (about $200, depending on the province of residence). Medical supplies (such as bandages and dressing), equipment (for example, wheelchairs and walkers)5 and transportation are also covered.

As with provincial ministries of health, a chief concern of NIHB managers has been cost containment. According to Health Canada’s annual report on the NIHB, total expenditures for 2012-13 were approximately $1.1 billion, an increase of 2.8 per cent over the previous year, even though the number of eligible claimants had increased by 3.3 per cent as a result of the registration of 26,142 members in the newly created Qalipu Mi’kmaq First Nation.6

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3 Ibid.
4 Ibid.
5 Ibid at 25.
6 NIHB Annual Report, supra note 2 at 5.

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Generally, providers bill the NIHB directly, but the program has brought in certain restrictions on the ability to directly bill, requiring “clients” to pay upfront and submit receipts for reimbursement. Also, some pharmacies have lost their billing privileges after having been audited. Until 2009, the direct billing was administered by a private entity called First Canadian Health Management Corporation, headquartered in Toronto and wholly owned by the Tribal Councils Investment Group of Manitoba Ltd., a business venture of the seven tribal councils of Manitoba.\(^7\) One pharmacy that was cut off by First Canadian Health Management sought judicial review in Federal Court, but the court found that the agreement was in the nature of a private contract and therefore not subject to judicial review.\(^8\) As I discuss below, many Aboriginal communities have entered the commercial area, providing a range of services that are funded through the NIHB and/or have entered into agreements with the federal government to administer some or all NIHB service delivery. These arrangements, while providing much-needed revenues for the communities in question, also further complicate both jurisdictional issues concerning Aboriginal health and the ability to assert a fiduciary obligation in connection with the NIHB.

A review of NIHB expenditures provides a graphic indication of the state of Aboriginal health, or lack thereof, at least “health” as it is understood in the worldview of the NIHB. Of total spending under the NIHB, pharmacy costs (including medical supplies and equipment), was the largest portion of the NIHB expenditures (at 42 per cent).\(^9\) Of these pharmacy expenditures, the cost of prescription drugs was the largest component (73 per cent). The annual report notes that through the NIHB pharmacy benefit, “the health needs of approximately 160,000 clients with gastrointestinal problems, 120,000 clients with cardiovascular problems and 63,000 clients with diabetes were met in 2012-13.”\(^10\)

\(^7\) First Canadian Health Management Corporation, online: <http://www.manta.com/ic/mtqy89j/ca/first-canadian-health-management-corporation>. The contract for direct billing is now held by Express Scripts Canada (ESI), whose patent company is a Fortune 500 company based in St. Louis, Missouri. “About Express Scripts Canada”, online: Express Scripts <http://www.express-scripts.ca/about/about-express-scripts-canada>.

\(^8\) AYC Pharmacy Ltd v Canada (Minister of Health) 2009 FC 554, 95 Admin LR (4th) 265.

\(^9\) NIHB Annual Report, supra note 2 at 25.

\(^10\) Ibid.
However, it is the expenditures on psychotropic drugs that paint the most painful picture of the state of health of Aboriginal peoples. The top pharmaceutical expenditure involved treatment for opioid dependence (via methadone and suboxone), totalling more than one million claims. Of the remaining nine items on the top 10 pharmaceutical list, four were associated with other addiction or psychiatric conditions, including opioid agonists, anti-depressants, anxiolytics-sedatives-and-hypnotics (benzodiazepines).

Jumping the jurisdictional quagmire

The medical pathologies related to certain components of the NIHB are matched by the legal pathologies caused by the intractable jurisdictional issues related to the NIHB health and health care of Aboriginal peoples generally. Indeed, legal pathologies can have medical consequences, as can be seen in the tragic story of Jordan River Anderson, a First Nations child from Manitoba who was born with a rare neuromuscular condition requiring hospitalization at birth. After two years in hospital, doctors felt Jordan was able to leave the hospital. However, the two levels of government could not agree on who would pay for the necessary home care and Jordan died in hospital before the matter was resolved. The tragic incident gave rise to the development of “Jordan’s Principle,” unanimously adopted by the House of Commons in 2007,\(^\text{11}\) which states that the government or ministry or department that has first contact with a patient should pay for the required health care services while the jurisdictional issues are sorted out.\(^\text{12}\)

Jordan’s Principle was considered a victory for Aboriginal health when the motion passed unanimously in the House of Commons, but as Cindy Blackstock points out\(^\text{13}\), the federal government has subsequently acted to undermine the impact of the measure by, among other things, arguing that Jordan’s Principle “is procedural and non-binding and does not create a right,” a position set out in its factum in a recent Nova Scotia case.

Involving the denial of a claim for reimbursement of home care services based on Jordan's Principle.\textsuperscript{14}

The striking similarity between the Government of Canada's position on Jordan's Principle and on the NIHB — that the medical services are provided on a policy basis and not out of any legal obligation — is not merely coincidental. What is now known as the NIHB emerged out of jurisdictional uncertainty similar to that involved in the Jordan River Anderson case and a competition between the federal government and the provinces to see who could best avoid financial responsibility for the health care of Aboriginal peoples. From the beginning, federal health services policy has had a containment focus — both in the spread of illness from an unhealthy Aboriginal population to the general citizenry, and then in keeping spending within modest expenditure parameters. As Josie Lavoie and Evelyn Forget note, "The settlers who arrived at the end of the last century were concerned that the appalling health conditions that prevailed on Indian reserves may lead to the spread of epidemics."\textsuperscript{15} The federal government established the position of General Medical Superintendent in 1904 to monitor on-reserve health and a mobile health nurse visitor program in 1922.\textsuperscript{16}

The 1974 Policy of the Federal Government concerning Indian Health Services\textsuperscript{17} out of which the current NIHB emerged was similarly lacking in ambition to deal in a comprehensive way with the interlocking health issues facing Aboriginal peoples. It was focused on "the availability of services by providing it [sic] directly where normal provincial services [were] not available, and giving financial assistance to indigent Indians to pay for necessary services when the assistance [was] not otherwise provided."\textsuperscript{18} From the beginning four decades ago, "the policy reiterated that no statutory or treaty obligations:

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\textsuperscript{15} Josie Lavoie & Evelyn Forget, "Legislativing Identity: The legacy of the Indian Act In Eroding Access to Care" (2011) 31:1 CJ of Native Studies 125 at 129 [Lavoie and Forget].
\textsuperscript{16} \textit{ibid}.
\textsuperscript{17} "History of Providing Health Services to First Nations Peoples and Inuit", online: Health Canada <http://www.hc-sc.gc.ca/ahc-asc/branch-dirgen/fninhb-dgsnte/services-eng.php> [History of Providing Health Services].
\textsuperscript{18} \textit{ibid}.
\end{flushleft}
exist to provide health services to Indians."19 As Melanie MacKinnon observes20, provision of health services to First Nations and Inuit people has been marked by a financial tug of war between the two levels of government as each tries to avoid ultimate responsibility for funding Aboriginal health care. That has had negative fallout for the health and well-being of Aboriginal peoples since unique health needs go unmet:

[P]iecemeal delivery has been linked to significant gaps between the health status of First Nations peoples and that of all other Canadians. Throughout this jurisdictional interplay, the federal and provincial governments continually seek to find ways in which the other government may pay the costs of services. It is evident that these disputes impede First Nations governments in pursuing positive health status of their people, and in First Nations individuals accessing the health care and preventative measures they need.21

The system of services to Aboriginal peoples (to the extent that there has been a system at all) has, she says, for the last one hundred and fifty years been marked by efforts of the federal government to "divest[] itself of the responsibility" to provide those services.22

Answering health issues with legal claims

Asserting that there is a legal duty on the federal government to take ultimate responsibility for providing health services to First Nations and Inuit people23 offers a way out of this jurisdictional morass. The AFN and others have gamely insisted that, contrary to consistent federal assertions, there is a fiduciary obligation to provide the NIHB at a level adequate to deal with the special health needs of First Nations and Inuit people.24 The AFN interlocutors made just such a claim when they participated with the federal government in a joint task force on the "future management of the NIHB."25 A core principle, the AFN said, is that "Health Services are provided through the fulfilment of

19 Ibid.
21 Ibid at 514.
22 Ibid.
23 I argue in the next chapter that there is no principled basis to restrict the health benefits in question to First Nations and Inuit. There may, however, be a strategic reason to focus a claim on First Nations and Inuit, since they already receive the benefits in question.
25 Ibid.
federal fiduciary responsibilities." However, the AFN appeared to have had some difficulty in articulating the basis of the fiduciary obligation. In an exchange in Fort Frances, Ontario, captured in the task force final report, the discussion leader writes: "I was asked to define what fiduciary meant, so we had a long discussion about fiduciary duties and what actually it is...And how under law it is a very restrictive definition and it is a much broader definition of course, from a First Nation point of view."27

While the AFN has searched for a legal argument that there is a fiduciary duty attached to the NIHB, the federal government moved to medicalize decision-making so that, "professional medical and dental judgment" grounds requests for services.28 However, the experience of individuals and communities whose members have tried to access services through the NIHB is that bureaucratic prerogative rather than medical judgment often drives decision-making. Indeed, it is just these concerns that are at the heart of a campaign by the AFN launched in late 2013 to highlight problems with the NIHB and to create pressure for change. For the purposes of this thesis, a brief examination of the contents of the campaign and the priorities raised are useful, since they highlight certain prevailing assumptions about "health," even among Aboriginal advocates, as well as the relatively undeveloped legal arguments that accompany demands for change.

There have been complaints about coverage limits and about particular decisions on whether or not to provide coverage since the inception of the NIHB. However, the issues have become more acute in recent years as the Government of Canada becomes increasingly concerned about providing services to more people while staying within their strict but self-imposed financial parameters. Newspaper articles detailing alleged misuse of the program – concerning, for example, air travel for ostensible medical care that allegedly was solely for shopping29 – have added to an already negative impression among non-Aboriginal people about misuse of public funds in the name of the NIHB, put Aboriginal advocates on the defensive and distracted attention from denial of legitimate requests for medical care and assistance.

28 Ibid, Volume 1 at 93.
27 Ibid, Volume 2 at 140-1.
28 History of Providing Health Services, supra note 17.
29 See, for example, "Nurses alleged to have misused flights", The Globe and Mail (September 24, 2012) A6.
When the AFN in late 2013 announced a series of regional roundtables and a national policy forum for 2014, it stated the efforts were part of “taking action to address the crisis in the Non-Insured Health Benefits Program,” and that a “legislative/legal strategy” would emerge out of the events. A review of the presentations made at the various meetings illustrates the reformist orientation of most of the participants, pro forma references to legal change, and only passing references to traditional health and healing. Faced with the immediate situation of people with needs as varied as kidney dialysis and diabetes treatment, the focus is on what can be done with the system as is, rather than conjuring a vision of a new tomorrow whose details can scarcely be discerned.

For example, the Chiefs of Ontario focused on “creating awareness of the NIHB program benefits and how to access those benefits.” As a way of doing so, the organization prepared a guide to answer questions such as “When am I eligible?” “How do I obtain benefit?” and “What does Ontario Health Insurance Plan cover?” The First Nations of Quebec and Labrador Health and Social Services Commission, meanwhile, prepared a guide to procedures for accessing health services, including how to file an appeal when services are denied.

There are also ostensible success stories, including from the Bigstone Cree Nation in Alberta, which became a service provider by getting into the business of operating a pharmacy, building and operating a seniors’ residence and entering other service areas. “Owning health-related businesses is profitable,” its presentation states. Elsewhere on the pharmacy front, there is good news from Saskatchewan, where the province permits pharmacists to assess and prescribe medication for minor ailments such as canker sores,

31 Ibid.
36 Ibid.
insect bites and acne.\textsuperscript{37} Unfortunately, jurisdictional complications arise in even this seemingly mundane activity. NIH\textsc{b} does not recognize pharmacists as legitimate prescribing agents for these minor conditions and will not pay for the medications thus prescribed.\textsuperscript{38}

There are mentions in the presentations of traditional approaches to health and healing. In feedback from regional roundtables in Alberta, “the lack of recognition for our culture, traditionalists [and] ceremonialists” is noted.\textsuperscript{39} A presentation from the Kahui Tautoko Consulting Ltd. centres on improving provincial service provision in British Columbia to First Nations – that is, outside the parameters of the NIH\textsc{b} \textit{per se} – does locate “traditional culture and spiritual wellness” at the centre of the “Aboriginal/First Nations Primary Health Care Model.”\textsuperscript{40} The BC system also advocates the incorporation of “traditional, cultural and spiritual supports into all services, especially across...Community health clinics, Home Health and Mental health and addictions services,”\textsuperscript{41} which invites speculation that some provincial systems are more open to traditional approaches than the NIH\textsc{b}. Similarly, the feedback presentation from the Northwest Territories, while highlighting concerns such as coverage of medical transportation and timely reimbursements, notes that the territorial government will cover costs of those who have been referred by their chiefs to traditional healers.\textsuperscript{42}

Though present, references to traditional approaches are few and fleeting. Rather than a lens through which a traditionally centred approach to health could be seen, the references to tradition are mere add-ons, specific items added as a discrete item. It is as

\textsuperscript{37} NIH\textsc{b} Forum, “Moving Forward: Sustaining and Improving Access to Pharmacist Patient Services for NIH\textsc{b} Clients”, online: Assembly of First Nations
\textls{<http://www.afn.ca/uploads/files/nihbforum/relationships_and_partnerships_d_martin.pdf>}.\textsuperscript{38}
\textsuperscript{39} \textit{Ibid.}.
\textsuperscript{40} NIH\textsc{b} Forum, “Plenary – Feedback from Regional Roundtables – Alberta (National First Nations Health Technician Network), online: Assembly of First Nations
\textls{<http://www.afn.ca/uploads/files/nihbforum/regional_roundtable_feedback_ab.pdf>}.\textsuperscript{41}
\textsuperscript{42} \textit{Ibid.}.
\textsuperscript{43} NIH\textsc{b} Forum, “Plenary – Feedback from Regional Roundtables – NWT (National First Nations Health Technician Network), online: Assembly of First Nations
If traditional approaches are just another item on the check list, like vision care and dental services.

Some of the presentations contain references to possible legal strategies, but as with traditional approaches to health, legal strategy is mentioned en passant. A presentation entitled Emergent Rules of Engagement offers a list of possible legal approaches that might be utilized — section 35, the concepts of duty to consult and honour of the Crown, as well as the UN Declaration on Indigenous Rights. Such international approaches also figure prominently in the presentation of the Wolf Policy Network, which invokes the concepts of the UN Development Program to ground its argument for self-government. Indeed, international law figures more prominently in the presentations than fiduciary duty, which was raised in feedback from the Ontario regional roundtable, which tersely refers to “fiduciary responsibility of [the] federal government as a means of ensuring accountability”, as if it is obvious how exactly the notion of fiduciary duty is to be used to obtain that result.

Special relationship, special problems

One can see in the development of the NIHB and in challenges faced by organizations such as the AFN in responding to what they perceive as the problems with

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45 Canada’s treatment of Aboriginal peoples has previously been found to be below the standard required by international law. In a report in May 2014, the Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, expressed concerns about the “distressing socio-economic conditions of Indigenous peoples” in Canada. [Human Rights Council, 27th Sess, Agenda Item 3, "Promotion and Protection of all human rights, civil, political, economic, social and cultural rights, including the right to development – Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/27/52/Add 2]. Regarding the health of indigenous people in Canada, the rapporteur stated: "The health of First Nations, Inuit and Métis people in Canada is a matter of significant concern. Although overall the health situation of indigenous peoples in Canada has improved in recent years, significant gaps still remain in health outcomes of aboriginal as compared to non-aboriginal Canadians, including in terms of life expectancy, infant mortality, suicide, injuries, and communicable and chronic diseases such as diabetes...Healthcare for aboriginal people in Canada is delivered through a complex array of federal, provincial and aboriginal services, and concerns have been raised about the adequacy of coordination among these" at paras 29-30.

the NIHB reflections of the "unresolved sovereignties"47 related to the Crown and Aboriginal peoples. The uncertainty arising out of plural sovereignties gives rise to anomalies in jurisdictional arrangements related to Aboriginal peoples. The sui generis relationship of the Crown to Aboriginal peoples, who were not conquered and who never relinquished their sovereignty, puts Aboriginal peoples in a special relationship with the federal government, which under section 91(24) of the Constitution has sole responsibility for "Indians and lands reserved for the Indians."48 This constitutional arrangement, reflecting the unique historic arrangement with Aboriginal peoples, upsets standard jurisdictional arrangements, which put responsibility for the healthcare of the general population in the provincial ambit.

Health is not the only area in which the unique status of Aboriginal peoples poses jurisdictional problems.49 However, health is the largest single expenditure item of provincial governments50 and a vital policy and political issue for all levels of government. Yet, as Justice Estey stated in Schneider v R, "Health is not a subject specifically dealt with in the Constitution Act either in 1867 or by way of subsequent amendment. It is by the Constitution not assigned either to the federal or provincial legislative authority."51 However, in 1867, "health was considered a private or local matter,"52 and so it is that the constitutional understanding has evolved. The federal government, through its spending power, is able to control certain aspects of provincial medical care programs through requirements set out in the Canada Health Act53 that must be met by provinces in order to receive financial transfers from the federal government.

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47 See discussion by Borrows in Chapter 3 infra at note 54.
49 The Supreme Court has, at various times, referred jurisdictional conflicts arising out of application of federal and provincial inter alia in Four B Manufacturing Ltd v United Garment Workers of America, (1980) 1 SCR 1031 (labour relations), Derrickson v Derrickson, (1986) 1 SCR 285 (matrimonial property), and R v Kruger, (1978) 1 SCR 104, (1978) 75 DLR (3d) 434 (wildlife regulation).
51 (1982) 2 SCR 112 at 141, 139 DLR (3d) 417.
53 RSC, 1985, c C-6.
Jurisdictional jerry-rigging has emerged in the delivery of NIHB services, particularly in the development of “transfer arrangements” of various kinds between the federal government and various Aboriginal communities. Such transfer arrangements, while offering the elixir of independence for Aboriginal communities, have turned out in real life to be less – figuratively and literally – than expected. The experience of the Mohawk Council of Akwesasne – presented at the AFN’s forum on the NIHB\textsuperscript{54} – is a case in point. Akwesasne took control over all administrative responsibilities for the NIHB delivery in 1998. However, the Akwesasne presentation to the AFN suggests that control is more illusory than real. The community must still abide by federal government guidelines when deciding to allow or deny benefits, and the ability to administer comes with a heavy administrative burden that is difficult to bear and for which no program dollars are provided.\textsuperscript{55} Akwesasne must submit 32 reports a year in order to meet its reporting requirements. Meanwhile, there is no money provided to pay for infrastructure, and the community must meet its administrative responsibilities with a computer system that is 17 years old. Its funding agreements allow little room for flexibility, and the community skirts with deficit each year.\textsuperscript{56}

Akwesasne’s experience is not unique. Indeed, as Constance MacIntosh notes, a common feature of all types of funding arrangements is a “non-enrichment clause,” which means that funding is based on the number of on-reserve “Indians” at the time the agreement is entered into and will only increase according to a standardized formula, regardless of the actual increase in population or the costs and medical needs of that population.\textsuperscript{57}

The limited experience thus far with the downloading of NIHB responsibilities to Aboriginal communities gives some indication of the complexities involved, especially when the available finances do not match the vision of self-management of health services. Indeed, some see such transfer arrangements as a means to “contract[...]


\textsuperscript{55} Ibid.

\textsuperscript{56} Ibid.

\textsuperscript{57} For a description of various types of transfer arrangements, see Constance MacIntosh, “Envisioning the Future of Aboriginal Health Under the Health Transfer Process” (2008) Health LJ (Special Edition: Visions) (MacIntosh).
all front line and a selection of regional services to First Nations organizations. Such financial arrangements also lay the basis for an argument that any possible argument for a fiduciary obligation on the part of the federal government to provide health services such as those contained within the NIHB are undone by the self-governance supposedly involved in such arrangements.

There are fears among those involved in Aboriginal healthcare that the federal government will rely on transfer arrangements made via the NIHB between Aboriginal communities to try and resile from any fiduciary duty asserted in regard to the provision of health services, MacIntosh states. Official policy of the Government of Canada signals that the Crown will take the position that fiduciary duty may in some cases become obsolescent with self-government:

While the Government's recognition of an inherent right to self-government does not imply the end of the historic [fiduciary] relationship, Aboriginal self-government may change the nature of the relationship...There is no justifiable basis for the Government to retain fiduciary obligations in relation to subject matters over which it has relinquished its control and over which an Aboriginal government or institution has, correspondingly, assumed control.

It would be difficult for the federal government to argue that many of the contribution agreements that have so far been negotiated have caused Ottawa to "relinquish its control" since it continues to set priorities and reimbursement criteria through the provisions of the transfer agreement.

However, NIHB transfer agreements are less than actual self-government, since the responsibilities transferred do not come with the financial resources needed to fulfill them. For there to be a basis for the argument that a fiduciary duty were at an end, there would have to be true self-government, rather than a mere transfer of administrative responsibility without financial independence derived, for example, from the same kind of fiscal and funding arrangements in place between the federal government and the provinces. Without such financial independence, the Government of Canada retains a

58 Lavole and Forget, supra note 15 at 131.
59 MacIntosh, supra note 57 at 71.

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residual discretion, since it determines via its administrative requirements the manner in which money must be spent. For example, if a certain traditional healing practice were not contained in the list of allowable items, then it would not be available, even if the particular Aboriginal community concluded that it would be beneficial for the individual concerned.

However, it is foreseeable that at some point in the future Aboriginal peoples will achieve authentic self-government such that they will have actual control over health services. The question that arises from this scenario is whether, from a normative point of view, there would be any justification for the position that a fiduciary duty should survive such an actual transition to self-government. On the one hand, "[t]he language associated with the fiduciary relationship speaks of power and discretion on the one hand and vulnerability on the other, [which] do not speak of a relationship of equality but of one party under the protection and discretion of another."61

However, even in this situation there may still be financial transfers to the self-governing Aboriginal community. According to the vision of the Charlottetown Accord62, self-government would create a third order of government (in addition to the federal and provincial governments), and like the provinces, self-governing Aboriginal communities may still be the recipients of federal financial transfers as are the provinces,63 though not because of a fiduciary obligation or the breach of a fiduciary duty. Even assuming that there is actual self-government in certain areas such as the delivery of health services, does the fiduciary duty in that area become obsolete as the federal position suggests or does it continue? In order to answer this question, we have to consider any remedy that arises out of the fiduciary duty as well as the duty itself. When

62 The constitutional amendment package presented in 1992 to the Canadian people by the federal and provincial governments and rejected in a referendum.
63 As there are currently via four transfer programs: the Canadian Health Transfer (CHT), the Canada Social Transfer (CST), Territorial Formula Financing and Equalization. Government of Canada, Department of Finance, “Federal Support to Provinces and Territories”, online: Department of Finance Canada <http://www.fin.gc.ca/access/fedprov-eng.asp>.
we do so, we can re-formulate the question so as to make it possible to provide an answer.

While it may be the case, as the federal government suggests, that there may be no ongoing fiduciary duty owed by the federal government once self-government is achieved, it may also be the case that restitution required to make whole the victims of past and historic breaches of the duty may not be complete. Therefore, the duty may end as far as the nature of, mechanism and decision-making about services in the future is concerned, but the fulfilment of the remedy for past breaches may continue in the form of financial obligations. If we see the NIHB and expanded services as the remedy for breaches of fiduciary duty that occurred before the moment of self-government, then the obligation continues, since it likely will be generations before the deleterious health effects of the multiple breaches described in the last chapter and on which I expand in the next chapter are resolved. The obligation to provide the remedy continues until indicators of First Nations and Inuit people are at the same level as the general population.

The current direction of federal health policy regarding Aboriginal peoples does not assist Aboriginal peoples in getting beyond the legacy of ill-health. Federal health policy incorporates a denial of the past and a business-as-usual approach to the present focused on controlling the cost of this and other health expenditures. That has created a chasm between the need as understood by Aboriginal peoples and the willingness of the government to respond. As Melanie MacKinnon states:

First Nation values, no matter what indigenous nation, are founded on respect and responsibility; people are accountable for decisions for life as an individual, and a member of a family, community and nation. However, First Nations people recognize the historical legacy that has resulted in disastrous social and economic conditions in our communities, and have impacted our health status and our indigenous medicine ways. To address health in all its aspects will require adequate and streamlined supports to create a balance between the individual and culturally relevant health systems for these individuals, families, communities and nations.  

Alas, there is no indication that the federal government will be a willing partner in such an endeavour. As has often been the case in the past, in the face of political

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64 MacKinnon, supra note 20 at 515.
roadblocks, Aboriginal people consider resorting to the courts to break a political logjam. So it is in the case of access to health care services. The judicial strategy most often mentioned in this regard is a claim that there is a fiduciary duty on the part of the Government of Canada. However, what precisely is the source of the duty, on what basis is it to be pleaded and what are the prospects for success considering the approach the court has taken in other cases in which a fiduciary duty to Aboriginal peoples has been claimed? These are the questions I consider in the remainder of this thesis.
Chapter 3 – Fiduciary duty: a new beginning in the nation-to-nation relations or mere salve for unresolved sovereignty wounds?

_Guerin v The Queen_\(^1\) was considered a legal breakthrough when it appeared because it established a unique or _sui generis_ fiduciary duty on the part of the Crown to Aboriginal peoples. Coming early in Canada’s modern constitutional history, the enthusiasm that greeted the decision suggested that a newer, more just period was imminent. Patrick Macklem, for example, stated that _Guerin_ “and cases like it have served to spur political and legal reform, pushing federal and provincial governments to reconceive their duties and obligations to native peoples.”\(^2\) It is, states another observer, “perhaps the single most influential decision in Aboriginal law in the modern history of the court.”\(^3\) However, the _sui generis_ fiduciary duty born in _Guerin_ has not met the expectations that marked its appearance.

Binnie J in _Wewaykum Indian Band v Canada_\(^4\) did more than anyone to short-circuit the jurisprudential development of the _sui generis_ fiduciary duty. He declared that for there to be a duty, there had to be a “cognizable Indian interest”\(^5\) and that not every interaction between the Crown and Aboriginal peoples gives rise to the duty. In Binnie J’s invocation of the notion of “cognizable Indian interest” lies the challenge to those who would use fiduciary duty to advance Aboriginal interests. Simply put, the question is “cognizable by whom”? The answer is, of course, cognizable by settlers’ law as it has developed since contact.

The 30\(^{th}\) anniversary of _Guerin_ is an appropriate moment to assess fiduciary duty as it applies to Aboriginal peoples, especially its potential to ground the legal recognition of schemes such as the NIHB, which are vital to the immediate health needs of Aboriginal people, despite the cultural inappropriateness of many of the program’s aspects. In

\(^1\) [1984] 2 SCR 335, 13 DLR (4th) 321 (Guerin).
\(^3\) Senwung Luk, “Not So Many Hats: The Crown’s Fiduciary Obligations to Aboriginal Communities since Guerin” (2013) 76 Saskatchewan LR 13 at 13 (Luk).
\(^5\) _Ibid_ at para 95.
considering Guerirt's legal bequest, we see the limitations of the *sui generis* fiduciary duty as well as the opportunities to escape the legal straitjacket imposed by Binnie J. Such a moment is also an occasion to examine the continuing health effects of the Crown's historical treatment of Aboriginal peoples, as I do in the next chapter.

**The duty generally – accretion over clarity**

In some ways, the challenges in using the *sui generis* fiduciary duty to advance the interests of Aboriginal people reflect the difficulties with the duty. It is a concept that emerged in equity to regulate a very specific set of business relationships at a time when the nature of business and the commercial issues that arose were rapidly changing. In particular, the notion of fiduciary duty was meant to prevent self-dealing as business structures became more complex and therefore less transparent.⁶

Generally, the notion has developed as a collection of relationships in which one party is a fiduciary and the other is the beneficiary of the duty. Though dissenting in *Frame v Smith*⁷, Wilson J's iteration of the elements of the duty has been relied on by courts subsequently when determining whether or not the duty arises in a particular context. Wilson J stated:

> Relationships in which a fiduciary obligation has been imposed seem to possess three general characteristics:
> (1) The fiduciary has scope for the exercise of some discretion or power.
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.⁸

It would appear not to be a matter of controversy that indigenous people fit the criteria set out by Wilson J. Consider the *Constitution of Canada, 1867⁹*, which gives to the federal government "exclusive Legislative Authority" for Indians, and Lands reserved for the

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⁶ See, for example, JC Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1981) at 15 [Shepherd].
⁸ Ibid at para 60 [emphasis added].
Indians," under which mandate was enacted the Indian Act, "a cradle-to-grave set of rules, regulations and directives" dealing with all aspects of the lives of "status Indians."

"From the time of birth, when an Indian child must be registered in one of the seventeen categories defining who is an 'Indian,' until the time of death, when the Minister of Indian Affairs acts as executor of deceased person's estate, our lives are ruled by the Act and the overwhelming bureaucracy that administers it."

Considering the nature of the classic duty as it has developed generally and the particular historical and legislative experience of Aboriginal people, one might conclude at first glance that Aboriginal people are perfect candidates for the role of beneficiary in the fiduciary relationship. Indeed, before the articulation of the sui generis duty in Guerin, the courts characterized the Crown-Aboriginal relationship in a manner that resonates with fiduciary duty but without the language per se. Indeed, the older cases use language that is no longer au courant, reflecting as it does a view of Aboriginal people as lacking agency and needing protection. Rand J's characterization of Indians in St. Ann's Island Shooting & Fishing Club Ltd. v Fl as "wards of the state" describes a relationship that sits comfortably with standard formulations of the fiduciary duty.

Rand J's phrasing was derivative of American case law, in particular Cherokee Nation v State of Georgia, which characterized the Cherokee relationship to the United States as "that of a ward to his guardian." It is important to recall that Rand J is otherwise considered to have been among the most progressive legal figures in Canada. As a Supreme Court justice, he ruled in Roncarelli v Duplessis that the revoking of the liquor licence of a Jehovah's Witness for ulterior and legally irrelevant reasons was an affront to the rule of law, and the case remains an important pre-Charter human rights case.

10 Ibid, 891(24).
11 RSC 1985, c I-5.
13 Ibid.
15 30 US (5 Pet) 1, 8 L Ed 25 (1831).
17 Ivan Rand also was the architect of the system of the automatic union dues check-off that bears his name and is considered as foundational in the modern Canadian labour relations system. For an excellent biography of Rand.

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Much of post-*Guerin* thought and jurisprudence has sought to distance itself from the notion of Aboriginal peoples as “wards of the state.” For example the Supreme Court in its 2013 *Manitoba Métis Federation* decision relied, as it often has, on the words of Professor Brian Slattery in rebuking the Rand point of view, quoting Slattery as follows:

The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a “weaker” or “primitive” people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.  

The difficulty with this analysis is that it does not account for subsequent developments in the Crown-Aboriginal relationship, when government policy and legislation deliberately rendered Aboriginal peoples into a state of paternalism. As I note later in this chapter, Aboriginal people should not be seen as passive bystanders in their own history but as active participants who shaped and were shaped by their political and economic relations with settlers. However, as Patricia Monture-Angus writes, “No matter how offensive the idea of ‘wardship’ or the modern or evolved notion of ‘dependency’ is to me, the fact of the matter is that there is a relationship of dependency between the First Nations and the Crown. This is the reality that is the result of colonialism.”

Fiduciary-like and fiduciary lite

In reacting to any perceived elements of paternalism in the idea of fiduciary duty, proponents of a *sui generis* duty may have placed themselves in a more restrictive place than they would be otherwise, since they do not avail themselves of the developments that have occurred elsewhere in the duty. John McCamus notes, for example, an increased willingness to expand the remedies that might be awarded in instances of

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See William Kaplan, *Canadian Maverick: The Life and Times of Ivan C. Rand* (Toronto: Published for the Osgoode Society for Canadian Legal History by University of Toronto Press, 2009).

18 2013 SCC 14, 355 DLR (4th) 57 (Manitoba Métis Federation).


breach of fiduciary duty. In particular, McCamus notes the significance of the reasons of La Forest J in *Lac Minerals Ltd. v International Corona Resources Ltd.* 22

La Forest found that a fiduciary duty was created when a junior mining firm disclosed confidential commercial information to a senior mining company which proceeded to stake the adjoining lands and purchase some of the very lands that the junior company was developing. Unlike the majority, La Forest J found that there was a fiduciary duty owed by the senior company in part because of the vulnerability that had been created when the junior provided confidential commercial information to it without executing any kind of confidentiality agreement. Such unprotected dealings were not unusual in the industry and La Forest J saw no need to “clutter normal business practice” 23 by requiring such a contract.

As a sign of the court’s willingness to be inventive in dealing with equitable issues in the commercial context, McCamus refers to La Forest J’s willingness to grant fiduciary-like remedies such as the constructive trust, “available on a principled basis even though outside the context of a fiduciary relationship.” 24 As La Forest J wrote:

> Courts have resorted to fiduciary language because of the view that certain remedies, deemed appropriate in the circumstances, would not be available unless a fiduciary relationship is present. In this sense, the label fiduciary imposes no obligations, but rather is merely instrumental or facilitative in achieving what appears to be the appropriate result. 25

One could read the decision in *Guerin* as part of the movement toward creativity in crafting remedial measures. In search of remedy, Dickson J looked to “the original heads of jurisdiction in Chancery,” 26 where “[t]he concept of fiduciary obligation originated long ago in the notion of breach of confidence.” 27 One author has described the historic roots of the fiduciary obligation as “tangled,” 28 but Dickson J had no reluctance in finding that the requirement that there be a surrender before the alienation of “Indian land” gave

24 *Ibid* at para 152.
25 *Ibid* at para 149.
26 *Guerin, supra* note 1 at para 98.
27 *Ibid*.
28 *Shepherd, supra* note 6 at 12.
rise to a fiduciary duty. Having so found, Dickson J determined that the lease of land on unfavourable terms was a breach of the duty. "Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal", he declared. He reinstated the trial judge's award of $10 million in damages.

Guerin contains remarkably little cogitation on the nature of fiduciary duty in its usual forms. As Leonard Rotman observes, Dickson J provided a limited illustration of the historic rationale for imposing the fiduciary concept upon Crown-Native relations and offers only a "rudimentary discussion of the principles underlying the fiduciary concept." While stressing the sui generis nature of the fiduciary duty as it applies in the Crown-Aboriginal context, there lurks in the Dicksonian prose traces of the very paternalism that Guerin's defenders claim is avoided in this sui generis approach. Dickson J reasons that the intent of the surrender requirement in the Indian Act is "clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited," a concern that he sees reflected in the Royal Proclamation in its reference to "great Frauds and Abuses have been committed in purchasing lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the Indians..."

As a result, the Crown undertook to "act on behalf of the Indians so as to protect their interests in transactions with third parties" and has "a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act." Dickson J saw in the relationship between the Crown and Aboriginal peoples in the Indian Act a reflection of the classic fiduciary duty described by Ernest Weinrib in his influential article, The Fiduciary Obligation, of which the "hallmark...is that the relative legal

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29 Guerin, supra note 1 at para 111.
31 Ibid at 221.
32 Guerin, supra note 1 at para 100.
33 Ibid.
34 Ibid.
35 Ibid.
36 (1975) 25 UTJ 1.
positions are such that one party is at the mercy of the other’s discretion." Far from departing from paternalism, the supposedly sui generis fiduciary duty is at least partly grounded in the Indian Act, which incorporated paternalism in public policy. The Crown-Indian relationship described would appear to be as close to “wards of the state” as to sovereign nation.

Furthermore, the decision offers no appreciation of the importance of land to Aboriginal peoples in other than financial terms. This is due in part to the facts of the case. Guerin is in large part a real estate case in which the Crown acting on behalf of the ultimate owners of the land in question failed to act with prudence in getting the best bargain for the title holders.

Indeed, one might ask whether invocation of a sui generis fiduciary duty was essential to the resolution of Guerin. Much turned on representatives of the Crown who handled details of a leasing arrangement between the Musqueam and the golf course and who acted in an unprofessional manner that would be found wanting in any real estate agent. In particular, representatives of the Crown kept an appraisal of the land secret from the Musqueam, even though the First Nation had paid for it. In addition, the Crown represented to the Musqueam that certain conditions to them would be included in the lease but in fact, they were not.

The greater difficulty for the court lay in ascribing the fiduciary duty to the Crown, something the Federal Court of Appeal had not been willing to do because, in its view, the trust resulting from the surrender of Aboriginal land to the Crown is political in nature and not a “true trust.” Seen from this point of view, what is sui generis is not the duty but the fiduciary. As Binnie J was to observe later in Wewaykum, “The Crown can be no ordinary fiduciary; it represents many hats and represents many interests, some of which cannot help but be conflicting.” In that crisp encapsulation is the challenge in the sui generis fiduciary – how is that conflict to be resolved? As Senwung Luk writes, the conflict

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37 Ibid at 4.
38 Guerin, supra note 1 at para 101.
39 Ibid at paras 110 to 112.
41 Wewaykum, supra note 4 at para 96.
is between "settler interests and indigenous interests, understanding that indigenous interests are not effectively represented by legislatures."\textsuperscript{42}

This conflict has a particular manifestation where there is an argument such as the one I am making here that extended health benefits should be provided to Aboriginal people and not to the population at large. As I discuss later in this thesis,\textsuperscript{43} providing benefits to a select group can cause backlash from those in need of the same benefits but not eligible for them because they are not part of the requisite special group. Currently, the NIHB is provided only to Inuit and status Indians and not to the population at large, so the change I am proposing – recognition of a fiduciary duty to provide the NIHB and an extended range of benefits – would in some ways be but a variation of the status quo. However, recognition of a legal duty to provide the benefits to Aboriginal people\textsuperscript{44} would bring prominence to a program that now exists in obscurity, little known in the general public. A political challenge would be to link an expanded system of health services to the normative consensus about the Crown’s historic failures to meet its commitments to Aboriginal people so as to undercut any resentment that might arise from legal recognition of those benefits.

\textit{Guerin} provides little assistance in dealing with these potential resentments, because it is exceedingly vague about the ambit of the \textit{sui generis} fiduciary duty. There is nothing in the decision about the spiritual and cultural relationship between Aboriginal people and traditional land. While the actions of Crown agents in their dealings with the Musqueam would not have met the requirements of a fiduciary generally, there was no sense of what other obligations were contained in the \textit{sui generis} version. There was, therefore, no indication of how to resolve the inherent conflict between settler and indigenous interests and little on which to build a foundation on which to develop its jurisprudence.

\textsuperscript{42} Luk, supra note 3 at 29.
\textsuperscript{43} See page 32 and following infra.
\textsuperscript{44} As I suggested in Chapter 1, there is a sound basis for the argument that Mètis people are entitled to the NIHB, which is currently provided only to First Nations and Inuit people.
The lack of a developed understanding of the fiduciary concept — either simpliciter or sui generis — in Guerin created an opening for those who would prefer to contain the effects of fiduciary duty. In particular, the jurisprudential deficiencies in Guerin facilitated the efforts of the biggest foe of Guerin, Ian Binnie or Binnie J as he was to be. Ian Binnie QC had previously been lead counsel for the Crown in the Guerin litigation in the lower courts. As a justice of the Supreme Court, Binnie did more than any member of the court to turn back the direction set by Dickson J and others, particularly in Wewaykum, the facts of which were not auspicious from a plaintiff point of view and provided a commanding position from which to undercut fiduciary duty.\textsuperscript{45}

The Court was unanimous in dismissing the appeal with costs. In his reasons, Binnie decried the “flood of ‘fiduciary duty’ claims by Indian bands across a whole spectrum of possible complaints\textsuperscript{46} that had arrived at the court’s doors since Guerin. With dramatic effect, Binnie proceeded to list such cases: Batchewana Indian Band (Non-resident members) v Batchewana Indian Band\textsuperscript{47} (the right of off-reserve Indians to vote in Band elections); B.C. Native Women’s Society v Canada\textsuperscript{48} (whether negotiated agreement needed to be altered to provide for the rights of Indian women married to non-Indians); Paul v Kingsclear Indian Band\textsuperscript{49} (whether partner in marriage break-up entitled to recovery of costs related to the family home); Mentuck v Canada\textsuperscript{50} (whether fiduciary duty arose in contract for compensation for failed land arrangement); Deer v Mohawk Council of Kahnawake\textsuperscript{51} (whether band could evict non-Indian husband of member from reserve); (Chippewas of the Nawash First Nation v Canada (Minister of Indian and Northern Affairs\textsuperscript{52} (Access to Information Act\textsuperscript{53} request for band council resolutions);

\textsuperscript{45} Two bands that had held their reserve land since the end of the 19\textsuperscript{th} century claimed breach of the Crown’s fiduciary duty not on the basis of any inherent Aboriginal right but on a clerical error at the time of the conveyance. But for the error, the bands claimed, each would possess both reserves and on that basis, they claimed compensation: each band claimed each other’s reserve land.
\textsuperscript{46} Wewaykum, supra note 4 at para 82.
\textsuperscript{47} [1997] 1 FC 689, 142 DLR (4th) 122 (FCA).
\textsuperscript{48} [2000] 1 FC 304, [2000] 3 CNLR 4 (TD) [BC Women].
\textsuperscript{49} [1997], 132 FTR 145, 148 DLR (4th) 759.
\textsuperscript{50} [1986], 3 FTR 80, 39 ACWS (2d) 177.
\textsuperscript{51} [1991] 2 FC 18, 41 FTR 306.
\textsuperscript{52} (1996), 116 FTR 37, [1997] 1 CNLR 1, aff’d (1999), 251 NR 220 (FCA).
\textsuperscript{53} RSC 1985 c A-1.
Montara Band of Indians v Canada (Minister of Indian and Northern Affairs)\textsuperscript{54} (band argues government not permitted to release band financial records under Access to Information request because they were connected in the context of a fiduciary relationship); Timiskaming Indian Band v Canada (Minister of Indian and Northern Affairs)\textsuperscript{55} (band resists release of land records requested under Access to Information Act because they were collected via fiduciary relationship); Ominayak v Canada (Minister of Indian Affairs and Northern Development)\textsuperscript{56} (whether fiduciary duty required government funding of applicant’s litigation); Tuplin v Canada (Indian and Northern Affairs)\textsuperscript{57} (whether Registrar’s discretion in exercising responsibilities related to individual applicants gave rise to fiduciary duty); G. (A.P.) v. A. (K.H.)\textsuperscript{58} (whether the fiduciary duty owed by the Crown to status Indians should be extended to family law matters under provincial jurisdiction).

Considering that Guerin broke completely new legal ground, it is not surprising that many cases would be brought forward in order to test the parameters of the new duty, especially over the lengthy period of nearly two decades between Guerin and Wewaykum. As the Federal Court stated in BC Women, “Notwithstanding a number of modern and current cases dealing with the nature of the fiduciary duty owed by the Crown to Indians...the fiduciary duty owed by the Crown to Indians is still in a state of flux and evolution”\textsuperscript{59} From that point of view, one might see the claims brought to court asserting the sui generis fiduciary duty as a positive and desirable part of the process of jurisprudential development that would bring greater certainty to the notion of “cognizable Indian interest,” especially in cases in which no interest in land per se was being asserted.

Binnie J, however, cast what could be seen as a healthy process of legal development in a pejorative light. “I offer no comment about the correctness of the disposition of these particular cases on the facts, none of which are before us for decision, but I think it desirable for the Court to affirm the principle, already mentioned, that not all

\textsuperscript{54} [1989] 1 FC 143, 51 DLR (4th) 306 (TD).
\textsuperscript{55} (1997), 132 FTR 106, 148 DLR (4th) 356
\textsuperscript{56} [1987] 3 FC 174, 4 ACWS (3d) 223 (TD).
\textsuperscript{57} 2001 PECSTD 89, 207 Nfld & PEIR 292.
\textsuperscript{58} (1994), 120 DLR (4th) 511, 52 ACWS (3d) 340 (Alta Qb).
\textsuperscript{59} BC Woman, supra note 48 at para 19.
obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature."\(^{60}\)

It is not so much the finding in *Wewaykum* as the tone of Binnie's judgment that is noteworthy. As Leonard Rotman acknowledges, the claims advanced in *Wewaykum* were "shallow,"\(^{61}\) but the "virtual mocking" they received from Binnie "cast a pall"\(^{62}\) over the future fiduciary duty cases:

The...overwhelming rejection of the appellants' claims goes beyond the weak facts in the case; the judgment reads as if it is actively pointed towards limiting the scope of Crown fiduciary duties to Aboriginal people generally. Since this message was not necessary to dispense with the claims in *Wewaykum*, Justice Binnie appears to have gone far beyond what he needed to do to indicate that the Crown did not breach any fiduciary duty.\(^{63}\)

In an unfortunate footnote to *Wewaykum*, it emerged that Binnie had dealt with the file when he was Associate Deputy Minister of Justice, a fact that he claimed he did not remember after he was appointed to the bench and the matter appeared on the docket. The litigants claimed bias on Binnie's part and the matter ended up back before the court, which decided that his earlier involvement had been limited, and that there was no reasonable apprehension of bias.\(^{64}\)

Rotman is skeptical. "Binnie gave advice that was intended to be relied upon by [Department of Justice] counsel in *Wewaykum* and that advice was, in fact, followed and correspondence was exchanged with Binnie that kept him abreast of decisions well beyond the negotiation stages...a rather different scenario than that painted by the Supreme Court in *Wewaykum* 2." One band officer said his band "feels very strongly that [it] didn't receive a fair trial in the highest court in the land; what is the alternative for justice in this case given the circumstance?"\(^{65}\)

However, *Wewaykum* remains, in the vocabulary of litigators, "good law" and thus the case continues to cast a pall on the future development of the *sui generis* fiduciary duty. Whereas fiduciary law generally, in commercial law in particular, continues to

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\(^{60}\) *Wewaykum*, * supra* note 4 at para 83.

\(^{61}\) A New Spin, * supra* note 30 at 249.

\(^{62}\) *Ibid* at 255.

\(^{63}\) *Ibid*.

\(^{64}\) 2003 SCC 45, [2003] 2 SCR 259.

\(^{65}\) Quoted in A New Spin, * supra* note 30 at 249.
evolve, Binnie J stymied the jurisprudential development of the *sui generis* duty, raising a floodgates concern and thereby rendering the jurisprudence a game of spot the "cognizable Indian interest" and reducing the role of judges to giving a thumbs up or thumbs down on the claim *du jour*.

As I note later, however, the courts subsequently have shown a willingness to escape the juridical straitjacket imposed by Binnie J and to craft remedies appropriate to the matters at hand, a willingness that, I suggest, is entirely appropriate when dealing with equity and with fiduciary duties.

Where is the reconciliation?

The concept of fiduciary, generally and more particularly as it has been applied in the Aboriginal rights context, has about it an arbitrary air, since the determination of whether there is a fiduciary interest is ultimately case-specific and eludes definition. As Binnie stated in *Wewaykum*, there is no "general indemnity" and the extent of the duty "varies with the nature and importance of the interest sought to be protected." Thus, *sui generis* fiduciary duty becomes a distraction from dealing with the unfinished business in the uncertain sovereignties – Crown and Aboriginal. Indeed, the effect of the *sui generis* fiduciary duty is to grant legitimacy to certain Crown conduct, privilege Crown sovereignty and render Aboriginal sovereignty subservient. This is the effect of the way in which the courts have developed their approach to fiduciary obligations in the Aboriginal context. The jurisprudence has developed in such a way as to put the party to whom the duty is

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66 See *La/Cora*, supra note 22 and discussion by McMurro, supra note 21 and, more recently, *Indalex Ltd. (Re)*, 2011 ONCA 265, (2001), 104 OR (3d) a case involving a company’s responsibilities as commercial enterprise and pension administrator in which the Court decided that the company’s fiduciary duties as pension administrator must prevail over its rights under the *Companies’ Creditors Arrangement Act* [RSC 1985, c C-36].

67 There are those who take a more sanguine view of the lasting effects of Wewaykum. For example, Senwung Luk writes: "Wewaykum worries explicitly about the food of fiduciary responsibility litigation after Guerin and perhaps seeks to blunt the wide-ranging application of the Crown’s fiduciary obligations to Aboriginal communities after the Court used three other duties to inform itself of the interpretation of s. 35(1) of the *Constitution Act, 1982*, in *Sparrow*. Wewaykum seeks to refocus the doctrine on cases where there is a ‘cognizable Indian interest,’ but it is important to note that it has not disavowed any of the past Supreme Court of Canada decisions on Crown fiduciary accountability to Aboriginal communities." Luk, supra note 3 at 23-24.

68 See discussion in Chapter 4 at page 22.

69 *Wewaykum*, supra note 4 at para 87.
owed — in this case, Aboriginal people — in an inferior position compared to how beneficiaries are treated in standard formulations of the duty.

This is clear from a consideration of the Supreme Court of Canada in *R v Sparrow*70, delivered by Dickson CJ (and La Forest J) six years after the judgment in *Guerin*. The issue before the Court in *Sparrow* was the ambit of rights conveyed by section 35(1) of the *Constitution Act, 1982*71, which “recognize[s] and affirms” the “existing aboriginal and treaty rights of the aboriginal peoples of Canada.” In its efforts to come to grips with the intended meaning of the crucial words “recognized” and “affirmed,” the Court found that the words imported into section 35 a responsibility for the government “to act in a fiduciary capacity with respect to aboriginal peoples.”72 That conclusion sent the Court back to *Guerin*, a decision that “should guide the interpretation of s. 35(1). The relationship between the Government and [A]boriginals73 is trust-like, rather than adversarial, and the contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.”74

As *Sparrow* illustrates, the concept of fiduciary duty — being fact-specific and not ordaining any particular relationship between Aboriginal peoples and the Crown — can be used to empower the Crown as well as Aboriginal peoples. The issue before the Court was whether an Aboriginal fisher found by fisheries officers using a longer net than that allowed by the band’s provincial licence was protected by section 35 because he was exercising his Aboriginal right to fish. “There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights,” the Court declared. “Yet, we find that the words ‘recognition and affirmation’ incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power”.75

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70 [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].
72 *Sparrow*, *supra* note 70 at para 59.
73 One notes the capitalization of Government and the lower case in “aboriginal.” In drawing attention to what might appear to an insignificant matter, one might be accused of being petty. However, one assumes a certain deliberateness in a decision of the Supreme Court of Canada — a letter is never just a letter but evokes a larger though unstated attitude toward the status of Crown and Aboriginal sovereignties.
74 *Sparrow*, *supra* note 70 at para 60.
75 *Ibid* at para 62 [emphasis added].
The Court set itself the task of balancing a respect for obligations made by the Crown in the past with the practical reality of governing all its citizens — Aboriginal and non — in the present. To meet its self-imposed task, the Court resorted to a "justification" requirement — the Crown could encroach on section 35 rights if the encroachment could be justified. "[F]ederal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights,...[which is consistent with the] concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by Guerin..." Sometime, then, fiduciary duty only has to be invoked, and once it has been, the mere fact that it has been invoked protects the Crown from a charge that it has acted contrary to its special obligations to Aboriginal peoples, even when the actions have the effect of restricting Aboriginal interests for the benefit of non-Aboriginal interests.

In many ways, the court in developing its justification analysis was performing the balancing of competing interests that courts are often called on to do, not least in the matter of the access to and use of natural resources and the rights of Aboriginal peoples. However, the decision also implicates the courts in the uncertain sovereignties of the Crown and Aboriginal peoples and it does so in a way that is not in keeping with the concept of fiduciary obligation on which the Court claims to rely.

Because of the work of legal biographers Sharpe and Roach, we now know that the Sparrow Bench (at that time of six members) was badly divided. One can see underlying the judicial differences on the Sparrow Bench fundamental disagreement as to how Aboriginal sovereignty was to be squared with Crown sovereignty. The outcome may be seen as the product of Dickson CJC's skills as a mediator of these profound differences as much as any high-minded resolution of the underlying issues in Sparrow. La Forest J had delivered to his colleagues a draft judgment in which he would convict Sparrow because, he argued, in spite of section 35, the federal government's power to regulate carries on as before. This approach was not acceptable to Wilson J, who promptly sent a memorandum.

76 Ibid.
77 Robert J Sharpe & Kent Roach, Brian Dickson: A Judge's Journey (Toronto: Published for the Osgoode Society for Canadian Legal History by University of Toronto Press, 2003) at 450-1 [A Judge's Journey].
78 Macintyre J. took no part in the judgment.
to the chief justice. She argued that there was "no reason to constitutionalize what has been done on the assumption that it was all legal. If we do that, it means that native people start in 1982 with diminished rights."79

In an effort to quell the competing factions within, Dickson CJC crafted a consensus document acceptable to both sides. "Existing aboriginal rights' must be interpreted flexibly to permit their evolution over time," the court stated.80 However, in a nod to the more cautious co-author La Forest J, the judgment also finds that the Musqueam "distinctive culture" did not include a commercial fishery.81

In the manner in which it balances the interests of the Musqueam people and commercial fishers, the court acts fundamentally differently in a doctrinal sense than in non-Aboriginal fiduciary duty cases. Consider, for example, Alberta v Elder Advocates of Alberta82, a class action in which nursing home residents claimed that the provincial government had charged them unjustly high accommodation charges. The plaintiffs relied on Guerin, Sparrow and Wewaykum in their argument that by virtue of being vulnerable nursing home residents they were owed a fiduciary duty by the Government of Alberta. Particularly relevant to the matter at hand is the following observation by the Chief Justice:

Finally, I note that the specific fiduciary duty that the plaintiffs seek to establish relates primarily to setting the accommodation charges by regulation. This is a legislative function of government. Where the government acts in the exercise of its legislative functions, courts have consistently held that a fiduciary duty does not arise...Deciding how to fund and implement insured health care services requires constant balancing of competing interests between all segments of the population, since everyone receives health care. The Crown would be unable to meet its obligations to the public at large if we were to hold it to a fiduciary standard of conduct for one group among so many others. This aspect of the claim is doomed to fail.83

79 A Judge's Journey, supra note 77 at 450.
80 Sparrow, supra note 70 at para 27.
81 Ibid at para 43.
83 Ibid at para 62. The decision in Elder Advocates reflects judicial reluctance to second-guess legislatures in their spending decisions. Notable in this regard is the decision of the Supreme Court of Canada in Reference Re Canada Assistance Plan (BC), [1991] 2 SCR 525, 83 DLR (4th) 297, in which a provincial attempted unsuccessfully to resist cutbacks in federal cost-sharing of social assistance and welfare programs. The court found inter alia that because of the importance of parliamentary sovereignty, one government could not government fetter the legislative authority of a future government. "This is particularly true when the restraint relates to the introduction of a money
In the matter at hand, the finding in *Elder Advocates* would appear to bode ill for a claim that there is a fiduciary obligation to provide the NIHB as part of an array of services that includes traditional health and healing, since the court might similarly object that everyone receives health care and that it would be unfair to privilege one group over another. However, the claim I am making here is not for a right to health services *per se*, but a remedy for historic and ongoing breaches of fiduciary duty owed to Aboriginal peoples for which the proposed remedy is the provision of the NIHB as part of an array of traditional and other health services until such time as Aboriginal peoples in the aggregate have achieved the same level of health and well-being as the general population.

While *Elder Advocates* contains restrictive language regarding the fiduciary duty to provide health benefits, it takes an onerous approach to the duties of a fiduciary generally. Where there is a duty owing, the court states, "[t]he duty must be one of utmost loyalty to the beneficiary."84 Relying on a text on fiduciary duty, the court concludes that "the fiduciary principle’s function is not to mediate between interests. It is to secure the paramountcy of one side’s interests...The beneficiary’s interests are to be protected."85

As Gordon Christie argues, such a balancing of interests as the court performs in *Sparrow* – supposedly in the name of fiduciary duty – are fundamentally in conflict with the obligations of the fiduciary and the rights of the beneficiary in the standard fiduciary relationship. *Sparrow* "makes absolutely no sense...as a ruling connected to the application of fiduciary doctrine" because of the advantages to the Crown and the prejudice to Aboriginal peoples in this formulation."88

The court’s reflection in *Sparrow* on the nature of fiduciary duty owed to Aboriginal peoples indicates a tentativeness about the obligation that is markedly different from the

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84 *Elder Advocates*, supra note 82 at para 43.
88 Gordon Christie, "Considering the Future of the Crown-Aboriginal Fiduciary Relationship in *In Whom We Trust*, supra note 20 at 286.
stringent approach taken in fiduciary cases generally regarding the rights of the beneficiary. The dilution of the duty of the *sui generis* version invites a consideration of whether — doctrinally or strategically — it makes sense to maintain a separation between this special duty and the duty *simpliciter*. James Reynolds argues that the distinction should be abandoned because it stands in the way of the jurisprudential development of the duty as it applies to the Crown Aboriginal relationship:

The description of the Crown's fiduciary relationship to Aboriginal peoples as *sui generis* adds nothing to the explanation of the relationship and serves to confuse and frustrate the orderly development of the law by discouraging the application, where appropriate, of principles common to all fiduciary relationships. In my view, it is time to abandon it. All fiduciary relationships are "situation-specific."  

As Leonard Rotman explains, the notion of fiduciary duty is built on categories of relationships, all of which have their own particularities. Traditionally, courts looked to the list of relationships — "such as trustee and beneficiary, parent and child, and guardian and ward" — and there were no guidelines for determining what a fiduciary relationship was.  

From this point of view, then, the mere fact that there are particular features of the Crown-Aboriginal fiduciary relationship does not preclude it from being considered along with fiduciary relationships generally and from sharing in the jurisprudential developments in fiduciary law.

As Reynolds argues,

It is difficult to understand why the relationship between the Crown and Aboriginal peoples is in any more in a class of its own than that between doctor and patient, director and company, parent and child, or lawyer and client. Each type of fiduciary relationship has special rules applicable to it that reflect the unique aspects of that relationship. However, the situation-specific nature of fiduciary relationships does not generally preclude the application of certain common principles. To pursue the taxonomic analysis, the Crown's fiduciary relationship to Aboriginal peoples may be *sui generis* or in a genus of its own, but so are other fiduciary relationships, and this does not prevent them from part of a genera sharing common characteristics. Rather than foreclose further analysis by invoking the

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mantra of *sui generis*, it would be more profitable for courts to explain why the rules that are common to fiduciary relationships generally should not apply to this particular fiduciary relationship. In the absence of such an explanation, those rules should apply.  

It is time, then, for the Crown-Aboriginal fiduciary duty to come in to the family of fiduciary duty, all forms of which are *sui generis*.

Such doctrinal issues may seem far removed from the day-to-day issues of the NIHB such as whether a certain medication should be included on the formulary or whether air travel from a fly-in community in northwestern Ontario should be reimbursed. However, any legal project that has as its objective a legal recognition of a fiduciary duty on the part of the Crown to provide the extended health program must contemplate the legal and historic landscape of which fiduciary duty is a part and the limits of the concept as it has been applied in relation to Crown-Aboriginal relations. One reading of fiduciary duty as it has developed in the context of Aboriginal peoples is that it is part of the legal infrastructure of legitimation needed because of the unresolved issues of sovereignty and sovereignties described by John Borrows, who writes, “Aboriginal peoples have had their status redefined by Canada without sound juridical reasons...The Supreme Court has not effectively articulated how, and by what legal right, assertions of Crown sovereignty grant underlying title to the Crown or displace Aboriginal governance.”

Despite the tentativeness of *Sparrow* and the setbacks of *Wawaykum*, there remain those observers who see in the *sui generis* fiduciary duty the means to advance the interests of improved Crown-Aboriginal relations and the correction of historic wrongs. Leonard Rotman, for example, sees it as a means for accomplishing “vital functions:” “an important check on government legislative power”; a “manifestation of the honour of the Crown”; “serving as a primary link between historic and modern Crown-Native relations”; ‘anima[tion] of the rights in section 35”; “it underscores the non-adversarial of Crown-Native relations”.

One could debate Professor Rotman in the general and the specific. In regard to checking government legislative power, there is an open question as to where

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89 See Reynolds, *supra* note 87 at 139.


91 A New SpIn, *supra* note 30 at 257.
— in the view of the courts — the fiduciary duty and the related concept of honour of the Crown ends and parliamentary sovereignty ends, as the discussion above indicates. Any of the benefits highlighted by Rotman are contingent ones that depend on a court finding that the duty is implicated, whether a remedy arises and — if so — what remedy. Of course, uncertainty and ambiguity are features of the litigation process generally. There are never any guarantees of success. However, the extra difficulty in matters in which the *sui generis* fiduciary obligation to Aboriginal people is asserted is the ability of the court to expand and contract the very nature of the *sui generis* requirement, in contrast to the standard fiduciary obligation.

It is important to get behind the legal riddles of fiduciary duty regarding when it arises and when it does not and place the *sui generis* duty in this larger context in which it is inextricably related to unresolved issues of sovereignty. Regarding the issue of whether there is a fiduciary duty on the Government of Canada to provide the NIHB, the argument has moved little beyond the preliminary claim of *sui generis* fiduciary duty. The historic failure of the Crown to respect Aboriginal peoples' sovereignty as it undertook to do in the *Royal Proclamation* but which it later conveniently ignored when circumstances changed is related to the poor quality of health and well-being for which the NIHB is a partial response.

An argument that there is a fiduciary duty to provide the NIHB as part of an array of services that includes traditional healing has the potential to weave together two very different strands of thinking regarding the nature of fiduciary duty. On the one hand, my argument looks to *Guerin* and the *sui generis* duty identified by Dickson CJ as arising out of the history of Aboriginal people as original occupants of these lands who had a unique relationship with the Crown — in particular, in regard to the disposition of their land, which could only occur via the Crown. However, the *sui generis* duty should not be construed so as to prejudice the very people it was meant to benefit — Aboriginal peoples. Though she signed on to *Sparrow*, Wilson J evidently was concerned about the potential of the *sui generis* duty being used as a cleansing agent for the Crown's sins of the past by accepting the present as legally non-contentious and by balancing the disparate interests of the present-day without due regard for how the current constellation of circumstances arose. While it is true that the Crown wears many hats, the condition precedent for the
Crown to be so attired is that the Aboriginal people who lived on these lands first agreed to share their lands with Crown.

As I describe below, invocation by the courts of the Crown’s many hats often leads to a blurring of the distinction between the special place of Aboriginal peoples and the public interest generally.

The dubious provenance of the many hats

As I describe below, the courts are wont to invoke the Crown’s wearing of many hats as an all-purpose way of dealing with the case at hand. However, Birnie J borrowed the words from Samson Indian Nation and Band v Canada\(^{92}\), which concerned claims of breach of trust and of fiduciary duty arising from the Crown’s management of oil and gas revenues from surrendered lands and the programs and services provided out of those revenues. From surrender in 1946 until 1981, the Crown kept the royalties in its Consolidated Revenue Fund\(^{93}\) and paid an interest rate of 3 to 5 per cent.\(^{94}\) Enactment of an Order in Council in 1981 provided for the calculation of interest according to market yield of Bank of Canada bond issues.\(^{95}\) The Samson First Nation claimed they would have earned anywhere from $239 million to $1.53 billion under the revised royalty payment scheme. The respective amounts calculated by the Ermineskin First Nation was $157 million to $217 million.\(^{96}\)

However, the reference at the Federal Court of Appeal to the Crown’s many hats came not with regard to the balancing of interests in regard to the management of lands or provision of services. Rather, it came as a result of a request by the appellant bands for the production of documents. The Crown filed its affidavit of documents and, as per normal litigation practice, filed a separate list covering documents over which it claimed privilege. The Aboriginal parties to the litigation argued that no privilege applied because

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\(^{93}\) Samson 2, ibid at para. 12.

\(^{94}\) Ibid at para. 13.

\(^{95}\) Ibid at para. 16.

\(^{96}\) Ibid at para. 19.
they had a trust relationship with the Crown and, per standard trust law, as beneficiaries of the trust relationship, the legal information belonged to them.

In adjudicating the matter, MacGuigan and [name missing here] JJA turned first to the nature of the solicitor-client relationship and only secondarily to the trust relationship:

The recognition of privileged communications between lawyers and their clients, as fundamental to the due administration of justice, dates back some four centuries...Contrary to the contention of the respondent,...the solicitor client privilege, therefore, is not to be interfered with except to the extent absolutely necessary, and any conflict should be resolved in favour of protecting confidentiality.97

The Court was, then, dealing first and foremost with a foundational issue – the extent and ambit of solicitor-client privilege. It was out of that primary issue that the issue of the nature of the trust relationship between the Crown and Aboriginal peoples arose. A consideration of the complete paragraph in which the court makes the many hats analogy is instructive because it indicates not only that the Crown is an extraordinary trustee but also that Aboriginal peoples are no ordinary beneficiary:

That assumption [that legal advice sought by the trustee belongs to the beneficiary] cannot be applied to Crown “trusts.” The Crown can be no ordinary “trustee.” It wears many hats and represents many interests, some of which cannot but be conflicting. It acts not only on behalf or in the interest of the Indians, but also is accountable to the whole Canadian population. It is engaged in many regards in continuous litigation. It has always [word missing here] to think in terms of present and future legal and constitutional negotiations, be they with the Indians or with the provincial governments, which negotiations, it might be argued, can be equated in these days and ages with continuous litigation. Legal advice may well not have been sought or obtained for the exclusive or dominant benefit of the Indians, let alone that of the three bands involved in these proceedings. Legal advice may well relate to policy decisions in a wide variety of areas which have little or nothing to do with the administration of the “trusts.” It is doubtful that payment of the legal opinions given to the Crown is made out of the “private” funds of the “trusts” it administers.98

This rendering of the Crown’s many hats suggests a view of its relationship with Aboriginal peoples as more substantial than a public interest in general. In invoking the Aboriginal

97 Samson 1, supra note 92 at paras 7 and 10
98 Ibid at para 21.
interest in the same context as the provinces, the court treats Aboriginal peoples via their Nation organizations as the third level of government anticipated by the Charlottetown Accord\textsuperscript{99} because they might one day be sitting across from each other on a nation-to-nation basis. The court appears to be concerned that giving them access to general Crown legal advice would produce an unfair advantage at such a future showdown at the constitutional bargaining table. Clearly, this is not an interest like others that might be subsumed under the public interest.

The case management judge’s order was challenged twice before the federal Court of Appeal. On the second occasion, the Crown once again challenged the case management judge’s order that it disclose documents that “though general in nature without specific reference to the ‘res’ [that is, the oil and gas interests surrendered or monies derived therefrom], the documents by necessary implication are considered to relate to the administration of the res.”\textsuperscript{100} In determining the ambit of solicitor-client privilege in the case, the court had to come to some determination about the nature of the trust between the Crown and Aboriginal peoples, generally and in the context of the surrender to which the oil and gas revenues were related. Predictably, the Crown argued for a narrow definition and the Aboriginal plaintiffs argued for a broad characterization. The Federal Court of Appeal confirmed the order of the case management judge.

Because the case was at this point in/of the discovery stage, the court was cautious in its approach to the Aboriginal litigations. Hearkening back to the previous Federal Court of Appeal decision on the matter, the court as now constituted noted that for the trust principle to apply at the discovery stage of an action for breach of duty of administration of a trust, there were two prerequisites – the alleged trust relationship must be established on a \textit{prima facie} basis, and the documents at issue must be “obtained or prepared by the trustee in the administration of the trust and in the course of the trustee carrying out his duties as trustee.”\textsuperscript{101}

\textsuperscript{99} The constitutional amendment package presented in 1992 to the Canadian people by the federal and provincial governments and rejected in a referendum.

\textsuperscript{100} Samson 2, supra note 92 at para 10.

\textsuperscript{101} Suncor 2, supra note 92 at para 16.
It was the second prerequisite that caused the court difficulty. As to whether there was a trust relationship, the court stated that "it is settled that there is a special fiduciary relationship between the Crown and the Indians," though "the Supreme Court of Canada has yet to define its true nature and scope."\(^{102}\) Regarding the matter at hand, the court said that it "was prepared, because of the very special relationship between the Crown and the Indians, and because the Crown was held to a 'high standard of honourable respect toward the Aboriginal people,' to accept that whatever was the nature of the relationship between the Crown and the respondent bands, it would qualify **prima facie** as a trust type relationship for the purposes of the application of the trust principle at the discovery stage."\(^{103}\)

There is, then, in the *Samson* decisions an expansive view of the trust relationship between the Crown and Aboriginal peoples because of the *sui generis* fiduciary duty that applies in the relationship.\(^{104}\) Binnie J transposed the many-hats view of the Crown's competing obligations on to the highly unusual set of facts that pertained in *Wewaykum*. The lands in question were not their traditional lands. As Binnie J noted, the "federal government sought to create reserves for the appellant bands out of provincial Crown lands to which these particular bands had no aboriginal or treaty right."\(^{105}\) Furthermore, the appellant Aboriginal nations "arrived in the...area at the same time as the early Europeans..."\(^{106}\) It was out of those rather unique set of facts that came Binnie J's conclusion that "[w]hen exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest."\(^{107}\)

Despite the odd facts in *Wewaykum*, Binnie J was able to craft two restrictive mechanisms — cognizable Indian interest and many-hatted Crown — that have served to stunt the jurisprudential growth of the *sui generis* fiduciary duty. The understanding of the Crown as the wearer of many hats fits neatly with Binnie J's sympathy as expressed in

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\(^{102}\) Ibid at para 21.
\(^{103}\) Ibid at para 17.
\(^{104}\) Ibid at para 21.
\(^{105}\) Ibid, supra note 4 at para 95.
\(^{106}\) Ibid.
\(^{107}\) Ibid at para 96.
Wewaykum for a limited liability view of the Crown as fiduciary. Indeed, in this view, there cannot be “plenary Crown liability covering all aspects of the Crown-Indian band relationship,” as Binnie J stated in his conclusion in Wewaykum.  

Its appearance in Wewaykum cast the Crown’s many hats in a more prominent role than it had played in the lower court decisions. Going forward, it would be divorced from the very particular context in which it was uttered in Samson and would serve as authority from the top court. Among such cases is the continuation of the Samson saga in the Supreme Court of Canada. In Ermineskin Indian Band and Nation v Canada, Rothstein J rejected the First Nations’ claims that the Crown had breached its fiduciary obligations by not handling the royalties monies in the manner most advantageous to the First Nations. Rothstein J noted that the 1946 Surrender obligated the Crown to hold those interests in trust in the manner “most conducive to the welfare of the bands.” However, relying in part on Guérin, Rothstein J went on to find that “Parliament may legislate in ways that contain or eliminate the Crown’s fiduciary duties.” Rothstein J found that Parliament had done so in part via the Financial Administration Act. “A fiduciary that acts in accordance with legislation cannot be said to be breaching its fiduciary duty,” he reasoned. “The situation which the bands characterize as a conflict of interest is an inherent and inevitable consequence of the statutory scheme.”

In Rothstein J’s view, the obligation to the Aboriginal people concerned presented an inherent conflict with its duties to the public at large:

A fiduciary that acts in accordance with legislation cannot be said to be breaching its fiduciary duty. The situation which the bands characterize as a conflict of interest is an inherent and inevitable consequence of the statutory scheme...The Crown’s position in the setting of the interest rate paid to the bands is...unique. On the one hand, it has fiduciary duties that are owed to the bands, including the duty of loyalty and the obligation to act in the bands’ best interests. On the other hand, the Crown must pay the interest owed to the bands with funds from the public treasury financed by

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108 Ibid at para 80.
110 Ibid at para 68.
111 Ibid at para 79.
112 RSC 1985, c F-11.
113 Ermineskin, supra note 109 at para 128.
taxpayers. The Crown has responsibilities to all Canadians, and some balancing inevitably must be involved... As Binnie J stated in Wewaykum Indian Band v. Canada... at para. 96, “[t]he Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting.” In the present case, the Crown must consider not only the interests of the bands but also the interests of other Canadians when it sets the interest rate paid to the bands... The standard of care required of the Crown in administering the funds of the band is that of “a man of ordinary prudence in managing his own affairs”... However, because the Crown “can be no ordinary fiduciary,” its obligation to act as a person of ordinary prudence in managing his or her own affairs is modified by relevant legislation and by the kinds of considerations outlined above.114

As noted, the judgment which Binnie J cited for his many hats reference comment was Samson 115, in which it emerged out of the very specific issue of solicitor-client privilege. In the hands of Binnie J, however, it came to play a more general role as an agent of legal relativism. Yes, the Crown had a fiduciary obligation to Aboriginal peoples, but it was one obligation among many. The particular importance to be given to the duty to Aboriginal peoples remained unclear. Binnie J indicated that the “content of the Crown’s fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected.”116 However, it is unclear once established whether the importance of the Aboriginal interest would also determine how the Crown ought to resolve any conflict between an Aboriginal interest and a non-Aboriginal public interest.

In Ermineskin, Rothstein J expanded the legal relativity by bringing the many hats reference plucked out of the solicitor-client context in Samson by Binnie J and bringing it back to the very same case that was litigated at the Federal Court of Appeal in Samson. Like a legal boomerang, the many hats had returned to the Samson-Ermineskin litigation, but in a form more restrictive to the future of the sui generis duty. Rothstein J used the many hats view of the Crown’s competing duties as the basis for the possibility of legislative control via statute to reduce the discretion resting with the Crown and thereby dispense with any fiduciary rights not protected by section 35(1) of the Constitution Act, 1982. If the fiduciary obligations did not have section 35 protection, “the bands will have

114 ibid at paras 128-131 [emphasis added].
115 supra note 92
116 Wewaykum, supra note 4 at para 86.
rights as beneficiaries of the Crown's obligations, but they will not be constitutionally protected rights. As such, legislation that precludes investment of Indian royalties by the Crown will be valid legislation.\footnote{Ermineskin, supra note 109 at para 48.}

Clearly, the implications of such an analysis for the argument I am making here regarding a fiduciary duty to provide the NIHB as part of an array of services including traditional healing would be considerable. Rothstein J appears to be suggesting that the Crown could elude such a requirement by, for example, introducing a law that provided for a health scheme even inferior to the current NIHB. One would then be left with the challenge of locating the fiduciary duty to provide the NIHB and traditional healing within the parameters of section 35. For the reasons I set out elsewhere in this thesis, I regard the section 35 argument that there is an inherent right to these benefits as a less attractive legal strategy than the one I am proposing.

However, for the reasons Intriguingly set out by Senwung Luk, there is a serious question regarding whether Rothstein J is legally accurate in his reading of his Court's jurisprudence on the \textit{sui generis} fiduciary duty. Rothstein J took the following pathway through the law:

\begin{quote}
In \textit{Guerin}, Dickson J. stated, at p. 387:

The discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case. This is as true of the Crown's discretion vis-à-vis the Indians as it is of the discretion of trustees, agents, and other traditional categories of fiduciary. The Indian Act makes specific provision for such narrowing in ss. 18(1) and 38(2). A fiduciary obligation will not, of course, be eliminated by the imposition of conditions that have the effect of restricting the fiduciary's discretion. A failure to adhere to the imposed conditions will simply itself be a prima facie breach of the obligation.

This Court has held in \textit{Guerin} and \textit{Authorson} that when the Crown is a fiduciary, Parliament may legislate in ways that constrain or eliminate the Crown's fiduciary duties. The Crown's obligation is to act in a way that is consistent with its fiduciary duties as constrained by valid legislation. It is
\end{quote}
therefore necessary to consider whether legislation limits the Crown's fiduciary duties to the bands with respect to their royalties.\textsuperscript{118}

As Senwung Luk astutely observes, Rothstein J appears to have misapprehended both the plain meaning and the import of the case law on which he relies. Writes Luk, "[T]he passage of \textit{Guerin} cited by Justice Rothstein stated that '[a] fiduciary obligation will \textit{not}...be eliminated by the imposition of conditions that have the effect of restricting the fiduciary's discretion.' However, at the part of the above-cited passage where the \textit{Guerin} quote is explained, Justice Rothstein stated that the Crown's fiduciary duties \textit{can} be constrained or eliminated."\textsuperscript{119}

Rothstein J like his brother judge Binnie J displays a jurisprudential opportunism, ignoring contextual fidelity in efforts to buttress their view that the \textit{sui generis} fiduciary duty is to be restrained rather than to be expanded. Binnie J used a many hats reference originally made in the very specific context of solicitor client privilege where the relationship between Crown and Aboriginal peoples are specifically defined by virtue of them being legal adversaries in a litigation process. The application of the rules of solicitor client privilege is, therefore, a different exercise than reconciling Aboriginal and settler interests generally. As the Federal Court of Appeal stated in \textit{Samson}, solicitor-client privilege is "fundamental to the due administration of justice."\textsuperscript{120} However, nothing in the \textit{Samson} courts' treatment of the Crown-Aboriginal interests anticipates the parity of interests suggested by the Crown's wearing of many hats.

Compounding the issue of the decontextualization of the many hats comment in \textit{Wewaykum} is the peculiar fact situation in the case itself. As Luk writes in regard to \textit{Wewaykum}, the circumstances in the case makes it legally anomalous, "since most reserves are within the traditional territory of an Aboriginal community [and] \textit{Wewaykum}'s pre-reserve creation period, and its concomitant fiduciary obligation standard, applies only to a small minority of cases where the Aboriginal community's interests are to be

\textsuperscript{118} \textit{Ibid} at paras 75-77.

\textsuperscript{119} Luk, supra note 3 at 27 [emphasis in original].

\textsuperscript{120} \textit{Ermineskin}, supra note 109 at para 7.
prioritized at the same level as those of the settler communities." For that reason, Luk questions the appropriateness of Rothstein J's reliance on *Wewaykum*.

Curiously, *Ermineskin*...cited the "many hats" passage from *Wewaykum* as a justification for allowing the Crown to depart from the strict duties to which the Crown would have been held if the doctrinal understandings of a fiduciary's duties of a fiduciary's duties had been applied. In *Ermineskin*...the fiduciary being alleged was certainly after reserve creation, which would seem to distinguish it from the *Wewaykum* situation... *Ermineskin*, on the other hand, took place on Treaty 6 lands. Presumably, the Crown signed Treaty 6 with the appellant bands from *Ermineskin* because it believed those Bands had the authority to relinquish Aboriginal title to their traditional lands... Even if a doctrine of the formal supremacy of the fiduciary obligations was never articulated [in the case law], it is clear that, at the very least, the fiduciary obligation operated to privilege Aboriginal interests when it came to interpreting statutory constructions of Crown powers. If we take seriously the dictum from *Sparrow*, it would seem that fiduciary obligations may have a force that trumps a clearly and plainly contradictory statute.  

The state of the law post-*Ermineskin* is unclear. Luk takes a sanguine view, maintaining that the spectre of downgrading of fiduciary duty suggested by *Ermineskin* is exaggerated. An alternative point of view is that the case-by-case focus of the jurisprudence accentuates the problem caused by the characterization of the duty as *sui generis* such that the Aboriginal form of the duty cannot evolve on its own into a coherent whole and is not able to share in the development of the fiduciary duty generally.  

"It would be tempting to read *Wewaykum* and *Ermineskin* as narrowing the Crown's fiduciary obligations," Luk writes. Indeed, Luk suggests that such a narrow view would be warranted, since "it may be that the Court took the Crown's fiduciary accountability beyond its origins in the protection of Aboriginal interests in lands and resources in *Sparrow* and has subsequently sought to rein in the development of the doctrine."

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111 Luk, supra note 3 at 39.
112 ibid.
113 See Reynolds, supra note 87 at 159.
114 Luk, supra note 3 at 2.
Surveying the legal landscape, Luk finds that there has not been undue restriction of the *sui generis* duty and that "a core concept of the fiduciary relationship has remained constant since *Guerin*"\(^{125}\) and that "the Crown, in fact, does not wear so many hats."\(^{126}\)

To summarize, it would appear that we now have the following schema for understanding the relationship between the Crown’s fiduciary obligations and its statutory obligations. Where the statutory obligations contradict the Crown’s fiduciary obligations, the inquiry will proceed to determine whether the Aboriginal interest in question is protected by s. 35(1). If it is not, then, according to Ermineskin, the Crown’s statutory obligation will override its fiduciary obligation. However, if it is a s. 35(1) protected Aboriginal interest then the statute will be invalid by virtue of the Crown’s fiduciary obligations. Where the Crown’s statutory obligations and fiduciary obligations do not contradict, then the case law...suggests that the Crown’s fiduciary obligations will inform the interpretation of the Crown’s statutory powers and obligations. Where the statute grants the Crown discretion, the Crown will be obliged to exercise that discretion to the standard of a fiduciary over the relevant Aboriginal interest...Ermineskin, in affirming the status of the Crown’s fiduciary obligations over s.35(1) interests as analogous to constitutional protection, has reaffirmed the core normative concept animating the whole line of case law canvassed here: the Crown interposes between Crown and settler communities over their traditional land and resources.\(^{127}\)

However, this may be giving the case law more coherence than actually exists. As Luk acknowledges, one needs to "pay[... ] close attention to the factual bases of the major fiduciary obligations" to discern this "constant core."\(^{128}\) The cases each depend on unique sets of circumstances — in *Wewaykum*, one might say that the facts were peculiar — and the possibility of distinguishing on the facts looms large in any litigation on which the *sui generis* fiduciary duty is relied.

One can see in Luk’s analysis a tension between a more modest view of the appropriate ambit of the *sui generis* fiduciary duty — one focused on supervising the discretion afforded to the Crown in the management of “the property of Aboriginal communities,” as he describes the core concept — and a more profound view of the nature

\(^{115}\) ibid.
\(^{116}\) ibid.
\(^{117}\) ibid at 47-48.
\(^{118}\) ibid at 2.
and extent of the duty. If Luk accurately crystallizes the ambit of the duty, one wonders whether the Supreme Court’s efforts post-Guerin have been superfluous. Yet Luk also ventures onto more ambitious normative ground, far beyond the limited jurisprudential terrain in which he has otherwise confined himself:

The role of the Crown as the guardian of the Aboriginal interest has been an important idea since the Royal Proclamation of 1763. Aboriginal communities the rightly feared what the settler influx would mean for their land rights and secured the Proclamation as a promise to protect those rights. That promise is as important today as it was then, since Aboriginal interests are under threat today from the settler community just as they were then. The introduction of electoral democracy in settler political institutions may have made it less palatable for the Crown to exercise its role as a protector of Aboriginal interests, but Canadian courts, true to their constitutional role as protectors of minority rights, stepped in with the articulation of the fiduciary concept in Guerin. The fiduciary concept is only judicial recognition of an idea and a relationship that remains crucial for the peaceful and just development of Canadian society, and one that the courts have done well in articulating in the case law since Guerin.

The implication of Luk’s words is to link the fiduciary idea to the larger goal of reconciliation, or, as he terms it, “the peaceful and just development of Canadian society.” In other words, if we did not already have a concept of fiduciary duty to deal with the unresolved issues of Aboriginal peoples, we would have to summon such an idea, for it encapsulates the need to recognize the wrongs of the past and to assess the appropriate settlement to compensate for those wrongs. Otherwise, there can be no just development of Canadian society, because the present and future would be built on the unresolved injustices of the past.

However, the nature of this vision of fiduciary concept that Luk offers is too limited to accomplish this larger goal that he recognizes as being the fundamental content of the fiduciary concept. Luk appears to agree with Binnie J that in Sparrow “the court took the Crown’s fiduciary accountability beyond its origins in the protection of Aboriginal lands and resources” and that its subsequent “attempts [notably in Wewaykum and Ermineskin] at circumscribing the Crown’s fiduciary accountability to Aboriginal peoples” However,
what is left over of the duty after the circumscribing of the duty of which Luk approves is a role for the Crown as *sui generis* fiduciary as holder of the discretionary power over the "property interests of Aboriginal communities."\textsuperscript{132} The Crown's role, in this view, is linked to its responsibilities as "the exclusive representative of Aboriginal communities in their dealings over lands and resources with settler communities."\textsuperscript{133} There is a profound gap between the role envisaged here of Crown as real estate agent for Aboriginal communities and an expansive purpose of the fiduciary duty described elsewhere by Luk. There, he states that the protective obligations in the *Royal Proclamation of 1763* are "deeply important to the evolution of the doctrine of Crown fiduciary obligations toward Aboriginal communities."\textsuperscript{134}

The focus on land *qua* property invites a conception of the Crown as wearing many hats, since it reduces the Aboriginal interest to being merely commercial without the overlay of spiritual and cultural significance. The Aboriginal interest is, therefore, on the same plane as settler interests. The Crown is thus cast in the role of referee of competing commercial interests rather than protector of the unique Aboriginal interests arising out of their status of original occupants of these lands whose bargain with the Crown included a right to maintain their special relationship with the land on which rested their health and well-being.

*Is fiduciary duty the best route?*

Having recognized the limitations of both the fiduciary duty and the *sui generis* fiduciary duty as it has been applied to the Aboriginal peoples, it is appropriate to ask what are the alternatives to relying on fiduciary duty as the basis for a legal requirement that the Government of Canada provide the NIHB as part of a wider array of services that includes those of traditional healers and other culturally appropriate measures. Are those alternatives more legally viable in the long run? There are four alternatives, in particular, that we might consider in this regard:

\textsuperscript{132} ibid.
\textsuperscript{133} ibid at 3.
\textsuperscript{134} ibid at 8.
• An argument based on treaty rights, specifically the commitment in Treaty 6 to provide a "medicine chest" (the treaty argument);

• An argument for the constitutionalization of the NIHB as part of a wider array of services that includes culturally appropriate services. Such an argument would contain an assertion that Aboriginal people have a social right to these services because they are required to bring Aboriginal peoples to a collective state of health necessary for them to participate fully as citizens and as agents for their own cultural survival (the distributive justice argument);

• An argument that Aboriginal peoples have an inherent right to the NIHB and other health services by virtue of having been the original occupants of the lands that are now Canada and having had intact and long-standing traditional approaches to health and healing at the time of contact (the section 35 argument);

• An argument that the honour of the Crown is sufficient to ground an obligation on the part of the Crown to provide the NIHB as part of a wider array of health services that includes traditional approaches.

After providing a brief sketch of what the contents of these arguments would be, I conclude that fiduciary duty is the preferred route because, in its classic form, it has the flexibility to respond to novel legal issues, especially those in which the "conscience of the court"[^135] is engaged, and in its sui generis version provides a way to relate low levels of health and well-being of Aboriginal peoples to unresolved issues of sovereignty.

The treaty argument: Treaty 6, entered into in the late 1800s by the Cree of what is now central Alberta and Saskatchewan provided, among other things, that a medicine chest be "placed in the house of every agent for the free use of the band."[^136] Though the words appear only in Treaty 6, there are indications that similar undertakings were made by the

[^135]: As the Court described its role in *Soulas v Karkantzas* [1997] 2 SCR 217 at para 46, 32 OR (3d) 716, in dealing with the fiduciary duty in the context of a realtor-client relationship.

Crown in the negotiation of treaties 7, 8, 10 and 11.\textsuperscript{137} Medical doctors regularly travelled with treaty parties and provided Aboriginal peoples with medical care. As Yvonne Boyer notes, "[t]his demonstration of medical care was important to the Aboriginal Peoples since their knowledge system is built on actions rather than words."\textsuperscript{138}

Advocates for the position that there is an obligation on the federal government to provide extended health services to Aboriginal people have frequently made the treaty argument, and there is some judicial authority for an expansive and general interpretation of the medicine chest clause\textsuperscript{139}, though the Supreme Court of Canada has not had occasion to provide an interpretation. However, as Maureen Lux points out, the medicine chest clause has been forever "the subject of contention," as Aboriginal people cite it as a "promise to provide health care" while the federal government argues for a "narrower interpretation."\textsuperscript{140}

The limitations to relying on the treaty argument are twofold – practical and theoretical. There are approximately 500 treaties between Aboriginal nations and the Crown.\textsuperscript{141} Each involved particular circumstances and understandings of what was being negotiated. Many of the pre-1850 treaties involved relatively small areas of land, in contrast to the much larger tracts of land involved in later transfers.

The Indian negotiators had their particular reasons for making the bargains that they did. As Bruce Morito writes\textsuperscript{142}, the "revisionist narrative of the encounter between Europeans and indigenous people in North America today rejects the once perceived view that Aboriginal people were passive victims of imperialist forces" but rather are to be "seen as active agents in the making of North American history."\textsuperscript{143} To suggest that

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\textsuperscript{138} Ibid at 21.

\textsuperscript{139} See, in particular, Dreaver v The King (1935) 5 CNLC 92 (Exch).

\textsuperscript{140} Maureen K Lux, Medicine That Walks: Disease, Medicine, and Canadian Plains Native People, 1880-1940 (Toronto: University of Toronto Press, 2001) at 27 (Medicine That Walks).

\textsuperscript{141} Patrick Macklem, Indigenous Difference and the Constitution of Canada (Toronto: University of Toronto Press, 2001) at 133 (Indigenous Difference), citing Donald J Purich, Our Land Native Rights in Canada (Toronto: James Lorimer, 1986) at 95.


\textsuperscript{143} Ibid at 18.
Aboriginal negotiators were simply taken advantage of in asking for specific language such as the medicine chest clause does not recognize the agency of those negotiators.

Insinuating into the treaties a duty to provide health services despite there being no such express language detracts from the position that treaties are to be honoured for what they do contain. The preferable approach would be to bring life to the actual language of the treaties and to the delicate balancing of Aboriginal and settler interests contained in them. In Morito’s view, for example, Crown-Aboriginal relations are to be seen as “intercultural.”

A manifestation of what he regards as an initially “respectful relationship” was the development of the Covenant Chain, a series of alliances and treaties between the British Crown and primarily the Iroquois Confederacy in the 17th century, that Morito regards as a “crosscultural, transnational political relationship.”

Similarly, John Borrows argues that Indigenous legal traditions were a major part of the legal tradition in what is now Canada and were central to the dispute resolution and to the interactions that led to negotiation and settlement of treaties.

It was out of this complicated intercultural exchange that treaties emerged. Borrows argues for a recognition of the role Indigenous law in treaty development because when “land and power is transferred in harmony with Indigenous law, all people of Canada can claim a relationship to land and jurisdiction that rests on consent and mutual respect.”

A view of treaties of reserving rights to Aboriginal peoples except insofar as those rights are expressly negotiated away is in keeping with such a harmonious transfer, Borrows argues.

To a certain extent, recognition of such Indigenous legal tradition has evolved in the jurisprudence, as Patrick Macklem notes in his discussion of the move away from a “contractualist” vision of treaty interpretation to new interpretive approaches. A contractualist approach sees the treaty as any other contract to be interpreted according

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144 ibid at 1.
145 ibid at 19.
147 ibid at 123.
148 *Indigenous Difference*, supra note 141 at 140.
to the procedures of contract. One interpretive procedure fundamental to the law of contract is the “parole evidence” rule, which holds that only if there is ambiguity in the contract can the court resort to extrinsic evidence in the interpretation of its terms.\textsuperscript{149} As I discuss in Chapter 4, the Court in \textit{Simon v The Queen} \textsuperscript{150} adopted a new interpretive approach that in its willingness to give treaties a “fair, large and liberal construction in favour of the Indians”\textsuperscript{151} was a significant departure from the contractualist approach.

Nevertheless, Macklem identifies an unease in the jurisprudence regarding unresolved questions about the nature of treaties and the treatment they are to be given. This lack of clarity reflects a change in the understanding of treaties that occurred over time. As Macklem writes, “European powers initially saw fit to enter into treaties with Aboriginal people in part to legitimize their claims of territorial sovereignty in North America” and because they were outnumbered by Aboriginal people.\textsuperscript{152} With a shift in military and economic favour in power in its favour, “[t]he Crown increasingly saw the treaty process as a means of formally dispossessing Aboriginal people of ancestral territory in return for reserve land and certain benefits to be provided by state authorities.”\textsuperscript{153} Macklem argues that treaties be seen as “constitutional accords,”\textsuperscript{154} as in keeping with the nation-to-nation nature of the transactions that gave rise to the agreements. There is in that approach to treaties the potential to draw attention to the Aboriginal relationship to land and to the health and well-being it provides, since such a relationship to land is consistent with the sovereignty maintained by Aboriginal peoples in those transactions.

However, even this highest order understanding of treaties and the treaty process provides only a limited benefit in the project to achieve legal standing for the NIHB as part of an array of culturally appropriate services for health and well-being. The de-valuing of the treaties and the treaty process is related to the dispossession from land that is at the

\textsuperscript{149} As, for example, Estey J. ruled in \textit{R v Horse}, [1988] 1 SCR 187, 47 DLR (4th) 526, a case concerned with access to private lands for hunting purposes.

\textsuperscript{150} See Chapter 4 \textit{supra} note 58 and accompanying text.

\textsuperscript{151} [1985] 2 SCR 387, 24 DLR (4th) 390 at para 27.

\textsuperscript{152} \textit{Indigenous Difference, supra} note 141 at 152.

\textsuperscript{153} \textit{Ibid.}

\textsuperscript{154} \textit{Ibid} at 151.
core of the lack of health and well-being among Aboriginal peoples. Attempts to reaffirm the significance of treaties and their relation to the unresolved sovereignty of Aboriginal peoples takes us to different issues than we are concerned with in issues of the NIHB, health and well-being. The issue of the NIHB as remedy arises because of the failure to abide by the terms and the intent of the treaties. The call to honour the treaties is aspirational and conjures a future relationship between Crown and sovereign and Aboriginal nations. An approach that relies on fiduciary duty, on the other hand, takes us to the breaches of the past whose legacy lives on in the present in the form of the lack of health and well-being of Aboriginal peoples.

Health services as a limited section 15 right: It is well-documented that the health indicators in the aggregate of indigenous people are significantly poorer than for the population generally and that they are not improving.¹⁵⁵ Relying on section 15 of the Charter of Rights and Freedoms and the jurisprudence flowing from it, Eldridge¹⁵⁷ in particular, one might argue that Aboriginal peoples in Canada face systemic and historic discrimination and that the NIHB as part of an array of western and traditional health services is necessary in order for them to participate fully in society and to have agency in social change.

In Eldridge, the section 15 equality rights guarantee was held by the Supreme Court to require sign language interpretation for deaf persons when accessing hospital services, since interpretation was necessary for deaf persons to “take full advantage” of publicly funded hospital care.¹⁵⁸ The Court also drew a connection between social attitudes toward persons with disabilities and to their socio-economic status. Persons with disabilities “have too often been excluded from the labour force” and “subjected to paternalistic attitudes of pity and charity…” As a result of these attitudes, persons with disabilities “have less education, are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale when

¹⁵⁸ Ibid at para 72.
employed..."158 Such observations apply also to Aboriginal peoples in Canada, for whom not only health indicators but income levels169 are significantly below Canadians in general.

One could find further support for a section 15 argument in the work of theorists who argue for recognition of certain positive rights as well as the negative rights — generally, protection from undue interference by the state in the lives of individuals — with which liberal democracies and Canadian courts are more comfortable.161 As the Supreme Court stated recently in Tsilhqot'in Nation v British Columbia162, "Parts I and II [of the Constitution Act, 1982], are sister provisions, both operating to limit governmental powers...Part II, Aboriginal rights, like Part I Charter rights, are held against the government — they operate to prohibit certain types of regulation which governments could otherwise impose."163

Theorists such as Cecile Fabre, in contrast, argue that the fulfillment of certain basic needs — "to be well-fed, to be healthy, to be educated enough to apply for jobs, to have the means of information about the opportunities society offers us, and so on" — are necessary for a person to be "minimally autonomous" and to "lead a minimally decent life."164 There is "special moral value" in the ability of a person to lead a "decent life," and thus the basis for "the meeting of people's needs as a matter of right and coerced the well-off to do so, by way of taxation."165 As regards Canadian Aboriginal people, we might also say that a minimal level of health is a prerequisite for sovereignty, since chronically low levels of health interfere with human agency and the ability to be independent.

Of course, there is a difference in what Fabre proposes and the scenario I am sketching, in that mine lacks the universalism fundamental in her argument. That points

158 ibid at para 56.
161 There are those who argue that such positive rights are ordained by the Charter. See, for example, Martha Jackman, "Poor Rights: Using the Charter to Support Social Welfare Claims" (1993) 19 Queen's LJ 65 QJ at 78.
163 ibid at para 142 [emphasis in original].
165 ibid at 22.
to a tension underlying section 15 and certain normative challenges in going this route. On the one hand, the section promises equality under the law and equal benefit under the law. On the other hand, the section carves out a space for any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Rather than the universalism proposed by Fabre, we have an exceptionalism, one set of poor who would receive benefits because of their special status, and another, perhaps larger, group of undeserving poor who would get nothing. The normative risk is that, rather than promoting social solidarity and reconciliation, such measures will foster resentment, particularly among those poor people who are not able to fit themselves into one of the necessary boxes, and ultimately undermine political support for such programs.

For Aboriginal peoples, there is a more profound problem. For various reasons, Aboriginal peoples have had uneasy relationship with equality and other Charter rights. The ambivalence is captured in section 25 itself, wherein it is stated that the rights set out in the Charter "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada."\textsuperscript{166} This issue commonly arises in discussions about Aboriginal self-government, and whether the Charter will apply in that context. As Kent McNeil writes,\textsuperscript{167} "section 35(1) guarantees the right, but does not specify the manner in which it may be exercised. That is left to the Aboriginal peoples, who are free to choose their own forms of government in accordance with their own traditions, values and present needs."\textsuperscript{168}

Furthermore, there is a question of whether Aboriginal government is in the nature of the "legislative, executive and administrative branches of government" identified by the Supreme Court of Canada as the entities to which the Charter applies.\textsuperscript{169} The Royal

\textsuperscript{168} Ibid at 66-67.
Commission on Aboriginal Peoples concluded yes\textsuperscript{170}, but McNeil argues that express intent would have been needed, over and above the words of section 32(1).\textsuperscript{171}

Of course, the unresolved issue of whether the \textit{Charter} would apply to Aboriginal self-government is not in and of itself a bar to a claim based on section 15 that there is a fiduciary duty to provide the NIHB as part of any array of health services, including traditional healing. However, reliance on the \textit{Charter} in some contexts and rejection of its applicability in others creates the potential for jurisprudential fallout that may not be useful for the self-government project.

\textbf{Health services as an inherent right}: Such an assertion is regularly made, notably by organizations such as the Assembly of First Nations, which has argued that health benefits are an inherent right and constitutionally protected.\textsuperscript{172} Though they deal more generally with indigenous knowledge and heritage, which would include traditional approaches to health and healing, Marie Battiste and James (Sa'ke'j) Youngblood Henderson take a similar approach, relying on inherent rights that arise not out of a treaty or the \textit{Royal Proclamation} but from the status of Aboriginal peoples as original occupants having viable societies and cultures. "Aboriginal rights are found in the ancient base of the worldviews, languages, customary teachings, knowledge, and practices of Aboriginal people."\textsuperscript{173}

Battiste and Henderson see in the courts' interpretation of the 1982 constitutional guarantee a promise to protect these inherent rights, adopting the language of \textit{Sparrow}. Though "[I]ndigenous ecological order and legal systems are \textit{sui generis} to the Canadian order," say Battiste and Henderson, the courts have recognized in \textit{Van der Peet}\textsuperscript{174} and

\textsuperscript{170} Canada, Royal Commission on Aboriginal Peoples, \textit{Partners In Confederation: Aboriginal Rights, Self-Government and the Constitution} (Ottawa: Canada Communication Group, 1993) at 65.
\textsuperscript{171} McNeil, supra note 167 at 69.
\textsuperscript{173} Marie Battiste and James (sa'ke') Youngblood Henderson, \textit{Protecting Indigenous Knowledge and Heritage: A Global Challenge} (Saskatoon: Purich Publishing Ltd, 2000) at 212.
Sparrow¹⁷⁵ that these rights are “protected by Canadian constitutional law and the rule of law.”¹⁷⁶

I agree that Aboriginal peoples have an inherent right to traditional cultural practices (including those focused on health and well-being). Indeed, that there is such an inherent right is presumed in the argument I am advancing. However, as regards the AFN’s current goal of protecting and expanding the NIIHB, there would be a problem. The 10-part test set out in Van Der Peet¹⁷⁷ for determining whether a particular practice, custom or tradition is integral to the culture of the Aboriginal litigant poses an obstacle. The test requires, among other things, that the practice, custom or tradition be of central significance to the Aboriginal people in question; have continuity with practices, customs or traditions that existed pre-contact and be of independent significance to the Aboriginal

¹⁷⁵ Supra note 70.
¹⁷⁶ ibid at 213.
¹⁷⁷ The 10-part test poses the following considerations:

1. Courts must take into account the perspective of aboriginal peoples themselves
2. Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right
3. In order to be integral a practice, custom or tradition must be of central significance to the aboriginal society in question
4. The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact
5. Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims
6. Claims to aboriginal rights must be adjudicated on a specific rather than general basis
7. For a practice, custom or tradition to constitute an aboriginal right it must be of independent significance to the aboriginal culture in which it exists
8. The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct
9. The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence.
10. Courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples
culture in which it exists. Considering the powerful and intentional forces of assimilation unleashed by government policy over the last two centuries, the continuity requirement, in particular, is questionable. It is in large part because of governmental actions that there have been disruptions in Aboriginal communities' traditional ways of living. However, in litigation the government can rely on that disruption as part of its defence. Furthermore, while all societies change over time, the effect of the Van Der Peet test is to force Aboriginal communities into a cultural deep freeze in order to ensure that their practices continue to be legally recognized. As John Borrows observes, "[T]he test is retrospective. It is about what was, 'once upon a time,' central to the survival of a community, not necessarily about what is of central, significant, and distinctive to the survival of the community today."\textsuperscript{178}

Van Der Peet played a key in Hamilton Health Sciences Corporation v DH\textsuperscript{179}, a recent decision of the Ontario Court of Justice in which academic and in some instances second-hand evidence was found to be sufficient to meet the Van Der Peet criteria in a case that involved critical health issues. Although the Court ultimately found in favour of the parents who insisted on their right to rely on traditional medicines, the case illustrates the strengths and the limits of the section 35 argument.

The applicant hospital brought an application under the Child and Family Services Act\textsuperscript{180} stating that JJ was a child in need of protection because her parents DH and PLJ refused chemotherapy treatment of JJ's acute lymphoblastic leukemia, which the hospital said was necessary in order for the child to stay alive.\textsuperscript{181} The hospital claimed a "90% cure rate" with the treatment and, while JJ "is not feeling well both from the cancer and the treatment," in the coming weeks "she will regain strength and improve."\textsuperscript{182} In her discussions with hospital staff, "DH had expressed her strong faith in her native culture and was discontinuing her daughter's chemotherapy treatment to pursue traditional medicine which she and her family believed would help JJ."\textsuperscript{183} The family, the court noted,

\textsuperscript{178} Recovering Canada, supra note 90 at 60.
\textsuperscript{179} Hamilton Health Sciences Corporation v DH, 2014 ONCJ 603 (CanLII) [Hamilton Health].
\textsuperscript{180} Ibid at para 12.
\textsuperscript{181} Ibid at para 2.
\textsuperscript{182} Ibid at para 12.
\textsuperscript{183} Ibid at para 58.
are "committed traditional longhouse believers who integrate their culture into their day to
day living...[T]heir longhouse adherence is who they are and their belief that traditional
medicines work is an integral part of their life."\textsuperscript{184}

An investigation by the respondent society "revealed DH to be a devoted mother
and concerned only with what was best for her daughter. This was a view even shared
by the Applicant Hospital's doctors [who] felt DH was an excellent mother and felt she
was doing the best for JJ."\textsuperscript{185} The society therefore concluded that it had no basis to have
a child protection worker apprehend the child — without warrant if necessary — and bring
the child "to a place of safety," as provided for in section 40(7) of the \textit{Child and Family
Services Act}.\textsuperscript{186}

The Six Nations Band, which was not initially a party in the matter but was ordered
by the court to be added, argued that the matter had to be decided via an application of
section 35(1). In deciding the matter, the court relied extensively on \textit{Van Der Peet} in
answering the question that was before it. "Can this Court conclude, to paraphrase Chief
Justice Lamer's summary, that the Six Nations' practice of traditional medicine is integral
to its distinctive culture today and that this practice arose during pre-contact times, so that
the community will have demonstrated that the practice is an aboriginal right for the
purpose of s. 35(1)?"\textsuperscript{187}

The Court relied extensively on the testimony of Dawn Martin-Hill, an anthropology
professor at McMaster University, who was found by the Court "to be an expert in the
area of First Nations' traditional medicine" and was therefore qualified "to provide opinion
evidence on the history of traditional medicines, the procurement of traditional medicines
and the use of traditional medicines to treat First Nations communities."\textsuperscript{188} As part of her
evidence, two papers were admitted on consent of the parties — the Haudenosaunee
Code of Behaviour for Traditional Medicine Healers published by the National Aboriginal
Health Organization (NAHO), and the second a paper written for NAHO by Professor

\textsuperscript{184} \textit{Ibid} at para 59.
\textsuperscript{185} \textit{Ibid} at paras 47-48.
\textsuperscript{186} RSO 1990, c C-11.
\textsuperscript{187} \textit{Hamilton Health, supra} note 179 at para 72.
\textsuperscript{188} \textit{Ibid} at para 74.
Martin-Hill entitled Traditional Medicine in Contemporary Contexts. The Court noted that its "reliance...on these materials recognizes Chief Justice Lamer's decision in Van Der Peet to relax our application of the rules of evidence in understanding the history supporting First Nations' claims."189

The first paper cites extensively from the Haudenosaunee story of creation, substantial portions of which are quoted in the judgment190, including this portion:

There is much more to our oral tradition, but the crux of this story explains how the Haudenosaunee received their knowledge of traditional medicines—medicines that are used by the traditional healers in ceremonies and healings to this day. Traditional medicine, as practised by the Haudenosaunee is key to the health and survival of the Haudenosaunee as a nation.191

Based on the evidence before it, the Court concluded that "DH's decision to pursue traditional medicine for her daughter JJ is her aboriginal right...Such a right cannot be qualified as a right only if it is proven to work by employing the Western medical paradigm. To do so would leave open the opportunity to perpetually erode aboriginal rights."192 Interestingly, there is no reference in the judgment about the specific traditional healing the parents intend to use to deal with their daughter's issues.

In Hamilton Health, the section 35 argument has been used as a shield and not a sword. It fended off intrusion in what the court decided was the rightful purview of the parents and their Aboriginal community in their rightful decision to choose Aboriginal tradition over western medicine. Edward J relies on Peter Hogg's treatise on the constitution193 to "understand the implications of [section 35]." Edwards J cites Prof. Hogg as follows:

Section 35 is outside the Charter of Rights which occupies sections 1 to 34 of the Constitution Act, 1982. The location of s. 35 outside the Charter of Rights provides certain advantages. The rights referred to in s.35 are not qualified by s.1 of the Charter, that is, the rights are not subject to "such

189 Ibid at para 75.
190 Ibid at para 77.
191 Ibid.
192 Ibid at para 61.
reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society;” although, as we shall see, they are subject to reasonable regulation according to principles similar to those applicable to s. 1. Nor are the rights subject to a legislative override under s.33 of the Charter. Nor are the rights effective only against governmental action, as stipulated by s.32 of the Charter. On the other hand, the location of s. 35 outside the Charter carries the disadvantage that the rights are not enforceable under s.24, a provision that permits enforcement of Charter rights. 194

Section 35 is useful as a defensive measure in fending off governmental intrusion into traditional practice. However, public financing of the traditional practice was not part of the integral practice.

It might be argued that such traditional practices that were integral to particular Aboriginal communities in the past have no meaning in the present unless they are part of a government-financed system of health care services. Otherwise, traditional healing practices marginalized and the relentless processes of assimilation push Aboriginal people into the western model of healthcare. However, these are two distinct legal challenges. The advantage of the fiduciary duty approach is that the arguments build on each other so that the breach of the duty also anticipates the remedy, which is the NIHB as part of an array of health care services including traditional healing.

Honour of the Crown: The judgment of the Supreme Court in Manitoba Métis Federation 195 indicates that the Court may be more comfortable with arguments based on the honour of the Crown than in assertions of fiduciary duty. In that case, the claimants sought a declaration that the Crown had breached both fiduciary duty and honour of the Crown obligations when it failed to provide lands promised in the Manitoba Act, 1870. 196 The appellants were successful in their honour of the Crown argument, but their arguments based on fiduciary duty came to naught. 197

194 Ibid [emphasis added].
195 Supra note 18.
196 33 Victoria c 3, [Canada], reprinted in RSC 1985, App II, No 8.
197 The case arose out of a land grant to children of the Red River settlers provided for in the Manitoba Act, 1870. Allotments were delayed or abandoned and speculators acquired land that ought to have gone to Métis children. When it became clear that the number of Métis children had been underestimated, the federal government decided to issue scrip that was redeemable for land, but because land prices had increased, some children could
The honour of the Crown has been a key lens through which courts have viewed Crown obligations to Aboriginal peoples. The honour of the Crown and fiduciary duty are related concepts in that both impart a high standard of conduct when assessing whether the Crown has met its *sui generis* obligations to Aboriginal peoples. As the Supreme Court stated in *Haida Nation v British Columbia (Minister of Forests)*,\(^{198}\) "[T]he honour of the Crown...infuses the processes of treaty making and treaty interpretation [and] the Crown must act with honour and integrity, avoiding even the appearance of 'sharp dealing.'"\(^{199}\) In *Manitoba Métis Federation*, the Court stated that "the honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest."\(^{200}\) In that case, the court found that there was no fiduciary duty because of the nature of the relationship between the Métis and the land in question: the land was not held communally and there was, therefore, no Aboriginal interest in land.\(^{201}\) The relief provided by the court was declaratory: "that the federal Crown failed to implement the land grant provision set out in s. 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown."\(^{202}\) The court's treatment of fiduciary duty was cursory, with little attempt to relate the *sui generis* concept developed in *Guerin* to the specific situation of Métis people, who did not have a history of owning land communally. While recognizing that the Crown relationship with Métis people was fiduciary in nature, the court stated that not all events between the parties in a fiduciary relationship triggered fiduciary duties on the part of the Crown.\(^{203}\)

Echoing *Wewaykum*, the court noted à la Binnie J that the fiduciary duty arises from Crown assumption of discretionary control over a specific Aboriginal interest. However, the court went on to say that this was but one of the four situations in which the honour of the Crown had been applied "thus far",\(^{204}\) suggesting other possible

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198 2004 SCC 73, 245 DLR (4th) 33 (*Haida Nation*).
199 Ibid at para 19.
200 *Manitoba Métis Federation*, supra note 18 at para 73.
201 Ibid at para 59.
202 Ibid at para 154.
203 Ibid at para 48.
204 Ibid at para 73. The other three situations identified by the Court was in the interpretation of section 35 of the *Constitution Act, 1982* (which gives rise to a duty to consult when a claimed but unproven Aboriginal interest is
applications. Indeed, the Court cited its judgment in *Haida Nation*\textsuperscript{205}, stating that the honour of the Crown "is not a mere incantation, but rather a core concept that finds its application in concrete practices" and gives rise to different duties in different circumstances.\textsuperscript{206} Though capable of being applied in multiple circumstances, the Court in *Manitoba Métis Federation* also highlighted the limits of the concept: "It is not a cause of action in itself; rather, it speaks to how obligations that attract it must be fulfilled."\textsuperscript{207}

On first glance, it appears that the limits of the concept of honour of the Crown — it is not a cause of action in itself — preclude it from being of use in establishing a legal obligation on the Crown to provide the NIHB as an array of health services containing traditional approaches to health. As the court in *Manitoba Métis Federation* stressed,

> [T]he remedy available under this analysis is of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available...[I]t is not awarded against the defendant in the same sense as coercive relief. In some cases, declaratory relief may be the only way to give effect to the honour of the Crown...Were the Métis in this action seeking personal remedies, the reasoning set out here would not be available. However, as acknowledged by Canada, the remedy sought here is clearly not a personal one...The principle of reconciliation demands that such declarations not be barred.\textsuperscript{208}

There are, therefore, two avenues in which the honour of the Crown could be invoked in the effort to establish a fiduciary obligation on the part of the Government of Canada to provide the NIHB and traditional health services. There is the first branch identified in *Manitoba Métis Federation*\textsuperscript{209} — where the Crown has assumed discretionary control over a specific Aboriginal interest. However, the court’s conclusion that the Métis did not have a specific Aboriginal interest because they did not own land communally indicates that the court continues to interpret Aboriginal interests narrowly, as per *Wewaykum*. Invoking the honour of the Crown in this manner may, therefore, detract from

\begin{itemize}
\item\textsuperscript{205} Supra note 198.
\item\textsuperscript{206} *Manitoba Métis Federation*, supra note 17 at para 73 citing *Haida Nation*, supra note 198 at paras 16 and 18.
\item\textsuperscript{207} Ibid.
\item\textsuperscript{208} Ibid at para 143.
\item\textsuperscript{209} Supra note 18.
\end{itemize}
the strength of a fiduciary duty argument that could otherwise rest on the protective relationship between Crown and Aboriginal people crystallized in the *Royal Proclamation*. Advancing the fiduciary argument using what the court has stated is an interpretive device only rather than a cause of action *per se* may be strategically unwise.

On the other hand, the normative force of the concept of the honour of the Crown is inviting, since there is a political consensus that the Crown has not acted honourably in many aspects of its relationship with Aboriginal peoples. Indeed, as I argue in Chapter 4, multiple instances of sharp practice – in the negotiation and failure to implement treaties, for example – are directly related to the dispossession from land that I argue is at the root of the crisis of health and well-being confronting Aboriginal communities. I also refer to the dispossession of land caused by the establishment of the residential schools system. Prime Minister Stephen Harper's apology to the survivors of the school system is an eloquent acknowledgement that the Crown did not act honourably in establishing the residential school system.\(^{210}\)

The concept of honour of the Crown would therefore be valuable in establishing a conducive normative context in which to conduct the litigation. The strength of the honour of the Crown in setting a normative tone is suggested by the decision of the Ontario Superior Court of Justice in *Fontaine v Canada (Attorney General)*,\(^{211}\) in which the court considered a Request for Directions regarding whether or not documents collected under the assessment process of the Indian Residential Schools Settlement Agreement (IRSSA)\(^{212}\) should be destroyed. A Truth and Reconciliation Commission\(^{213}\) was established under the IRSSA "to create a historical record of the residential school system and ensure its legacy is preserved and made accessible to the public for future study and use," the Court noted.\(^{214}\) The settlement agreement also established an independent

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\(^{211}\) 2014 ONSC 4585 [CanLII] [Fontaine].

\(^{212}\) "Indian Residential Schools Settlement Agreement" (May 2006) [IRSSA], online: Residential Schools Settlement <http://www.residentialschoolsettlement.ca/settlement.html>.


\(^{214}\) *Fontaine*, supra note 211 at para. 5.
Assessment Process (IAP) to provide financial compensation for claims of sexual and physical abuse suffered by students of Indian Residential Schools. Claimants and religious organizations argued that the documents be destroyed because, respectively, of the deeply personal nature of the information contained in the documents and the unproven nature of the allegations against religious organizations’ personnel made by the claimants. The Government of Canada claimed that it owned the documents as government records which it had a right to control without interference.\(^{215}\) Though acknowledging that the IRSSA was not a treaty and that religious organizations were not bound by the terms, the chief adjudicator of the IAP argued that the honour of the Crown should be an interpretive principle brought to it. The Government of Canada argued that the honour of the Crown was not applicable.

Perell J agreed that the honour of the Crown was “not a source of obligations independent of the IRSSA” and “cannot add or subtract or change the promises made by the parties.”\(^{216}\) He also stated:

\begin{quote}
I disagree that it is not an interpretive principle for an agreement in which Canada makes an attempt to make peace with its Aboriginal peoples. If an honourable and a dishonourable interpretation are available, obviously it would be wrong to interpret the IRSSA in a way that does dishonour to Canada.\(^{217}\)
\end{quote}

An effect of the honour of the Crown, then, is to bring a consideration of normative standards to the matter at hand. In an argument that there is a fiduciary obligation to provide the NIHB and other health services, the honour of the Crown is relevant both in a consideration of the legal and moral culpability of the Crown in actions that could foreseeably be expected to have future negative health impacts (generally, actions that were intended to fracture the relationship between Aboriginal people and their traditional lands) as well as to a consideration of how the ongoing injury from breaches of fiduciary duty are to be remedied. The honour of the Crown is not the underlying cause of action. Rather, the concept provides a normative scale on which to assess the actions at issue. When there is a fiduciary obligation as there is between the Crown and Aboriginal peoples.

\(^{215}\) ibid at para 13.
\(^{216}\) ibid at para 84.
\(^{217}\) ibid at para 90.
stemming *inter alia* from the promises made in the *Royal Proclamation*, how is the obligation to be fulfilled? The honour of the Crown, it could be argued, requires the Crown to have a specific regard to the relationship between Aboriginal people and their traditional lands because that relationship was central to the well-being of Aboriginal peoples.

The additional question posed by the concept of honour of the Crown is, a breach of the Crown’s fiduciary duty to Aboriginal peoples having been established, what remedy most adequately atones for the breach and restores the honour of the Crown? Because health and well-being are at the core of human capacity and because of the wilful disregard by the Crown of the health and well-being of Aboriginal peoples, a remedy must have measures to restore health and well-being in order to be meaningful to Aboriginal peoples and to restore the honour of the Crown.

In summary, then, the honour of the Crown cannot ground the argument that there is an obligation to provide the NIHB and other health benefits. However, the honour of the Crown establishes a legal, moral and historical environment in which it makes it more likely that the fiduciary duty can be established and that the remedy of NIHB and other health services will be ordered.

**Conclusion**

The fiduciary duty born in *Guerin* has received most of the focus in arguments for legal recognition of health services. However, as I have suggested, it is not necessary to rely exclusively on the *sui generis* duty to ground the argument that there is a legal obligation to provide health benefits. Despite protestations to the contrary, the history of colonialism created a relationship of dependency between the Crown and Aboriginal peoples. The fiduciary relation in both its general and *Guerin* form provide both a recognition of that dependency and a remedy for dealing with the lingering pathologies created by it.

When its conscience is engaged, courts at all levels have shown a willingness to use the flexibility afforded by the concept to craft remedies to afford justice in the particular situation, and in the specific situation of Aboriginal peoples, to offer remedies that
advance the goal of reconciliation at the heart of section 35. There is, I would suggest, a normative consensus in the jurisprudence and in the views of Canadians generally regarding the profound wrongs that have been committed against Aboriginal peoples in the name of the Crown. An expanded range of health services, including NIHB services and traditional and culturally appropriate other services, is in keeping with that normative consensus and essential to the Aboriginal peoples regaining their agency needed to shape the path to self-determination.

Because of the normative consensus regarding unresolved wrongs in Crown-Aboriginal relationship, it may be possible to negotiate an understanding of what is needed to deal with acute issues of ill-health and lack of well-being. A willingness to bargain has been central to the historic Crown-Aboriginal relationship and a negotiated settlement would be more in keeping with the goals of reconciliation than would the adversarial litigation process. However, negotiation requires willing partners. A well-developed legal argument would increase the chances that Aboriginal people have such a willing partner on the other side of the table.
Chapter 4 – Recovering tradition and appreciating what was lost: making the claim cognizable

As the Royal Commission on Aboriginal Peoples noted, “There is considerable evidence to show that Aboriginal People enjoyed good health at the time of first contact with the Europeans.”¹ RCAP further observed that “[h]istorical records and the findings of modern paleo-biology suggest that many of the illnesses common today were once rare, and that mental and physical vigour once prevailed among Aboriginal people.”² RCAP quotes the words penned in 1688 by French aristocrat and colonizer Nicholas Denys:

[A]boriginal people were not subject to disease, and knew nothing of fevers...They were not subject to the gout, gravel, fevers or rheumatism. The general remedy was to make themselves sweat, which they did every month and even oftener.³

The diet of indigenous people pre-contact was determined by what was available from the immediate environment, but it kept them well, as noted by the historian George Wharton James, who wrote primarily about the American Southwest but whose words were also invoked by the RCAP as pertinent to the experience in more northern parts of the continent:

Before the Indian began to use the white man's foods, he was perforce compelled to live on a comparatively simple diet. His choice was limited, his cooking simple. Yet he lived in perfect health and strength...and attained a vigour, a robustness, that puts to shame the strength and power of civilized man.⁴

There are indications that indigenous peoples pre-contact did not have to deal with many of the ailments that the Europeans did:

Skeletal remains of unquestionably precolumbian date...are, barring a few exceptions, remarkably free from disease. Whole important scourges [affecting Europeans during the colonial period] were wholly unknown....There was no plague, cholera, typhus, smallpox or measles. Cancer was rare, and even fractures were infrequent....There were, apparently, no nevi [skin tumours]. There were no troubles with the feet,

¹ Report of the Royal Commission on Aboriginal Peoples, Volume 3 – Gathering Strength (Ottawa: Minister of Supply and Services, 1996) at 111 [Gathering Strength].
² Ibid.
³ Ibid.
⁴ Ibid.
such as fallen arches. And judging from later acquired knowledge, there was a much greater scarcity than in the white population of...mental disorders, and of other serious conditions.\(^5\)

Lest these accounts appear idyllic, one notes the medical challenges that indigenous communities did face pre-contact. "[T]he idea of a disease-free pre-contact America is not supported by the substantial evidence for infection," Waldram et al state.\(^6\) Tuberculosis – the great scourge of the future – was present in the pre-historic period, though likely uncommon, on the plains.\(^7\) Furthermore, pre-historic peoples had to deal with "climatic deterioration."\(^8\) In the 13\(^{th}\) century, people from the eastern woodlands were forced to the northern Great Plains, where they shared the bison herds with the communities already there.\(^9\)

As Waldram at al caution, the size of the land area of what is now Canada and the lack of overarching data make references to specific territories and communities more useful.\(^10\) Also, the meaning of "contact" varies from region to region. While the year 1492 has become a "powerful metaphor"\(^11\) for contact with Europeans, in southern Ontario it was not until the rise of the beaver fur trade in the late 1500s that there was meaningful transaction between indigenous peoples and newcomers.

As history and features of the natural environment varied, so did the disease patterns. For example, high population density among the Iroquois of southern Ontario and their occasional over-reliance on maize may have been a major factor in the high rate of infections indicated by isotope analysis of physical remains. Less is known about the Arctic than about southern Ontario. However, there is enough information, Waldram et al state, to rule out "the idea that a 'cold screen' filtered out Old World diseases during the peopling of the Americas via the Bering Land Bridge."\(^12\) Environmental hazards faced by

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5 Ibid.
6 James B Waldram, et al, Abariginal Health in Canada: Historical, Cultural, and Epidemiological Perspectives, 2nd ed (Toronto: University of Toronto Press, 2006) at 47 [Waldram et al].
7 James Daschuk, Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life (Regina: University of Regina Press, 2013) at xvi.
8 Ibid.
9 Ibid.
10 Waldram et al, supra note 6 at 24.
11 Ibid at 34.
12 Ibid at 38.
Arctic peoples included “toxic substances in water hemlock and the presence of other poisonous plants; the potential for paralytic shellfish poisoning; and the danger of ingesting environmental type E Clostridium botulinum in soil, associated with marine mammal butchering.”

As the health challenges varied depending on the environment, so did the strategies — medicinal and otherwise — for dealing with them. Each region offered its own set of remedies. As historian Olive Dickson points out, “Amerindians are all by nature physicians, apothecaries and doctors, by virtue of the knowledge and experience they have of certain herbs...More than 500 drugs used in the medical pharmacopelia today were originally used by Amerindians.”

The variety of practices and strategies among indigenous peoples points to a key challenge in arguing for recognition of a fiduciary duty on the Crown to provide the NIIHB as part of a culturally appropriate healing system. There is no pan-Canadian indigenous culture, but multiple cultures with their particular shared histories and understandings. However, there is one profound commonality shared among all the indigenous nations. Being healthy was not a state specific to the individual, but a collective phenomenon. Being “well” came from being in harmony with the land and humans and other creatures with whom the land was shared, and not just land in the abstract but this land, the territory on which ancestors and kin lived and from which they, too, achieved the balance central to the state of well-being. This is a key point in our consideration of fiduciary duty because it is only by understanding the psycho/emotional aspect of the relationship with land — not land in general but each nation’s particular traditional land — that we can adequately frame the legal argument.

This crucial specificity is captured in the observations of Naomi Adelson regarding the Cree of what is now northern Quebec, in whose language there is no word that translates into English as “health.” Adelson, therefore, translates it as “being alive well,”

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13 Ibid at 39.
14 Gathering Strength, supra note 1 at 112.
which includes the state that we might understand as “being healthy” yet is “less determined by bodily functions than by the practices of daily living...” Being alive well means that one is able to hunt, to pursue traditional activities, to eat the right foods and, (not surprisingly, given the harsh northern winters) to keep warm.” Wall-being is not merely bio-medical, but social, community, emotional and spiritual and all integrally connected to the relationship with the land.

The particularities of the Aboriginal-land relationship vary from nation to nation, but the intensity and interlocking qualities of the relationship are common. Referring to the Mi’kmaq who lived in what is now known as Atlantic Canada and the northeastern United States, historian William C. Wicken writes:

In Mi’kmaq cosmology, the distinction between humans and other living things were not as clear as in Christian thought. The world of the Mi’kmaq was inhabited by animate and inanimate beings. Mi’kmaq people were animate but so too were animals, trees, plants and sometimes even rocks. Families were associated with a specific landscape, and their identity was tied to this animate world. To trespass through their territory was to disturb the beings who lived there and to undermine families’ ability to live in harmony with their world. For the Mi’kmaq, to “molest” meant more than to interfere with the activities of individuals; it also meant to interfere with the symbiotic relationship between animate and inanimate beings.

Through that brief overview of Aboriginal understandings of health and well-being, we have a reference point for considering the injuries suffered post-contact by, among other things, the Crown’s refusal to abide by the spirit of the Royal Proclamation of 1763 and treaties that followed, the introduction of the Indian Act without any consultation

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16 Ibid.
17 William C Wicken, Mi’kmaq Treaties on Trial: History, Land and Donald Marshall Junior (Toronto: University of Toronto Press, 2002) at 132. Wicken is reflecting on the meaning to be accorded to “molest” in Reciprocal Promises Made by Captain John Doucett: 1726 [London, England, Public Records Office, Colonial Office Series 217/4: doc 321, made in conjunction with the Article of Peace and Agreement: Annapolis Royal 1726 (London, England, Public Record Office, Colonial Office Series 217/5: 3r-5r (cited by Wicken), accords which would be renegotiated four times over the next four decades. Included in the Reciprocal Promises is this undertaking: “And I do Further promise & In the absence of the humble the Lt. Govr of the Province of the this said Government, That the Said Indians shall not be Molest in their Persons, Hunting Fishing and Shooting & planting on their planting Ground nor in any other their Lawfull occasions, By his Majesty’s Subjects or Their Dependents In the Exercise of their Religion Provided the Missionaries Residing amongst them have Leave from the Government for So Doing” [emphasis added].
18 Royal Proclamation, 1763 (UK), reprinted in RSC 1985, App II, No 1 [Royal Proclamation].
19 RSC 1985, c I-5.
with Indigenous peoples whose lives the statute would so severely restrict and control, and calculated attempts to destroy indigenous culture and traditions — indeed, the very sense of indigenous self — that produced the residential schools program. By giving some appreciation to the pre-contact reality and the effect on that reality by Crown acts of omission and commission we are able to achieve some sense of the scale of the breach of fiduciary duty and the remedies that should flow from those breaches.

Making the claim cognizable

Having identified the potential in the classic fiduciary duty in addition to the Guerin\textsuperscript{20} sui generis fiduciary duty and the lack of specificity in arguments that there is a fiduciary duty to provide health benefits, I turn now to a consideration of how to make such a claim legally cognizable rather than merely theoretical. Such a claim would be novel, but the courts have stated that the mere fact that a claim is novel in and of itself does not preclude the claim from going forward.\textsuperscript{21}

Perhaps the most daunting challenge is to connect claims to specific individuals rather than between the Crown and groups too amorphous and therefore without the commonality necessary to make the claim viable.\textsuperscript{22} There is also the complicating factor that, in most cases, the actions giving rise to the claims — that is, the breaches of the fiduciary duty — will have taken place before the claimants were born. Here, also, there are precedents. In particular and as I discuss in the residential schools class action cases, the courts have been prepared to consider claims of the children of residential school survivors that the Crown breached its fiduciary duty by actions that deprived them of the "benefit of aboriginal culture from their parents."\textsuperscript{23} The courts have specifically rejected

\textsuperscript{20} [1984] 2 SCR 335, 13 DLR (4th) 321 [Guerin].
\textsuperscript{21} Hunt v Carey Canada Inc, (1990) 2 SCR 959. 74 DLR (4th) 321.
\textsuperscript{22} The Class Proceedings Act 1992, SO 1992, c 6, s 5(1)(c) makes the presence of common issues a requirement for a claim to be certified as a class action, as do the class actions rules in the eight other provinces that have similar laws (British Columbia, Manitoba, Saskatchewan, Alberta, Quebec, Nova Scotia, Newfoundland and Labrador and New Brunswick. Class actions can also be filed with the Federal Court of Canada, but that court is a statutory court without general civil jurisdiction allowing the addition of non-governmental parties. RSC 1985, c F-7, s 17.
\textsuperscript{23} Bonaparte v Canada (2003), 64 OR (3d) 1, 169 OAC 376 [Bonaparte].
Crown arguments that the mere fact that a claimant was not alive when the breach occurred necessarily prevents the claim from being considered.\textsuperscript{24}

The actions and motivations of the Government of Canada in the residential schools saga were particularly egregious and the effects most acute such that, as the government itself has recognized, the effects continue to contribute to dysfunction in Aboriginal communities. As well as the claims for deprivation of transmission of Aboriginal culture, I suggest, can be added claims for loss of health and well-being caused by the deliberate actions by the federal government to rupture the relationship of Aboriginal people with the land.

Along with the establishment of residential schools can be added the failure to abide by the negotiated terms of the various numbered treaties and the introduction of the \textit{Indian Act}. Though disparate, each of the three areas contains elements of a common phenomenon described by the Royal Commission on Aboriginal Peoples as dispossession from traditional territory, which in turn had an impact on health. As the Royal Commission noted, the “set of relations between Aboriginal and non-Aboriginal people...[i]n the broadest sense...represents a form of dispossession, part of a historical process set in motion long before Confederation.”\textsuperscript{25} Separating indigenous people from their land, the RCAP stated, “breaks a spiritual relationship.”\textsuperscript{26} Regarding the consequences of separation, the Commission quoted an Inuk, “who defined \textit{nuna} (the land) as ‘my life’; \textit{nuna} is my body.”\textsuperscript{27} “The Commission found that, for the hunting-life bred person, the whole habitat is significant, and intimate familiarity with it is vital, reassuring, and metaphysically validated”\textsuperscript{28}

Members of particular Aboriginal nations can make more specific claims, based on their own history and particular circumstances. In particular, those nations who were subject to the forced relocations enumerated by RCAP might use those particulars to

\textsuperscript{24} See, for example, \textit{Canada (Attorney General) v Anderson}, 2011 NLCA 82, 315 Nfld & PEIR 314 [\textit{Anderson}].
\textsuperscript{25} \textit{Report of the Royal Commission on Aboriginal Peoples, Volume 1 – Looking Forward, Looking Back} (Ottawa: Minister of Supply and Services, 1996 at 505 [\textit{Looking Forward, Looking Back}]).
\textsuperscript{26} \textit{Ibid} at 491.
\textsuperscript{27} \textit{Ibid}.
\textsuperscript{28} \textit{Ibid}.
ground their individual claims. For example, the Mi'kmaq of what is now Nova Scotia (among the first indigenous people on this continent to encounter Europeans) were uprooted in the 1940s from approximately 20 reserves and consolidated into two large reserves as part of a government cost-cutting exercise. States RCAP: “Coercion was used in several ways against those reluctant to move...[including] threats and the actual termination of educational, medical and general welfare services on their reserves.”28 As one member of a Mi'kmaq community told RCAP, the relocation served to “disorient and demoralize three generations of our people.”30 The Mi'kmaq could argue that such heavy-handed tactics by the Crown represented a breach of the fiduciary duty owing to them.

The source of the duty

However, regardless of the particular claim, there is an initial fundamental step involved in making a claim for NIHB and other health benefits legally cognizable. We must identify the source of the fiduciary duty whose breach makes the remedy of the NIHB and other health benefits reasonable and equitable. In Guerin, Dickson J appeared to locate the source of the duty in that case in the fact that “Indian interest in the land is inalienable except upon surrender to the Crown.”31 Dickson J did make reference to the Royal Proclamation, but in a secondary fashion, as a source of Indian title, which in turn gives rise to the fiduciary duty. In his view, the fiduciary duty appeared to pre-date the Royal Proclamation.32 However, nothing in Dickson J’s judgment precludes a finding that it is another source of the fiduciary duty. Indeed, as Yvonne Boyer states, the Royal Proclamation “contains promises of security and protection for Indian nations and tribes. The language of ‘protection’ directly links the fiduciary relationship and duties of the Crown and its Agents to Aboriginal peoples as beneficiaries.”33

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28 Ibid at 419.
29 Ibid at 421.
30 Guerin, supra note 20 at para 84.
31 Ibid at para 86.
It is important for present purposes to consider what was being protected by the *Royal Proclamation*. It arose in circumstances in which a victorious Britain was consolidating its power over defeated European colonial powers but was prudently creating political and cultural space for First Nations who still possessed sufficient military power to do damage to the consolidated British interests. As Henderson et al record\textsuperscript{34}, the *Royal Proclamation* came shortly after the British colonialists formally implemented a legal carve-out for the Mi’kmaq of Nova Scotia as British law was being implemented in the colony (which at that time also included what is now known as New Brunswick). British law would henceforth apply “except to the extent that the law was unsuitable to the circumstances of the colony, as for example, when inconsistent with the existing compact and treaties with the Aboriginal nations.”\textsuperscript{35}

For Henderson et al, this measure and related measures such as the *Royal Proclamation* “conferred upon the Crown a *sui generis* fiduciary duty, both contractually and equitably, to protect the Mikmaw hunting grounds for the Crown under the law.”\textsuperscript{36} Henderson et al point out that additional instructions from the King to the Governor in 1761 and the other colonies acknowledged the “inviolable” compacts and treaties that had been made with the Aboriginal nations. The Instructions stressed that the peace and security of the colonies “greatly depend upon the Amity and Alliance of the several Nations or Tribes of Indians bordering upon the said colonies.” British Governors were ordered to “support and protect” the Aboriginal nations in their just Rights and Possession and “to keep a just and faithful Observance of these Treaties and Compacts which have been heretofore solemnly entered into.”\textsuperscript{37}

The *Royal Proclamation*, though part of the same protective promise, had its origins in more global developments. The *Treaty of Utrecht* required Great Britain to restore certain conquered territories that had been acquired by what was then the world’s superior colonial power. Lands of Aboriginal nations who had been allies of the defeated

\textsuperscript{34} James (Sakej) Youngblood Henderson at al, *Aboriginal Tenure in the Constitution of Canada* (Toronto: Carswell, 2000) at 141.
\textsuperscript{35} Ibid.
\textsuperscript{36} Ibid at 142.
\textsuperscript{37} Ibid.
The French Crown were among those territories.\textsuperscript{38} The \textit{Royal Proclamation} was the means through which those international obligations were incorporated into imperial law. Henderson assesses the implications of the \textit{Royal Proclamation} as follows:

That the existing treaties and compacts with the Aboriginal nations [such as those pertaining to the Nova Scotia lands] were sacred and inviolable; that they were binding on the Crown colonies and subjects; that they were acts of state establishing rights; and that they were enforceable in the courts.\textsuperscript{39}

The \textit{Royal Proclamation} was a part of a grand bargain between Indians and other nations. However, the Proclamation itself was directed not at Aboriginal people themselves but at the Crown's representatives, who were enjoined from taking any actions that were contrary to its terms and that, therefore, would be void.\textsuperscript{40} The Crown, then, acted partly for reasons of international law and partly to ensure peace with still militarily and potentially dangerous Aboriginal nations. As Henderson et al explain, the British empire was a "protectorate of Aboriginal nations and tribes."\textsuperscript{41} The sovereign did not have absolute power but shared it with Aboriginal peoples.\textsuperscript{42}

As Brian Slattery\textsuperscript{43} and others have noted, Aboriginal peoples were a crucial constituency, because they were valuable allies at various times of both the French and the English in their contest for control of the new territories. The \textit{Royal Proclamation} stated that it was "essential to our [colonial] Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed" in the occupation of lands that had not been sold or otherwise surrendered to the Crown.\textsuperscript{44} The solemn document also pointed to the misdeeds that, even then, had become an issue in Crown-Indigenous relations. These "great Frauds and Abuses...committed in purchasing Lands of the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{38} Ibid at 147.
\item \textsuperscript{39} Ibid at 148.
\item \textsuperscript{40} Ibid at 150.
\item \textsuperscript{41} Ibid at 151.
\item \textsuperscript{42} Ibid.
\item \textsuperscript{43} Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can Bar Review 727 at 753.
\item \textsuperscript{44} Supra note 18.
\end{itemize}
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Indians” were to the “great Dissatisfaction of the said Indians” and, therefore, to the “great Prejudice of [Crown] Interests.”

To avoid further nation-to-nation tensions, all the lands of Indigenous peoples would be strictly off-limits to private interests. No governor or commander in chief in any of the colonies was to grant any warrants of survey or pass any patents of lands for beyond already purchased or ceded territory. All unceded land or land that had not been purchased was “reserved to the said Indians...as their Hunting Grounds.” States RCAP, the Royal Proclamation portrays Indian nations as autonomous political units living under the Crown’s protection while retaining their internal political authority and their territories and was “a landmark in British/Indian relations.” Indeed, Justice Hall in Calder v Attorney-General of British Columbia likened it to an “Indian Bill of Rights” with status “analogous to the Magna Carta” and which “must be regarded as a fundamental document upon which any just determination of original rights rests.”

The reasonable expectation created by the Royal Proclamation was that lands not “ceded to” or “purchased by” the Crown would remain for Aboriginal peoples to use for their purposes, “[un]molested or disturbed.” The Royal Proclamation was, as Lord Denning said, “equivalent to an entrenched provision in the Constitution of the colonies in North America [and] was binding on the Crown ‘so long as the sun rises and the river flows.”

The protective language of the Royal Proclamation provides “direct links to the fiduciary concept.” Indeed, as the court states in Elder Advocates, the “clear commitments” in the Royal Proclamation provide the “necessary undertaking” needed to

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45 Ibid.
46 Ibid.
48 Ibid at 115.
50 Ibid at 203.
52 Mark L Stevenson and Albert Peeling, “Probing the Paramaters of Canada's Crown-Aboriginal Fiduciary Relationship” in In Whom We Trust: A Forum on Fiduciary Relationships Co-Sponsored by Law Commission of Canada and Association of Iroquois and Allied Indians (Toronto: Irwin Law, 2002) at 12 [In Whom We Trust].
ground a fiduciary obligation. As RCAP points out\textsuperscript{54}, the broad message imparted to Aboriginal peoples was one of reassurance. With a war led by Aboriginal people raging south in the American interior, the British needed to come to some understanding with the Aboriginal nations farther north. Through the Royal Proclamation, "it was hoped to reassure Indian peoples of the good intentions of the British government."\textsuperscript{55} It did so by promising a "confederal" arrangement in which "Aboriginal nations would "hold inherent authority over their internal affairs and the power to deal with the Crown by way of treaty and agreement."\textsuperscript{56} From the point of view of indigenous peoples, they formed the reasonable expectation that they would continue to live on their lands and maintain the ways of living that had kept them healthy and well for millennia.

In conclusion, then, a fiduciary duty arises out of the Royal Proclamation, which was an instrument through which certain protective duties in relation to Aboriginal peoples and their lands were willingly taken on by the Crown in return for peaceful relations with those Aboriginal peoples. This duty can be seen as related to the \textit{sui generis} duty described by Dickson in \textit{Guerin} as arising from the status of Aboriginal peoples as first inhabitants who were never conquered. However, the duty contained in the Royal Proclamation is separate from and in addition to the \textit{sui generis} duty. A residual sovereignty is legally recognized in the Royal Proclamation, and the Crown undertakes a duty to protect that sovereignty. The mere fact that the duty undertaken is not defined as a fiduciary duty is of no matter. A fiduciary duty by another name is still a fiduciary duty.

Recognizing that there is such a fiduciary duty, how are we to determine whether there is a breach and, if there is a breach, whether the appropriate remedy is a legal undertaking to provide the NIHB as part of a broader package of health benefits and services that also includes traditional medicines and services? The starting point in the determination must be the health condition of Aboriginal people at contact and during/in? the period thereafter. Such a consideration provides a reference point for considering the losses resulting from the multiple breaches of fiduciary duty that followed thereafter.

\textsuperscript{54} \textit{Gathering Strength}, supra note 1 at 115.
\textsuperscript{55} Ibid.
\textsuperscript{56} Ibid.
The negotiation of treaties and the Crown's resiling from the terms

The Royal Proclamation, as noted previously, came at a time when Aboriginal peoples were in an advantageous position owing to military tensions between the British and Americans. The military might of the Iroquois Confederacy, in particular, made them valued allies. In the years following, however, their position deteriorated and the Crown engaged in sharp practice and used the weakened position of Aboriginal peoples to its advantage. Indeed, as I argue in this thesis, the Crown bargained in bad faith, contrary to its obligation as a fiduciary to act in utmost good faith in its dealings with Aboriginal peoples.

The Royal Commission on Aboriginal Peoples identifies some of the factors that led to the erosion of indigenous peoples' military and political influence. Aside from normalization of relations between the British and Americans, there was a flood of settlers, in particular from what is now Ontario to Manitoba and points farther west, in many cases accompanied by Christian missionaries, which between them were uprooting Aboriginal communities physically and spiritually. "The period saw the end of most aspects of the formal nation-to-nation relationship of rough equality that had developed in the earlier stage of relations," the RCAP observes.57

It was in this period of deteriorating circumstances that indigenous peoples, concerned about their very ability to continue living on their lands as they always had, entered into treaty negotiations with the Crown, beginning with Treaty 1 in what is now Manitoba, which was experiencing the most dramatic settler incursion. 58 However, the parties to the treaties entered into in the early 1800s were under profoundly different assumptions about what they were negotiating. "From the Aboriginal perspective...the process [was] akin to the establishment of enduring nation-to-nation links, whereby both nations agreed to share the land and work together to maintain peaceful and respectful relations..."59

57 Ibid at 140.
58 James Daschuk, Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life (Regina: University of Regina Press, 2013) at 93 [Daschuk].
59 Looking Forward, Looking Back, supra note 25 at 140.
On the Crown side, however, intentions and expectations were very different. The failure to live up to its duty of care to Aboriginal peoples began with the treaty-making process itself, in which the Crown knowingly and wilfully used its advantageous position to, for example, omit terms that had been agreed to and to misconstrue to Aboriginal negotiators what was being agreed to. For example, in the negotiations between the Dene leading to Treaty 11, the Dene voiced their concern about the failure to respect certain obligations in Treaty 8 and in response made certain demands: “no reserves to restrict their movements; protection of their lands; education; medical care; protection of their wildlife and of their hunting, fishing and trapping economies.” States the Royal Commission on Aboriginal Peoples, oral promises were “made and remade” as the treaty was negotiated. Bishop Breynat recalled:

I gave my word of honour that the promises made by the Royal Commissioner, “although they were not actually included in the Treaty” would be kept by the Crown. ...

They were promised that nothing would be done or allowed to interfere with their way of living...

The old and the destitute would always be taken care of.

They were guaranteed that they would be protected, especially in their ways of living as hunters and trappers, from white competition, they would not be prevented from hunting and fishing, as they had always done, so as to enable them to earn their own living and maintain their existence.\(^{61}\)

However, the commitments made orally did not make it into the final text, which was virtually the same as the Treaty 8 text that had been already rejected by the Dene.

This quick-and-dirty approach to negotiation was not unique to Treaty 11. States the RCAP: “Throughout the negotiation of the numbered treaties the commissioners did not clearly convey to First Nations the implications of the surrender and cession language in treaty documents.”\(^{62}\) As a result, First Nations assumed they “would retain what they considered to be sufficient land within their respective territories, while allowing the

\(^{60}\) States

\(^{61}\) ibid.

\(^{62}\) ibid.
incoming population to share their lands. Many nations believed they were making treaties of peace and friendship, not treaties of land surrender.⁶³

It was doubtful whether the Crown had any intention of living up to the terms of the treaties. No implementation legislation was introduced. "Once treaties were negotiated, the texts were tabled in Ottawa and the commissioners who had negotiated them moved on to other activities."⁶⁴ The new country was more concerned with nation building than Indians, and the treaties gathered dust in some depository in Ottawa.⁶⁵

Not only did the treaties not protect Aboriginal peoples' access to their land and their ability to live according to their traditional ways, they did not provide them survival sustenance when famine and disease descended on their lands. Along with the settler influx came something even more devastating for indigenous people on the Plains – the decline of the buffalo. As Daschuk describes, the near extinction of the buffalo was as the result of several factors, among them the arrival of cattle and horses and the spread of diseases such as anthrax and bovine tuberculosis, and the arrival of the Northern Pacific Railroad to North Dakota.⁶⁶ It is difficult for any government to handle such momentous change. However, the actions of the government of the new nation of Canada during this period are noteworthy for how they responded (or did not respond) to the dire consequences, including starvation, which beset indigenous people. Indeed, as Daschuk details, the government used starvation strategically. "Communities that entered into treaties assumed that the state would protect them from famine and socioeconomic catastrophe, yet in less than a decade the 'protections' afforded by treaties became the means by which the state subjugated the treaty Indian population."⁶⁷ For the nation-building prime minister John A. Macdonald, the new railway was his over-riding concern and the Aboriginal peoples determined to continue living on their land as per the terms of their treaties were a serious impediment. "Macdonald's plan to starve uncooperative

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⁶³ *Ibid* at 172-3.
⁶⁴ *Ibid* at 176.
⁶⁵ *Ibid*.
⁶⁶ *Daschuk, supra note 58 at 102.
⁶⁷ *Ibid* at 125.
Indians onto reserves and into submission might have been cruel, but it certainly was
effective.\textsuperscript{68}

Post-1982 Supreme Court jurisprudence has attempted to rebalance
understandings of the nature and significance of treaties. Notable are the four
interpretation principles enunciated by Chief Justice Dickson in \textit{Simon v The Queen}\textsuperscript{68};
"treaties should be given a fair, large and liberal construction in favour of the
Indians...construed not according to the technical meaning of their words, but in the
sense they would naturally be understood by the Indians...interpreted in a flexible way
that is sensitive to the evolution of changes in normal hunting practices [and include]
those activities reasonably incidental to the act of hunting itself."\textsuperscript{70}

Macklem writes of the decision that it "challenges the blind acceptance of the
legitimacy of non-Aboriginal norms and values in the process of determining the meaning
of vague treaty rights and calls for heightened sensitivity to Aboriginal [treaty]
expectations."\textsuperscript{71} However, those "expectations" must be understood as more than an
ability to hunt, as important as that activity is. Rather, hunting must be seen as part of a
larger set of rituals that connect Aboriginal peoples and individuals to their community
and to their land. This connection is what was lost and it is that profound loss that we
seek to remedy through fiduciary principles.

The \textit{Indian Act} and the shuffling aside of the treaties

In the space of a little more than a century, the situation of Aboriginal peoples had
declined from the militarily powerful communities that had been recognized in the \textit{Royal
Proclamation of 1763} to desperate communities beset by starvation. Rather than the
protection of a fiduciary promised by the \textit{Royal Proclamation}, the Crown acted in quite
the opposite way/manner: It used desperation for its own financial and political advantage

\textsuperscript{68} \textit{Ibid} at 127-8.
\textsuperscript{69} [1985] 2 SCR 387, 24 DLR (4th) 390.
\textsuperscript{70} \textit{Ibid} at para 27.
\textsuperscript{71} Patrick Macklem, \textit{Indigenous Difference and the Constitution of Canada} (Toronto: University of Toronto Press,
2001) at 145.
and in doing so denied indigenous peoples that which was most important to them – their ability to remain on their lands. Their lives and the territories on which they could carry on their lives became ever more circumscribed, from the general access promised by the Royal Proclamation to treaty lands and then reserve lands.

However, the ever-tightening controls over the lives of Aboriginal people was to continue, in the form of the Indian Act and then in the residential schools system. Each development carried with it increasing interference in the ability to live traditional lives in harmony with the land and to maintain well-being. The Indian Act contained rules that impinged on almost every aspect of the lives of Aboriginal people, and the residential schools system removed children from their families and communities altogether in an effort to destroy their very identity as Aboriginal people.

As Maureen Lux writes, "[T]he goal of assimilation justified the repressive economic, political and cultural policies that resulted in terrible living conditions and subsequent poor health, which in turn justified the position that Aboriginal people were biologically inferior."\(^\text{72}\) Even before the introduction of the first Indian Act in 1876, there were earlier attempts to advance the civilization of the Indians, for example, the Gradual Civilization Act in 1857, which sought through enfranchisement of the Indians to remove all legal distinctions between them and the rest of society and thereby "absorb Indian people fully into colonial society."\(^\text{73}\)

Indeed, the Indian Act incorporated racist views into public policy along with calculated attempts to destroy Aboriginal identity. The 1876 annual report of the department of the interior summed up the policy mission as follows:

Our Indian legislation generally rests on the principle, that the aborigines are to be kept in a condition of tutelage and treated as wards or children of the State ... the true interests of the aborigines and of the State alike require that every effort should be made to aid the Red man in lifting himself out of his condition of tutelage and dependence, and that is clearly our wisdom and our duty, through education and every other means, to prepare him for

\(^{72}\) Maureen K Lux, Medicine That Walks: Disease, Medicine, and Canadian Plains Native People, 1880-1940 (Toronto: University of Toronto Press, 2001) at 5.

\(^{73}\) Looking Forward, Looking Back, supra note 25 at 271.
a higher civilization by encouraging him to assume the privileges and responsibilities of full citizenship.\textsuperscript{74}

As RCAP observes: "The transition from tribal nation in the tripartite imperial system to legal incompetent in the bilateral federal/provincial system was now complete."\textsuperscript{75}

In bringing about such a transition from sovereign nation to ward of the state, the Crown also assumed the duties of fiduciary, in the classic if not the Guerin sense. The conceptualization of indigenous person as legally incompetent was reflected in the act itself by the minute supervision of the lives of Aboriginal people via the many requirements of the Indian Act, from who could be included on the band list to how their estates would be handled post-death. For a time, the Act outlawed certain traditional ceremonies such as the potlatch and sundance.

The finely textured controls over indigenous individuals and communities in the Indian Act are self-evidently consistent with the indicia set out by Justice Wilson in Frame v Smith\textsuperscript{76}, in which she stated that a fiduciary is the entity which has the scope to exercise some discretion or power and can unilaterally exercise that power to effect the beneficiary’s interests. The beneficiary is particularly vulnerable to the exercise of power.\textsuperscript{77} It would be difficult to imagine any citizens more subject to the exercise of government power and more vulnerable because of it. The introduction of the Indian Act, therefore, represents a breach of the fiduciary duty contained in the Royal Proclamation to protect the ability of indigenous peoples to continue to live in harmony with the land, which was key to their physical and spiritual well-being. At the same time, the Indian Act was express acceptance by the Crown that it would henceforth be in a fiduciary relationship with those Aboriginal peoples it recognized as "Indians."

Strangely, Guerin does not mention the oppressiveness of the Indian Act as a possible basis for a fiduciary duty. This is all the more notable since the interests in land with which Guerin was concerned figure prominently in the Indian Act. For example, a 1911 amendment to the Act provided judicial power to move a reserve that was within a

\textsuperscript{74} Ibid at 277.
\textsuperscript{75} Ibid.
\textsuperscript{76} [1987] 2 SCR 99, 42 DLR (4th) 81.
\textsuperscript{77} Ibid at para 60.
certain distance of an adjoining municipality. As the RCAP states, "[The amendment] was passed despite Parliament’s knowledge that its implementation could lead to a breach of treaty rights." In 1919, an amendment to the Act enabled mining operations to make use of adjoining reserve lands even if the band in question did not consent to such use. By the 1950s, successive amendments to the Indian Act had left band governments without any meaningful control over their reserve lands other than consenting to transfer.

The injuries to Aboriginal peoples flowing from the Indian Act are multiple and complex. The Act incorporated racism into Canadian public policy by taking a view of Aboriginal people as morally inferior, intellectually incompetent and in need of assimilation through the destruction of their self-identity as Aboriginal people, an important part of which is having a spiritual and communal aspect to the land. The effects on health and well-being from the policies contained in the Indian Act have a continuing impact on the health and well-being of Indigenous people, in particular on feelings of self-worth and the ability to exercise individual agency to positively effect and achieve physical and spiritual health. That this is the case should not be surprising, since destruction of identity was one of the precise policy goals of the Indian Act.

From ward of the state to residential school inmate

The racist attitudes toward Aboriginal people that led to the adoption of the Indian Act in 1876 also figured prominently in the creation of the residential school systems. In fact, amendments to the Indian Act in 1920 facilitated the populating of the residential schools by making it a requirement that Aboriginal children between seven and 16 years old attend, regardless of whether or not their parents wanted them to.

At first glance, the residential schools issue would seem to be of a different order than the rights in land raised by the Royal Proclamation and treaties. However, separation

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78 Looking Forward, Looking Back, supra note 25 at 284.
79 ibid.
80 ibid at 285.
of Aboriginal peoples from their land and communities was key to the assimilationist intentions of the constructors of the residential school system. As the RCAP explained, "A wedge had to be driven not only physically between parent and child but also culturally and spiritually. Such children would then be separated forever from their communities."

The issue of the extent to which the treatment of Aboriginal children in residential schools constituted a breach of the government’s fiduciary duty to the students and their communities has been considered in a number of cases, in particular in the class action context. The residential schools experience has also given rise to an alternative dispute resolution (ADR), which I discuss below. Often, such alternative mechanisms are described in contrast to the litigation, often in positive terms because they avoid the slow and often traumatic experience of court processes. However, the residential school dispute resolution system must be understood as having emerged both in response to the failures of the conventional legal system and as having been made possible by the contributions of that same legal system. Furthermore, neither of the two approaches – ADR and litigation – is better or worse than the other, but better and worse, in that both have advantages and disadvantages, both for individual litigants and for achieving the goals of justice. The interplay between the two suggests ways in which extra-legal normative consensus might also assist legal efforts to establish a fiduciary duty to provide the NIHB and an array of services including traditional healing.

Before the signing of the Indian Residential Schools Settlement Agreement in 2006, claims against the Crown by students – including claims for breach of fiduciary duty – had been certified as class actions. Certification usually marks the end of the road for litigation, owing to the incentive on respondents to settle. The jurisprudence that has developed in this area is tentative, since it establishes only whether class proceedings are the most expeditious way of adjudicating common issues, such as whether or not there was a fiduciary duty on the Crown in the particular circumstances and whether it was breached. However, even post-Wewaykum, courts in residential schools cases have been open to more expansive analyses of the ambit and nature of the fiduciary duty.

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82 Looking Forward, Looking Back, supra note 25 at 341
83 See, for example, Rummey v British Columbia, 2001 SCC 69, [2001] 3 SCR 184 and Cloud v Canada (Attorney General), [2004] OJ No 4924, 73 OR (3d) 401 (ON CA).
The treatment of students in the residential school systems is illustrative for present purposes because it lends itself to claims based both on the sui generis fiduciary duty and on the standard formulation of the duty. Regarding the latter, that the horrendous treatment of students in schools operated by churches on behalf of the Government of Canada and of which the government had knowledge\textsuperscript{84} breached the duty of any organization who had responsibility for the care of children. The Truth and Reconciliation Commission records the painful testimony of some of the survivors:

Food was strange, spoiled and rotten in many cases, poorly prepared and often in very short supply. Many people recalled being punished for being unable to clean their plates. Others recalled that they were always hungry... Many people came with stories of harsh discipline...crossing the line into abuse: of boys being beaten like men, of girls being whipped for running away. People spoke of children being forced to beat other children, sometimes their own brothers and sisters. The Commission was told of runaways being placed in solitary confinement with bread-and-water diets and shaven heads. People spoke of being sexually abused with days of arriving at residential school. In some cases, they were abused by staff; in others, by older students...Many compared the schools to jail (in some cases, complete with barbed wire).\textsuperscript{85}

Other aspects of the testimony illustrate an intentional dispossession from land and tradition that was at the heart of the residential schools project. Testimony to the TRC also provides a description of the means and the effect of such possession:

People told the Commission of being sent to school hundreds and even thousands of kilometres from their homes. Once they were there, it was impossible for their parents to visit them...Some did not return home for years at a time...Traditional, and often highly valued, clothing and footwear, handmade by loving mothers and grandmothers, was taken from them and never seen again. Long hair, often in traditional braids that reflected sacred beliefs, was sheared.

\textsuperscript{84} See, for example, Looking Forward, Looking Back, supra note 25 at page 362 and following where the Royal Commission on Aboriginal Peoples details the chronic underfunding that led to shortage of food in residential schools and deplorable physical conditions, a situation that was described as "totally unsuitable and a disgrace to Indian Affairs" by an association of principals. Reports of physical and sexual abuse made their way all the way to deputy superintendent Duncan Campbell Scott, who proclaimed that the department "would not countenance 'treatment that might be considered pitiless or jail-like in character'" (ibid at 362). However, the words of this powerful bureaucrat did not change the situation.

Children who had lived traditional lifeways told us that after a year of education, they did not have the skills they needed to survive when they returned home. And so it was that the relationship between individual Aboriginal person and their land and tradition was fractured, creating a legacy of ill-health and dysfunction whose symptoms are partially dealt with by the components of the existing NIHB but for which a more holistic legal and therapeutic response remains elusive.

Two strands of fiduciary duty in one

Though it has not been articulated as such, some of the residential schools litigation suggests the possibility of the two strands of fiduciary duty – sui generis and the standard formulation – overlapping in the same litigation. Notable in this regard is *Bonaparte v Canada*, in which the children of former students of two residential schools near Spanish, in northeastern Ontario, brought claims on their own behalf against the Crown for breach of fiduciary duty.

...to act as a protector of their aboriginal rights, including the protection and preservation of their language, culture, and way of life. They allege that, by reason of the application of government policy, they have been deprived of the full benefit of the transmission of their Indian culture from their parents, the primary plaintiffs, and they have been denied the opportunity to achieve a full and normal family, social and economic life, as has been afforded to other Canadians, and as would have been the case except for the application of the policy.

On the one hand, the litigation involves children in care, a context in which the fiduciary duty (and whether it has been breached) frequently arises. However, the pleadings also evoke some of the concerns I have raised in this thesis – namely, the importance to self-identity and well-being that comes from “language, culture and way of life,” all of which presuppose a relationship with traditional land.

In *Cloud v Canada*, the Ontario Court of Appeal also appeared open to broader notions of fiduciary duty in residential schools cases that extended the benefit of the duty to “families and siblings of the students.”

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86 Ibid.
87 Bonaparte, supra note 23.
89 Ibid at para 72.
In considering the decision of the motions judge to dismiss the claim as disclosing no cause of action because the children were not alive when the alleged breaches of fiduciary duty occurred, the Ontario Court of Appeal in *Bonaparte* gave a nod to the Binnie J admonition in *Wewaykum* that the fiduciary duty "does not exist at large" and that there is no "plenary Crown liability covering all aspects of the Crown-Indian band relationship." The court also acknowledged Binnie’s floodgates warning, in which he referred to "a whole spectrum of possible complaints" that had appeared on the docket after *Guerin*.

Despite the judicial finger-waving in *Wewaykum*, the Court of Appeal was not prepared to go along with the motions judge. It distinguished the claim for breach of fiduciary duty – as a claim in equity – from a claim in tort, which would not have been successful. "In negligence and contract the parties are taken to be independent and equal actors...[whereas] the essence of a fiduciary relationship...is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other." And, in a moment of jurisprudential ju-jitsu, the court took the list of issues summarized with disapproval by Binnie that had come before the courts – claims to social services, moving expenses and legal aid funding among them – and adopted a more open-ended point of view. The court concluded:

> [A]s Binnie J.’s review of the law in *Wewaykum* Indian Band reveals, fiduciary law in Canada, particularly in respect of the Crown's relationship with aboriginal peoples, is a very dynamic area of Canadian law. The nature and extent of the particular obligations that may arise out of this relationship are matters that remain largely unsettled in the jurisprudence.

The decision in *Bonaparte* recently was cited with approval by the Newfoundland Court of Appeal in *Canada (Attorney General) v Anderson*, in which students who attended residential schools before the thendominion became a province in 1949 sought damages from the Government of Canada. In addition, the court on its own accord relied on an academic authority, which was, as the court pointed out, "not relied on by the

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90 *Bonaparte*, supra note 23 at para 81.
92 *Ibid* at para 32.
93 *Anderson*, supra note 24.
applications judge (or cited on this appeal).”\textsuperscript{95} Nevertheless, the court agreed with the author’s view, including his observation that, “notwithstanding the several statements of the Supreme Court alluding to the finitude of the fiduciary duties of the Crown to aboriginal peoples, it remains manifest that as \textit{sui generis} duties they are capable of expansion and mutation to meet the needs of justice revealed in future cases.”\textsuperscript{96}

On first glance, it might appear that decisions such as \textit{Anderson} and \textit{Bonaparte} are results-oriented judgments in search of a legal rationale. However, both decisions are in keeping with the vision of courts of equity, which seek to do justice as required by the circumstances. In invoking \textit{Wewaykum} at the same time as they are taking distance from Binnie strictures and obsession with specificity (“cognizable Indian interest”), the courts are actually squaring the \textit{sui generis} duty with the duty generally, which \textit{Lac/Corona}. Decisions must continually be changing in order to respond to new realities and in order for equity to fulfill its purpose of doing justice.

\textbf{From litigation to ADR and back}

\textit{Anderson} and \textit{Bonaparte} were but two of many cases to be initiated by residential school survivors in the mid- to late 1990s. As Mayo Moran notes\textsuperscript{97}, until the mid-1990s, there was almost no litigation. By 2002, more than 12,000 claims had been filed and the numbers continued to increase and to overwhelm the capacity of the courts to deal with them. She attributes the flood of litigation to a number of developments, among them a ruling by the Supreme Court of Canada that normal limitation rules did not apply to plaintiffs alleging childhood sexual abuse\textsuperscript{98}. In addition, the Court expanded the law of vicarious liability so that an employer could be found vicariously liable for sexual abuse committed by employees.\textsuperscript{99} While these changes created the possibility of viable claims,

\begin{itemize}
  \item \textit{Anderson, supra} note 24 at para 53.
  \item \textit{The Honour of the Crown, supra} note 94 at 159-160, cited at para 53.
  \item Mayo Moran, “The Role of Restorative Justice in Responding to the Legacy of Indian Residential Schools” (2014) UTLJ 529 at 529 [Moran]. Moran served as chair of the Independent Assessment Process Oversight Committee established under the settlement agreement who mandate was to adjudicate compensation claims from survivors who had suffered serious harm including physical and sexual abuse. This article appears as part of special volume on the residential school litigation and settlement.
  \item \textit{M(K) v M(H),} (1992) 3 SCR 6, 96 DLR (4th) 289.
  \item \textit{Bazley v Currey,} (1999) 2 SCR 534, 174 DLR (4th) 45.
\end{itemize}
other legal changes were creating openings in the immunity from prosecution formerly afforded to government and churches.\textsuperscript{100}

There were also aspects of cases such as \textit{Bonaparte} and similar litigation that led to a feeling of legal vulnerability on the part of the defendant government and churches and therefore an increased willingness to agree to a settlement scheme acceptable to survivors. Previously, the courts had been willing to accept tort claims from residential school survivors arising out of physical abuse but had been reluctant to uphold claims for destruction of family bonds and loss of culture and language. In \textit{Blackwater v Plint}\textsuperscript{101}, for example, the BC Court of Appeal considered a claim that confinement to residential schools caused the loss of language, culture, custom and tradition. The court found that there was “no evidence of dishonesty or intentional disloyalty” on the part of government or church and therefore no breach of fiduciary duty. At the Supreme Court, however, McLachlin CJ recognized the possibility of a broader claim “focusing on Aboriginal children generally”\textsuperscript{102} but did not deal with it because it had emerged only at the Supreme Court level.

Regarding \textit{Bonaparte} and \textit{Cloud}, Moran writes:

[\textit{O}f those decisions must have set off alarm bells in the defendant communities, particularly the federal government. The possibility of general liability to all who attended residential schools and to their descendants created a threat that the scale of litigation would be far beyond what anyone would have thought possible only a few years before. This, along with escalating legal costs and judicial gridlock, provided strong incentives to settle.}\textsuperscript{103}

As is often the case when defendants conclude that the litigation odds are overwhelmingly against them, the spate of residential schools claims led to settlement. The Indian Residential Schools Settlement Agreement\textsuperscript{104} was the largest class action settlement agreement in Canadian history\textsuperscript{105}, and as a form of alternative dispute resolution (ADR)

\textsuperscript{100} Moran, \textit{supra} note 97 at 538-9.
\textsuperscript{101} 2003 BCCA 671, 235 DLR (4th) 60 at para 82 [\textit{Blackwater BCCA}].
\textsuperscript{102} 2005 SCC 58, [2005] 3 SCR 3 at para 61 [\textit{Blackwater SC}].
\textsuperscript{103} Moran, \textit{supra} note 97 at 546.
\textsuperscript{104} “Indian Residential Schools Settlement Agreement” (May 2006) [IRSSA], online: Residential Schools Settlement \textit{<http://www.residnentialschoolsettlemment.ca/settlement.html>}. \textsuperscript{105} Moran, \textit{supra} note 97 at 529.
provided *inter alia* for compensation for survivors without them having to go through much of the painful experience that attains to court proceedings.

It is important to note that the eventual form of the IRSSA was one that was advanced not by individual survivors but by the Assembly of First Nations. Kathleen Mahoney, chief negotiator for the AFN, attributes the lack of push from plaintiffs for the reconciliation components of the ISRRA — in particular the Truth and Reconciliation Commission106 — as a reflection of their lawyers’ “sole focus on the resolution of individual claims, [which was] disappointing because their attitude mirrored that of the government and some church representatives insofar as the restorative elements of the Settlement Agreement, so important to survivors, were concerned.”107 No doubt that was a factor in the lack of enthusiasm for the non-compensatory aspects of the settlement agreement. However, it may also have been the case that there was insufficient interest or even skepticism on the part of individual survivors to overcome his lack of interest on the part of the profession. As I discuss below, based on issues that subsequently arose in relation to the funding of the TRC and its relationship with the government of Canada, there would have been a basis for that skepticism.

Under the compensatory portions of the IRSSA, approximately $1.7 billion has been paid out in “Common Experience Payments” to eligible survivors of residential schools who received an average $20,000 each in compensation without the need of establishing additional harms.108 In addition, the IRSSA established an “Independent Assessment Process” (IAP) to award compensation for victims of sexual and physical abuse and other serious harm and has paid out approximately $2.8 billion.109

It is the IAP process that is the most reminiscent of the standard tort process, though it was amended to take into account the cultural needs of Aboriginal claimants. In particular, the process uses an inquisitorial rather than an adversarial questioning model

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106 “Schedule N”, online: Residential Schools Settlement <http://www.residentialschoolssettlement.ca/SCHEDULE_N.pdf> [“Schedule N”].
107 Kathleen Mahoney, “The Settlement Process: A Personal Reflection” (2014) 64:4 UTLJ at 518 [Mahoney]. In the same, Trevor Farrow reflects on lawyers’ professional instinct to respond to deal with residential schools litigation in an adversarial rather than a collaborative manner and the inappropriate soliciting of clients by some lawyers. Trevor Farrow, “Residential Schools Litigation and the Legal Profession” (2014) 64:4 UTLJ.
108 Moran, supra note 97 at 532.
109 Ibid at 533.
so as to avoid the potentially negative impact of standard cross-examination techniques regarding very traumatic incidents of abuse and provides for the use of "[c]ultural ceremonies such as an opening prayer or smudge...at the request of the claimant to the extent possible".110

As Moran notes, this was among the "important adjustments...made to temper the risk of the kind of undue harshness that is unfortunately common in the civil justice setting."111 This is an issue with which courts have long grappled, with limited success. The Supreme Court of Canada, notably in Delgamuukw v British Columbia112, has identified the importance of adapting values of evidence law in a manner culturally appropriate to Aboriginal peoples, including in the way the courts receive oral history. The adversarial system of dealing with disputes is culturally alien to the Aboriginal approach to conflict resolution113, which tends to adopt a consensus rather than a winner-takes-all approach. Cross-examination is often difficult not only for plaintiffs, but also for elders, who would likely have to be called to give evidence about matters such as traditional healing practices of their Aboriginal community. As John Borrows writes:

To subject elders to intensive questioning can come across as ignorance and contempt for the knowledge they have preserved, and a disrespect and disdain for the structure and the culture they represent. Yet such behaviour is currently mandated by the Canadian legal system, and reveals the problems Aboriginal elders encounter in placing their traditions before the courts.114

After such painful experiences, alternatives to the standard civil litigation approach become attractive. Indeed, the procedural advantages and the prospect of a reconciliation exercise in addition to the compensation provided made organizations such as the AFN early proponents of the Truth and Reconciliation Commission provided for in the IRSSA. As AFN chief negotiator Mahoney writes:

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111 Moran, supra note 97 at 560.
The National Chief and the AFN negotiating team were always of the view that the Truth and Reconciliation Commission (TRC) would be the lasting legacy of the Settlement Agreement and its most important feature. We operated from the premise that, once a TRC has done its work and a history is known; it can never be unknown...The TRC...was designed to...be part of an overall holistic and comprehensive response to the Indian Residential School legacy, to provide a mechanism whereby the Injustices and harms experienced by Aboriginal people and the need for continued healing would be acknowledged.115

The implementation of the IRSSA has given rise to a discourse regarding reconciliation in which the positive aspects are assumed and the negative overlooked. The courts have partaken of this discourse, accepting its own limitations in dealing with the issues of Aboriginal peoples. The Nunuvut Court of Justice spoke fulsomely of the litigation drawbacks in its judgment in a matter in which it was simultaneously dealing with an application from residential school survivors to certify their action as a class proceeding, while at the same time considering whether to give approval to a negotiated settlement.116 One of the issues in the litigation was whether the Government of Canada breached its fiduciary duty to the surviving and deceased students and their families and breached its Aboriginal and treaty rights by allowing church organizations to operate the residential schools system in a manner that failed to protect the students from physical and mental harm.117

The court referred to varied intentions of the litigants: “Some seek redress in the form of financial compensation. Some seek an opportunity to rebuild damaged lives through access to remedial programs...There is a need for reconciliation so that a healing journey can be completed.”118 However, the court appeared anxious to outsource the consideration of these objectives of the litigants:

115 Mahoney, supra note 107 at 517.
116 Ammaq et al v Canada (Attorney General), 2006 NUCI 24 (CanLII) [Ammaq].
117 Ibid at para 7. It is interesting that the court, whether intentionally or through infelicitous phrasing, suggests that there is an Aboriginal and treaty obligation to protect the students from physical harm. The court defines this particular legal issue as follows: “By their purpose, operation or management of Indian Residential Schools during the class period, did the Defendants breach a fiduciary duty they owed to the survivor class and the deceased class or the aboriginal or treaty rights of the survivor class and the deceased class to protect them from actionable physical or mental harm” [emphasis added].
118 Ammaq, supra note 116 at para 2.
The settlement agreement provides for community healing through a Truth and Reconciliation Commission and related commemorative events. No legal victory in a courtroom could ever hope to do this. This court is not equipped to address the holistic healing perspectives...in a way that does justice to the larger Inuit and aboriginal perspectives on life, on living and on conflict resolution.\textsuperscript{119}

The court acknowledged, albeit obliquely, that financial compensation was taking a back seat to healing: "[The settlement agreement provides some redress in the form of monetary compensation while focusing on the need to heal]."\textsuperscript{120} Elsewhere in the judgment, the court suggests that even if litigation of the claims was preferable to the alternative approach it was advocating, it would not be possible in any event because of the cost:

The extremely high cost of litigation in this jurisdiction puts this type of complex litigation out of the financial reach of most Nunavummiut. The expenses associated with proving an individual claim would most likely eat up the potential recovery in many, if not most claims. The groups most likely to benefit from complex court-based litigation would be the local airlines and the legal community.\textsuperscript{121}

In the normal course, the financing of litigation would be provided for a costs order in favour of the winning party. The Nunavut court has a wide discretion to award costs in a manner that it considers "just."\textsuperscript{122} While, as the court stated, those plaintiffs who did not wish to sign on to the settlement agreement could proceed individually, this is an option more theoretical than real because of the emotional and financial burden of being an independent litigant in such a complex matter. In the guise of reconciliation, plaintiffs in cases such as Ammaq are incentivized to forego the litigation process.

Of course, there is much in the award that is accurate and that correctly conveys the advantages of the IRSSA approach. However, just as there are limitations to the court

\textsuperscript{119} ibid at para 61.
\textsuperscript{120} ibid [emphasis added].
\textsuperscript{121} ibid at para 51.
\textsuperscript{122} Judicature Act, SNWT (Nu) 1998, c 4, s 26: "Subject to appeal as in other cases, a court has power to relieve against all penalties and forfeitures and in granting that relief to impose terms as to costs, expenses, damages, compensation and all other matters that the court considers just." Ontario's rules of court provides a similar discretion for the court via a provision to consider, in addition to enumerated grounds, "any other matter related to the question of costs," which in addition to legal costs include the cost of disbursements for items such as travel. Rules of Civil Procedure, RRO 1990, Reg 194, r 60.03, s 57.

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system, so are there to the IRSSA approach and its notion of reconciliation. These limitations are both practical and conceptual. To begin with the former, federal government lawyers take a "hyper adversarial" approach to dealing with compensation files, Mahoney says, and counsel for applicants "complain of delayed compensation payouts, arguments for increasingly narrow interpretations of the Settlement Agreement, refusal to provide documents, imposition of arbitrary new rules on the process, and shameless reliance on victim blaming arguments.”

In many ways, these problems relate to the difficulty of having a defendant – the Government of Canada – act as administrator of the agreement in which claims against it are settled. The unfortunate travails of the Truth and Reconciliation Commission, the centrepiece of the Indian Residential Schools Agreement, is a case in point. The conflict of interest between the Crown as funder and as a party whose relationship with Aboriginal peoples is to be reconciled has given rise to conflict and bad feeling. Financial problems plagued the process from the start, as the commissioner complained of lack of resources to carry out the mandate of the Commission properly and was forced to go to the Government of Canada seeking additional funding. As the Commission neared the end of its mandate, the issue was how records collected during the process would be handled after the Commission had ended its work and ceased to function.

Litigation over the fate of the documents used in the assessment of individual claims highlights some of the challenges in making reconciliation an authentic process in which no party is advantaged vis a vis another. One of the issues with which the Ontario

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123 Mahoney, supra note 107 at 523.
124 Ibid. Regarding the latter, see in the same issue Kent Roach, “Blaming the Victim: Canadian Law, Causation and Residential Schools” (2014) 64:4 UTLJ.
125 CBC News, “Residential schools commission faces financial crunch: Give panel more funding or scale back its obligations, says chief commissioner”, online: <http://www.cbc.ca/news/canada/manitoba/residential-schools-commission-faces-financial-crunch-1.1069710> “This commission cannot do all of the things that you’ve asked us to do with the resources that you’ve given us. Understand that and be prepared to live with it when the crunch comes,” [chief commissioner Murray Sinclair] said from his office in Winnipeg.” The Government of Canada later extended the operating period of the Commission for one year, prompting Sinclair to state: “The Commission is glad of the opportunity to finish the work it was mandated to do under the Settlement Agreement.” “Truth and Reconciliation Commission Granted One-Year Extension to Its Operating Period” (January 30, 2014), online: Aboriginal Affairs and Northern Development Canada <https://www.aadnc-aandc.gc.ca/eng/1391095362751/1391095496572>, a measure that was subject to the approval of the supervising court (the British Columbia Supreme Court).
126 See Fontaine v Canada (Attorney General) 2014 ONSC 4585 [Fontaine].
Court of Justice had to grapple was “the multifarious emanations of Canada and the
different roles played by Canada.” The court was particularly concerned about the
potential conflict in roles, as it stated in approving the settlement in a class action
proceeding which would lead to the defendant Government of Canada being the
administrator of the settlement. To deal with the conflict the court insisted on ongoing
involvement in the administration of the settlement to ensure that the “administrative
function is completely isolated from the litigation function with an autonomous supervisor
or supervisory board reporting ultimately to courts.”

Such intrusion by a defendant (the Government of Canada) into the management
of documents relating to the Truth and Reconciliation Commission raises particular
concerns. As Mahoney says, the TRC was, as far as the AFN was concerned, the
centre-piece of what it obtained under the IRSSA, “the lasting legacy and its most
important feature...a permanent achievement.” However, at the Ontario Court of
Justice, the AFN supported the request for an order that all IAP documents be
destroyed. The case raises difficult issues about the personal prerogative of individuals
to control the record of traumatic events in their lives, and the importance of preserving
the history of this tragic chapter in Canadian history.

The deliberate incompleteness of the narrative history has been raised as a
concern about the legacy of the Truth and Reconciliation Commission, notably by Ronald
Niezen, who interviewed witnesses (including alleged perpetrators of abuse such as
priests and nuns) as the TRC process was unfolding. Niezen, who may be seen by some
as an apologist for the residential schools, maintains that truth is often more nuanced
than represented by stock characters such as “victim” and “perpetrator.” In interviewing

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127 Ibid at para 30.
129 Mahoney, supra note 107 at 517.
130 Fontaine, supra note 126 at para 93.
131 The Canadian experience has been reviewed both from a practical and political point of view. For example, after
interviewing survivors, priests and nuns, Ronald Niezen raises a concern over the extent to which the goal of
reconciliation can be met when a working truth for commission emerges and the nuance of individual actors is lost.
Ronald Niezen, Truth and Indignation: Canada’s Truth and Reconciliation Commission on Indian Residential Schools
(Toronto: University of Toronto Press, 2013) [Niezen]. Funk-Unrau and Snyder take an anti-state point of view,
arguing that the truth and reconciliation process should be seen as state co-optation of survivor grievances. Nell-
Funk Unrau and Anna Snyder, "Indian Residential School Survivors and State-Designed ADR: A Strategy for Co-
witnesses as they took their turn before the TRC, Niezen saw an “ontological invulnerability” develop around which the testimony revolved. This narrow narrative space did not allow for the narratives of school personnel who also may have felt victimized by their role in the system or, for that matter, by the senior government and personnel who allowed the system to operate for generations but whose role – more physically remote from the schools and the students confined there but more significant in the overall maintenance of the system than the on-scene religious personnel – is not present in the narrative. As Teresa Godwin Phelps writes, the “scholarly human rights culture...has been overly awed by the truth commission phenomenon and far too slow in probing beneath the surfaces. If we start from the premise that truth commissions have something valuable to offer, we must move beyond it to the questions of their limitations and dark sides.”

The word “reconciliation” has about it a positive hue which evokes the replacement of conflict with peace. However, reconciliation as a national process to resolve historic wrongdoing has begun to be critically examined not only in Canada, but also in other national contexts, notably South Africa. There, the reconciliation process has been credited for its role in moving the country without bloodshed into a post-apartheid era but has been criticized for having done little to undo the extreme inequality between black and white that was fundamental to apartheid and that remains.

In Canada, the rise of the reconciliation discourse as a result of TRC activities raises more specific concerns. Along with the internal conflicts of interest that lurk in the shadows of the reconciliation process, there is a temporal limitation in the notion of reconciliation as it has been articulated in the TRC context. That limitation operates to the advantage of the Crown and to the detriment of Aboriginal peoples. The vision of

132 Niezen, ibid, at 67.

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reconciliation, as articulated in the TRC mandate, endeavors? "to put the past behind us so that we can work towards a stronger and healthier future," as it states. 135

The focus is on the future and on moving forward? from the past. Reconciliation provides a "much-celebrated panacea for a wide range of injustices committed by states against their own citizens," as Brenna Bhandar writes in the context of reconciliation and Canadian Aboriginal peoples. 136 "The complexities and contradictory forces of colonial settlement— including problems associated with plural sovereignties — are smoothed over in an attempt to produce a unified version of the nation's past, which in turn enables the nation to embrace its idealized self-image of a post-colonial, constitutional democracy." 137 The components of such reconciliation sometimes appear purely symbolic and lack authenticity. 138

The temporal bias is vividly illustrated in the components of the IRSSA. In order to avail themselves of the monies available under the settlement agreement, former students of the residential schools are required to sign a legal release, a standard document in the resolution of lawsuits but poignant when included as part of a project of reconciliation. The signatories

fully, finally and forever release and discharge, separately and severally, Her Majesty the Queen in Right of Canada, the Attorney General of Canada, their successors and assigns and their ministers, officers, employees, servants, and agents...from any and all actions, liabilities, claims and demands whatsoever of every nature and kind...which I ever had, now have or may in future have against them (whether I now know about these claims or causes of action or not). 139

135 Mandate for the Truth and Reconciliation Commission provided in Schedule N of IRSSA, supra note 106.
137 ibid at 95.
138 See, for example, the Government of Canada's self-posed question, "What has the Government of Canada done to promote reconciliation?" and its answer: In addition to implementing the [Indian Residential Schools Settlement Agreement], Canada continues to promote reconciliation between Aboriginal and non-Aboriginal people in Canada through the implementation of specific initiatives...One of these initiatives, a stained glass window, has been installed directly above the west entrance to Centre Block of Parliament Hill. Designed by renowned Métis artist Christi Belcourt, the window commemorates the legacy of Indian residential schools and the Prime Minister's Apology to former students on behalf of all Canadians. The window provides a unique opportunity for Parliamentarians and visitors to Parliament to learn about the history of Indian residential schools and Canada's ongoing reconciliation efforts. "Frequently Asked Questions — Gestures of Reconciliation", online: Aboriginal Affairs and Northern Development Canada <https://www.aadnc-aandc.gc.ca/eng/1314851168768/1314831372522>.
139 "Schedule P", online: Residential Schools Settlement <http://www.residentialschoolsettlement.ca/ScheduleP.pdf> [emphasis added].
The agreement also contains the standard no-admission-of-liability clause for the benefit of the defendants, including the Crown: “I understand that Her Majesty the Queen does not admit any liability to me by acceptance of this Release or by any payment that may be made to me.”

Our first impulse might be to dismiss this language as mere formality of the sort that accompanies the many legal settlements that occur every day, comfort words without which such beneficial occurrences would not take place. In this view, the Crown as a respondent, like any respondent, cannot be expected to expend funds on settlement if there is a possibility that the plaintiff might then go back to court and attempt to continue the litigation. In matters such as those involved in the IRSSA, however, they strike a discordant tone, seeming to undo precisely what is promised – justice, truth and reconciliation.

Moran suggests that the normative consensus represented by the IRSSA undercuts any legal strength in the formal legal undertaking:

The Settlement Agreement contains the usual statement that none of the provisions is to be construed as an admission of liability. And while the CEP may, therefore, be a tenuous basis on which to argue that there is emerging private law protection for language and culture, it does constitute a very important step forward in achieving the fair and lasting resolution that the IRSSA aims at...The litigation history is replete with efforts to capture the sense that a grievous wrong was done to all children who were in the [residential schools] system, not just those who suffered the additional serious harms of physical and sexual abuse. And while the cause of action may be uncertain in existing law, the fact that the policy now appears to us as clearly wrong puts courts in a very difficult position when confronted with the claims.

In Canada, then, the reconciliation exercise represented by the TRC must be seen as part of a larger whole that in and of itself cannot bring about the more general and elusive reconciliation between Aboriginal and non-Aboriginal peoples. In this way, we see that what is required is not a choice between the alternative processes contained in the IRSSA, but the search for a synchronicity between them. On the one hand, the settlement

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140 Ibid.
141 Moran, supra note 97 at 557 [emphasis added].
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agreement short-circuits the jurisprudential development that would occur if the court rendered decisions on individual claims. In Bonaparte\textsuperscript{142}, for example, the court appeared to be, albeit gingerly, heading into a broader understanding of fiduciary duty that contained within it a duty to protect Aboriginal tradition profoundly connected with a relationship to land.

However, as Moran points out, the judicial history of Blackwater \textit{v} Plint\textsuperscript{143} shows the downside of litigation, especially in the novel areas of law where there is much legal uncertainty and many fertile grounds for appeal – and delay. The defendant, Plint, a dormitory supervisor, already had a criminal conviction when the civil trial began in 1996. Judicial proceedings ended at the Supreme Court of Canada 10 years later, after “hundreds of days of court hearings, thousands of paragraphs of judicial reasoning, very significant costs, and a great deal of time on the part of courts and counsel on all sides. Given all this, one can only imagine the toll it must have taken on the plaintiffs.”\textsuperscript{144} Yet the case increased the legal pressure that led the defendant churches to agree to the IRSSA process, in part because the Supreme Court of Canada removed the protection of charitable immunity.\textsuperscript{145}

Just as the litigation created pressure for the defendants’ acceptance of the alternative processes of the IRSSA, so does the IRSSA prepare the normative grounds for future litigation. These grounds include a claim that the Government of Canada breached its fiduciary duty to protect the relationship between Aboriginal people and their traditional lands and that this caused grievous and foreseeable harm to their health and well-being for which the NIHB and traditional healing services are the appropriate equitable remedy. Survivors of residential schools and their children are best placed to initiate such a legal claim.

In addition, the Government of Canada has officially apologized for the wrongs caused/perpetuated by? the residential school system, another part of the wider reconciliation process. Prime Minister Stephen Harper stated in the House of Commons on June 11, 2008: “The government now recognizes that the consequences of the Indian

\textsuperscript{142} Supra note 23.
\textsuperscript{143} 93 BCLR (3d) 228; [2001] BCJ No 1446 (CL).
\textsuperscript{144} Moran, \textit{supra} note 97 at 553.
\textsuperscript{145} \textit{ibid} at 546.
residential schools policy were profoundly negative and that this policy has had a lasting and damaging impact on aboriginal culture, heritage and language.\textsuperscript{148} The Prime Minister also referred to the continuing damage wrought by the residential schools system: "The legacy of Indian residential schools has contributed to social problems that continue to exist in many communities today."\textsuperscript{147}

The injuries for which the Prime Minister apologized are essentially the same as those recognized in Bonaparte and Anderson as having been caused to students in residential schools. As Moran has observed with regard to the no-liability clause in the IRSSA legal instruments, the normative consensus — encapsulated in the apology of the Prime Minister itself — makes it difficult for the courts to go offside in regard to such claims, which have in their essence been admitted.

The residential schools experience is the most egregious of the instances of dispossession that have beset Aboriginal peoples over the centuries. I have referred elsewhere in this thesis to the experiences of the Mi'kmaq\textsuperscript{148} and the Innu\textsuperscript{149}, but there are others.\textsuperscript{150} The details are different but the impact on communities as a result of being separated from their traditional land have, in all instances, resulted in generationally intractable deficiencies in health and well-being that continue into the present. Those deficiencies are integrally related to the loss of tradition, language and culture identified in Bonaparte in regard to the specific facts of dispossession with which that case was concerned. The challenge now is to bring all these instances of dispossession into that normative consensus and within the reach of fiduciary duty. As the residential schools experience shows, what is required is not a choice between litigation and other routes but the two working together to create the normative space in which the courts can provide equitable remedies for equitable breaches.

\textsuperscript{149} Ibid.
\textsuperscript{150} See page 9 above.
\textsuperscript{147} See Chapter 5 at page 10 and following.
\textsuperscript{150} See generally Looking Forward, Looking Back, supra note 25, in particular Chapter 6 ("Displacement and Assimilation") and Chapter 11 ("Relocation of Aboriginal Communities").

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Conclusion

In their discussions with the settlers (in treaty negotiations, for example), indigenous leaders were careful to insist on their future rights to their lands and to continue to live on their lands as they had for millenia. The protective language of the Royal Proclamation of 1763 gave them confidence that the settlers would abide by these bargains. However, economic and political changes reduced the military influence of indigenous nations and the government of the new dominion singularly focused on a national railway chose to ignore its obligations under treaty and the Royal Proclamation.

The Royal Proclamation was, among other things, an articulation of the Crown's fiduciary duty to indigenous peoples, who never ceded their sovereignty or became conquered peoples. The behaviour of the Crown in negotiating treaties, which led to the dispossession of traditional lands so important to the well-being of Aboriginal peoples, included various forms of sharp practice, from dishonesty in explaining the terms of the treaties to failure to include agreed-upon terms in the written versions of the agreement. Such actions were a breach of the Crown's fiduciary duty and to the extent that they interfered in the indigenous peoples' right to maintain a relationship with their land that was integral to their physical and spiritual well-being, have caused lasting deleterious effects.

The Indian Act, drafted and passed without any consultation with Aboriginal peoples or reference to the treaties, was a further breach of the Crown's fiduciary duty. Among other things, the Indian Act facilitated the removal of traditional lands from Aboriginal control and title, and imposed oppressive controls over their daily lives, including their ability to practice traditional ceremonies, which formed part of the cultural identity of Aboriginal peoples. In aiding in the dispossession of lands from indigenous people and in interfering with their ability to practice the traditions that continued and reinforced their self- and community identity, the Indian Act was a breach of the Crown's fiduciary duty to Aboriginal peoples.

At the same time, the Act was an express acceptance by the Crown of fiduciary obligations to Aboriginal peoples. As it had obligations to other "wards of the state" (children in care, for example), it would have similar obligations here. Though such discourse induces cringing today, the fiduciary duty undertaken by the government in the
Indian Act clearly meets the indicia set out by Justice Wilson in Norberg v Wynrib\textsuperscript{151} and remain part of the law, inasmuch as the Indian Act continues in force.

Though residential schools might appear to involve a different form of historical injustice than treaty non-fulfillment and the introduction of the Indian Act, they also involve separation from land and resulting deleterious effects on health and well-being, as students were robbed of their self-identity and their ability to care for themselves through the traditional ways that they and their ancestors had been taught. The courts, notably in the class actions area, have recognized not only possible breaches of the fiduciary duty to the students of residential schools but to the children of the students, through the injury to their ancestral heritage caused by the treatment of their parents in the residential schools system, which interfered in the parents' ability to continue that heritage.

The sources of fiduciary duty, then, are multiple and not reliant exclusively on the sui generis considerations set out in Guerin. Indeed, reliance on general fiduciary law and principles offers an opportunity to access the developments in that area, which, as equity does, tries to respond to injustice and not be obstructed by technical considerations.

Having established the benchmark for well-being by setting out the conditions at contact and describing the connection between well-being and a harmonious relationship with the land (not land in general, but specific land), I set out the ways in which non-fulfillment of treaties, introduction of the Indian Act and establishment of the residential schools system were breaches of the fiduciary duty owing to Aboriginal peoples, and how those breaches negatively affected the well-being of those Aboriginal peoples. I have questioned the extent to which reconciliation as it has been conceptualized in the context of the grievances of the indigenous peoples of Canada is an adequate response to the past and can be the basis of a different relationship in the future. The problem, I have suggested, is that focus on the future and on "put[ting] the events of the past behind," as stated in the mandate of the Truth and Reconciliation Commission.\textsuperscript{152} Alas, the events of the past in the forms of breaches of fiduciary duty live into the present and require a legal as well as a normative response.

\textsuperscript{151} Supra note 91.
\textsuperscript{152} "Schedule N", supra note 106.
I have suggested that reconciliation is part of a continuing process, of which litigation is a part and not the alternative. As the residential schools experience shows, litigation helps shape and crystallize normative understandings and creates additional pressure on even powerful defendants such as the Crown and church to settle, thus increasing the chances of positive outcomes for plaintiffs. In turn, the IRSSA as an ADR process provides a normative foundation for litigation, in which it was pleaded that the Crown's multiple breaches of fiduciary that caused the dispossession from Aboriginal peoples from their traditional lands gives rise to a remedy in the form of the NIHB as part of an array of services that includes traditional healing.

In the next chapter, I argue that the legal remedy cannot be mere financial damages but a very specific remedy that not only responds to the immediate health needs of Aboriginal peoples through the elements of the existing NIHB, but that also puts in place a more holistic system of western and traditional medicine, which seeks to re-establish the well-being that was so seriously undermined through multiple breaches of fiduciary duty.
Chapter 5: NIHB and holistic health services as remedy for breach of fiduciary obligation

There is an inevitable tension between the court's refusal to dismiss claims merely because they are novel\(^1\), and the admonition of Binnie J in *Wewaykum*\(^2\) that a fiduciary duty only arises when there is a "cognizable Indian interest." Indeed, the bar set by Binnie J is considerably higher than in non-Aboriginal fiduciary duty, the relationships giving rise to which are not fixed and must only meet the criteria set out by Justice Wilson in *Frame v Smith*.\(^3\)

That certain aspects of the relationship between Aboriginal peoples and the Crown give rise to a fiduciary relationship is not in doubt. Dickson J (as he then was) found in *Guerin* that there is a *sui generis* duty based on the fact "that the Indian interest in the land is inalienable except upon surrender to the Crown."\(^4\) In *Guerin*, fiduciary duty was found in relation to the disposition of "real property," although this is not a requirement for finding that there is such a duty. In *Wewaykum*, even fiduciary skeptic Binnie J was careful not to suggest that the list of previous claims he cited with such disapproval could not involve breaches of fiduciary duty merely because they did not involve land *qua* property.\(^5\) "It is necessary...to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation," he stated.\(^6\)

In this thesis, I have argued that provision of the NIHB as part of an array of health services centred around traditional health and well-being is the legally appropriate remedy for multiple breaches of fiduciary duty. I have identified two aspects of that duty – one rooted in the standard formulation and the other a variation of the *sui generis* duty identified in *Guerin*. Regarding the former, I have suggested that the rendering of

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\(^3\) [1987] 2 SCR 99 at para 57, 42 DLR (4th) 81.

\(^4\) [1984] 2 SCR 335 at para 84, 13 DLR (4th) 321[*Guerin*].


\(^6\) *Ibid.*
Aboriginal peoples as "wards of the state" without the capacity as individuals or communities to look after their own affairs — notably through introduction of the Indian Act\(^7\) — although rooted in racist and colonialisit attitudes toward Aboriginal peoples nevertheless created a legally binding fiduciary relationship in which the Crown willingly assumed discretionary control of most aspects of the lives of Aboriginal peoples. Furthermore, the Indian Act was part of a phenomenon of dispossesson, as it was characterized by the Royal Commission on Aboriginal Peoples\(^8\), and breached the fiduciary obligations assumed by the Crown under the Royal Proclamation of 1763\(^9\). These obligations were protective in nature and in the expectations of the Aboriginal peoples provided safeguards for their continuing sovereignty, access to their lands and their ability to maintain their traditional ways of living.\(^10\) I have also cited multiple instances of sharp practice in treaty negotiation and establishment of the residential school system as breaches of the fiduciary obligation contained in the Royal Proclamation of 1763.\(^11\)

This "dispossession," as the RCAP pointed out, is at once physical but also spiritual.\(^12\) As Naomi Adelson has also described in relation to the Cree of Northern Quebec, an ongoing relationship with the land is inseparable from well-being, which includes bio-medical factors but also a healthy self-identity and a sense of individual and community agency.\(^13\) Recognizing the role of the land in the lives of Aboriginal people, I have argued that these spiritual, identity aspects of the land are as vital as the real property issues that are more commonly the basis of findings of a fiduciary duty and its breach. That this more profound relationship with the land is cognizable as an "Indian interest" is suggested by existing jurisprudence, notably Bonaparte v Canada\(^14\) and

\(^7\) RSC, 1985, c l-5.
\(^9\) Royal Proclamation 1763 (UK), reprinted in RSC 1985, App II, No 1 [Royal Proclamation].
\(^10\) See, for example, Mark L Stevenson and Albert Peeling, "Probing the Parameters of Canada's Crown-Aboriginal Fiduciary Relationship" in In Whom We Trust: A Forum on Fiduciary Relationships Co-Sponsored by Law Commission of Canada and Association of Iroquois and Allied Indians (Toronto: Irwin Law, 2002) at 12 [In Whom We Trust] cited in Chapter 4 at note 47.
\(^11\) Royal Proclamation, supra note 9.
\(^12\) See discussion in Chapter 4 at note 8.
\(^13\) Naomi Adelson, 'Being Alive Well': Health and the Politics of Cree Well-Being (Toronto: University of Toronto Press, 2000) at 14
\(^14\) [2004] OJ No 1046, 64 OR (3d) 1 (ONCA) [Bonaparte].
Canada (Attorney General) v Anderson\textsuperscript{15}, residential schools cases where the respective appeal court recognized the possibility of a successful claim in which the respective pleadings involved breach of a fiduciary duty to act as a protector of the claimants' Aboriginal rights, including the "protection and preservation of their language, culture and way of life"\textsuperscript{16} and deprivation "of the full benefit of the transmission of their Indian culture from their parents."\textsuperscript{17} In Blackwater v Plint\textsuperscript{18}, another residential schools case, the Supreme Court considered an argument that the system "robbed Indian children of their communities [and] culture..."\textsuperscript{19} It rejected the claim not on jurisprudential grounds but for lack of a sufficient evidentiary record.\textsuperscript{20}

**Dispossession as a cause of pathology**

Though these cases deal with the residential school system, there is no principled reason why the same considerations could not underlie a claim that the Crown had breached its fiduciary duty by causing the dispossession of Aboriginal people from their land and thereby failed to "act as a protector of the Aboriginal rights, including the protection and preservation of the language, culture and way of life."\textsuperscript{21} The loss of culture and way of life are integrally related to the bio-medical and psychological/spiritual pathologies affecting Aboriginal peoples and their communities, as the RCAP has documented.\textsuperscript{22}

These pathologies are reflected in the health indicators for Aboriginal Canadians, which in almost all respects are worse than for the general population. Life expectancy among First Nations people is shorter and disease rates are higher.\textsuperscript{23} In addition, there is a crisis of youth suicide. According to Health Canada, "Suicide rates are five to seven times higher for First Nations youth than for non-Aboriginal youth. Suicide rates among

\begin{itemize}
\item \textsuperscript{15} 2011 NLCA 82, 315 Nfld \& PEIR 314 [Anderson].
\item \textsuperscript{16} Bonaparte, supra note 14 at para 7.
\item \textsuperscript{17} Anderson, supra note 15 at para 53.
\item \textsuperscript{18} 2005 SCC 58, [2005] 3 SCR 3.
\item \textsuperscript{19} Ibid at para 61.
\item \textsuperscript{20} Ibid at para 62.
\item \textsuperscript{21} Bonaparte, supra note 16 at para 7.
\item \textsuperscript{22} See discussion in Chapter 4 at note 25.
\item \textsuperscript{23} Health Canada, "A Statistical Profile of the Health of First Nations in Canada: Self-Rated Health and Selected Conditions, 2002-2005" (Ottawa: Health Canada, 2009), online: <http://www.hc-sc.gc.ca/niah-spnia/pubs/abori-
\end{itemize}
Inuit youth are among the highest in the world, at 11 times the national average. A court might take judicial notice of this appalling data regarding the health and well-being of Aboriginal peoples in Canada. In addition, there would be abundant expert evidence available to connect these pathologies to the dispossession from land.

Causation in equity is treated differently than in tort, where the test that emerged in Donaghue v Stevenson has been applied in determining liability. As McLachlin J (as she then was) indicated in Canson Enterprises Ltd. v Broughton & Co., “the requirement that the loss must result from the breach of the relevant equitable duty does not negate the fact that ‘causality’ in the legal sense as limited by foreseeability at the time of breach does not apply in equity... [W]hile the loss must flow from the breach of fiduciary duty, it need not be reasonably foreseeable at the time of the breach.” However, McLachlin J did find that only losses that were “on a common sense view of causation” caused by the breach are compensable. This suggests a different standard than in law, but that nonetheless there will need to be a compelling connection found between the breaches of fiduciary duty described above and the negative health situation of Aboriginal peoples today. Each piece of litigation brings with it its own strengths, weaknesses and need for particulars. A claim will have its own litigants who bring with them their personal and Aboriginal histories, the details of which will speak to the connection between breach of fiduciary duty and lack of health and well-being.

The appropriate remedy

Of course, even if the court was to rule that a claim for breach of fiduciary duty was properly made out, it has the discretion to craft the remedy it considers appropriate in the circumstances. What is there to recommend as remedy the NIHB as part of a wider array

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25 [1932] AC 562. In negligence claims, the court asks whether the plaintiff was owed a duty of care, whether there was a breach of the duty, but for the tortfeasor’s actions would the plaintiff have suffered an injury, and whether that injury was foreseeable. See, for example, Galaske v. O’Donnell, [1994] 1 SCR 670, 112 DLR (4th) 109
26 [1991] 3 SCR 534, 84 DLR (4th) 129
27 Ibid at para 26
28 Ibid at para 27
of services centred around a holistic approach to health and well-being, as I am proposing in this thesis?

As regards the existing NIHB, there are urgent needs for which the existing components of the NIHB are required. For example, the incidence of diabetes among Aboriginal peoples is three to five times more than in the general population, according to the Canadian Diabetes Association (CDA).\textsuperscript{29} Diabetes is life-threatening and requires ongoing and expensive medical care, which is currently provided through the NIHB.\textsuperscript{30} According to the CDA, "The higher rate of adverse health outcomes in Aboriginal peoples is associated with a number of factors, including lifestyle (diet and physical activity), genetic susceptibility, and historic-political and psychosocial factors, stemming from a history of colonization that severely undermined Aboriginal values, culture, and spiritual practices."\textsuperscript{31}

However, at best, the NIHB in its current form is triage, an \textit{ad hoc} collection of treatments and services that does not respond in a holistic way to the larger bio-medical and spiritual issues stemming from "this history of colonization" highlighted by the CDA as a causal factor in the high incidence of diabetes. The inability of the NIHB in its current form to respond effectively to Aboriginal health challenges is most poignantly illustrated in the fact that the single greatest item on the NIHB expenditure list is psychotropic drugs. At the same time, dependence on some of the very same pharmaceuticals – either medically prescribed or obtained illicitly – is one of the most serious problems faced by Aboriginal communities today.\textsuperscript{32}

A revamped system of health services that includes the NIHB but also includes an array of services including traditional approaches is an appropriate remedy both for the immediate situation of First Nations and Inuit people and as a response to the breaches of fiduciary duty I have described. The court has greater discretion in equity than in law.

\textsuperscript{29} Clinical Practice Guidelines, "Type 2 Diabetes in Aboriginal People", online: Canadian Diabetes Association \url{<http://guidelines.diabetes.ca/Browse/Chapter38> [Canadian Diabetes Association].}


\textsuperscript{31} \textit{Canadian Diabetes Association, supra} note 25.

\textsuperscript{32} See the discussion in Chapter 2 regarding NIHB expenditures on psychotropic drugs and on the problems of illicit use of the same drugs in First Nations communities.
to craft a remedy that is appropriate to the situation. Furthermore, equitable remedies are available even when failure to uphold statutory requirements are concerned, as was the case in *Indalex Ltd. (Re)*, a case involving a company’s responsibilities as commercial enterprise and pension administrator. In part, the court relied on a deemed trust having been created in favour of the two pension plans covering company employees. However, the court went on to present an alternative basis for its decision. “Even if I am wrong in concluding that the deemed trust has priority over the secured creditor in this case,” MacPherson JA states, “I would make the order on the basis that it is the appropriate remedy for the breaches of fiduciary obligation…” The *CCAA* “was not designed to allow a company to avoid its pension obligations…Such a result would work an injustice.” In this part of the reasoning, the court resorts to a normative basis for its decision, for which it feels it has the support of the Supreme Court of Canada, which “has repeatedly stated that equitable remedies are sufficiently flexible that they can be molded to meet the requirements of fairness and justice.” In *Indalex*, fiduciary obligations provide both the standard of conduct required and the remedy for those situations in which the standard is not met.

*Indalex* illustrates the greater flexibility of remedy in equity as compared to common law legal remedies, which look to compensation through damages. However, as the Supreme Court has concluded elsewhere, “often an award of damages will only go a short distance in remediying the effects of a breach” and a broader range of remedies designed to make whole are appropriate. Among the equitable remedies is specific performance, a discretionary and extraordinary remedy that is available when a damages order is inadequate, for example, in a unilateral resiling from contractual obligations to convey land.

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32 2011 ONCA 265, 104 OR (3d) 641 [*Indalex*]. The Ontario Court of Appeal found that in obtaining orders under the *Companies' Creditors Arrangement Act* [RSC 1985, c C-36] that favoured debtor-in-possession lenders and left pension plans underfunded the company had *inter alia* contravened the *Pension Benefits Act* [RSO 1990, c P-8].
33 *Ibid* at para 199.
34 *Ibid* at para 201 citing *inter alia* Soulos v Korkontzilas, [1997] 2 SCR 217, 32 OR (3d) 716 [Soulos].
36 See, for example, Southcott Estates Inc v Toronto Catholic District School Board, 2012 SCC 51, [2012] 2 SCR 675.
The court resorted to specific performance in Soulós, where as a result of a fall in the real estate market the plaintiff client was not out any money as a result of the defendant real estate agent having acquired the target property for himself. However, the court nevertheless found that "good conscience" required the property to be conveyed to the plaintiff, who "asserted that the property held special value for him because its tenant was his banker, and being one's banker's landlord was a source of prestige in the Greek community of which he was a member." In Soulós, the court had no difficulty in grasping the importance of a unique piece of land and property, at least in the commercial context. In the end, however, the court was motivated more by the professional impropriety than by the uniqueness of the property.

Soulós illustrates the limitations of damages awards, particularly when the court wishes to convey its approbrium of a defendant's actions. Equitable remedies can be contrasted with standard damages awards, where the concern is merely compensation without concerns of normativity. For example, in some breach of contract cases, the courts have adopted a view of "efficient breach," where the concern is to make neither party any worse off than the other as a result of one's failure to uphold the bargain. Indeed, to the extent that efficiency is a positive goal for individual commercial enterprises and the economy generally, it could be inferred that breach comes without moral approbation and is within normative parameters.

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38 Supra note 35.
39 Ibid at para 3.
40 The Supreme Court of Canada in Bank of America Canada v Clarica Trust Company, 2002 SCC 43 at para 614, (2002) 2 SCR 601 described efficient breach as follows:

Efficient breach is what economists describe as a Pareto optimal outcome where one party may be better off but no one is worse off, or expressed differently, nobody loses. Efficient breach should not be discouraged by the courts. This lack of disapproval emphasizes that a court will usually award money damages for breach of contract equal to the value of the bargain to the plaintiff.

On this basis the courts have reasoned that damages are preferable to specific performance in a breach of contract case because damages fully compensate the plaintiff and leave and leave the defendant able to focus on more financial advantageous endeavours. Specific performance forces the breaching party to perform the contract and "needlessly waste an opportunity for profit," writes Robert J Sharpe, Injunctions and Specific Performance, 4th ed (Toronto: Canada Law Book, 2012) at para 7:120.
Imparting normative standard through equity

Normative expressions that are frequently part of equitable remedies are not merely ancillary to the remedy but are a fundamental part of it. This is especially so in the matter I am dealing with here. The importance of acknowledging the wrongs of the past is reflected in the apology by Prime Minister Stephen Harper for the establishment of the residential schools system, as discussed previously in this thesis.\textsuperscript{41} As the Prime Minister said in the House of Commons on June 11, 2008: “The government recognizes that the absence of an apology has been an impediment to healing and reconciliation. Therefore, on behalf of the Government of Canada and all Canadians, I stand before you, in this Chamber so central to our life as a country, to apologize to Aboriginal peoples for Canada’s role in the Indian Residential Schools system.”\textsuperscript{42} However, for it to be effective, an apology must be embedded in the national soul and, as the Truth and Reconciliation Commission has suggested, the apology remains a footnote in the history of Crown-Aboriginal relations and thus lacks the power to heal:

The apology does talk about the impacts of the residential schools, not just on the students, but also on their families and communities. However, there appears to be limited awareness of its actual wording...The Commission continues to face challenges in raising awareness among non-Aboriginal Canadians of the residential school history and legacy. This presents an enormous limitation on the possibility of long-term understanding and meaningful reconciliation...\textsuperscript{43}

The equitable remedy I am proposing here would be significant not only for the elements of the medical services that, I argue, are the appropriate response to the multiple breaches of the fiduciary duty I have described. The very nature of equitable remedy — being a statement of appropriate conduct and of misconduct deserving moral sanction —

\textsuperscript{41} See discussion in Chapter 3 at note 132.
are along with the health services part of the “process of truth and healing, leading toward reconciliation”\textsuperscript{44} as described by the TRC.

The normative aspect of equity and the creativity it allows in the crafting of remedy are both valuable in the struggle for reconciliation and are at the heart of the \textit{sui generis} fiduciary concept. The power of equity and the crafting of fiduciary remedies are illustrated in the report of Donald M. McRae to the Canadian Human Rights Commission regarding the findings of his investigation into five complaints brought by the Innu of Labrador, one of which concerned three separate relocations starting in 1947 for which there was no consultation and “result[ed] in a high level of social dysfunction,”\textsuperscript{45} McRae found that the relocations were a breach of the fiduciary obligation of the Crown to the Innu.\textsuperscript{46} “While payment of compensation by the federal government would be appropriate,” McRae concluded, “this would not of itself remedy the wrong suffered by the Innu people.” Rather, he stated,

A real remedy in this case would involve putting the Innu in the position they would have been in if governmental responsibilities had been exercised and appropriate human rights standards met. This would involve ensuring that the Innu have the opportunity and the resources to take responsibility for their own lives and future.\textsuperscript{47}

McRae recommended a range of measures as remedy, including the relocation of the Innu to a site chosen by them and adequate financial resources necessary to pay for this and other recommendations.\textsuperscript{48}

The objective of the remedy I am proposing – an order that the federal government provide the NIHB as part of an array of services centred around traditional healing practice

\textsuperscript{44} Ibid
\textsuperscript{45} Donald McRae and Canadian Human Rights Commission, \textit{Report On the Complaints of the Innu of Labrador to the Canadian Human Rights Commission} (Ottawa: Canadian Human Rights Commission, 1993). The impetus for the forced Innu relocations are painfully reminiscent of the rationale for establishing Indian residential schools. As MacRae writes at page 36: “[A] policy of relocating the Mushuau Innu to Nutak and ‘teaching them to fish’ was described in the October 1949 report to the Newfoundland government of Harold Horwood, MHA as ‘monstrous but necessary,’ and Horwood stated that the ‘servile labour’ of cutting wood for the Inuit at Hebron was ‘better than the enforced idleness they suffered at Nain and Davis Inlet.’ The comment encapsulates a contemporary attitude; aboriginal people had to be integrated into some sort of economic activity. As Horwood said earlier in his report, the policy of the Commission of Government was to ‘make white men’ of the Indians and Eskimos.”
\textsuperscript{46} Ibid at 5.
\textsuperscript{47} Ibid at iv.
\textsuperscript{48} Ibid at 6.
— is in the nature of such a make whole remedy to put Aboriginal peoples in the health situation they would have been but for the multiple breaches of fiduciary duty as described above. As the historical evidence referred to earlier indicates, Aboriginal peoples were in a relatively good state of health at contact, in part because of the traditional remedies they had used for millennia and because of the well-being that came from the deep relationship with the land. As the Royal Commission on Aboriginal Peoples stated, the ill-health facing Aboriginal peoples today can be traced to the destruction of those relationships with the land.49

Of course, the extent to which Aboriginal peoples can be made whole must be assessed in the reality of today. For example, if more than half of First Nations people live off reserve50, how would the remedy I am proposing be meaningful? However, it is precisely because of the increasing urbanization of the Aboriginal population that this remedy is crucial as a means of countering the relentless forces that encourage assimilation. In this regard, the Supreme Court in *Corbiere v Canada (Minister of Indian and Northern Affairs)*51 quoted with approval the findings of the RCAP:

> Aboriginal identity lies at the heart of Aboriginal peoples' existence; maintaining that identity is an essential and self-validating pursuit for Aboriginal people in cities...Cultural identity for urban Aboriginal people is also tied to a land base or ancestral territory. For many, the two concepts are inseparable...Identification with an ancestral place is important to urban people because of the associated ritual, ceremony and traditions, as well as the people who remain there, the sense of belonging, the bond to an ancestral community, and the accessibility of family, community and elders.52

Reconciling western medicine with Aboriginal tradition

Some of the attempts to create a holistic system of health services that includes traditional approaches to health and healing have tried to take urban-rural separation into account. For example, an Aboriginal Traditional Wellness Clinic at the Winnipeg Health

49 See Chapter 1 at note 23.
52 Looking Forward, Looking Back, supra note 8 at 521-525.
Sciences Centre\textsuperscript{53} provides "an opportunity to seek healing using a traditional healing approach." Among its activities are an annual harvest by Aboriginal staff and volunteers of sweetgrass and other healing plants from the nearby Peguis reserve that are used in treatment at the wellness clinic. However, the clinic operates only two days per month.\textsuperscript{54} Such limited service raises a question of whether the clinic is sufficiently at the centre of patient care.

The clinic is one of a range of services provided through the hospital’s Aboriginal Health Programs.\textsuperscript{55} Patients can request to speak with a "spiritual and cultural care provider"\textsuperscript{56} The hospital states: "When you or a family member are receiving health care in the Winnipeg Health Region and want someone to speak with, a ceremony, access to traditional medicines or other spiritual support."\textsuperscript{57} The hospital also offers a variation of the "grand round," that important ritual of medical education in which doctors and medical students travel the wards and discuss patient medical issues in the patient’s presence. The Winnipeg Health Region offers "Grand Rounds in Aboriginal Health,"\textsuperscript{58} which are designed to provide hospital staff with information on Aboriginal approaches to health and healing.

Education is also central to the mandate of the Well-Living House being established at St. Michael’s Hospital in Toronto, which attempts to transform childbirth from a routine medical event in a big city hospital into an occasion for community celebration as it was and is for many Aboriginal people.\textsuperscript{59} The self-professed mandate of the facility is to incorporate “Indigenous and non-Indigenous ‘ways of knowing’ and doing,”\textsuperscript{60} in particular in regard to birthing and infant care. In its promotional material, the facility states that it

\textsuperscript{53} News and Information from the Winnipeg Regional Health Authority, "Traditional Wellness Clinic", online: WinnipegHealthRegion.ca <http://www.wrha.mb.ca/aboriginalhealth/services/wellness-clinic.php>.
\textsuperscript{54} Ibid.
\textsuperscript{55} Ibid, “Aboriginal Health Programs”, online: <http://www.wrha.mb.ca/aboriginalhealth/index.php>.
\textsuperscript{56} Ibid, “Spiritual and Cultural Care”, online: <http://www.wrha.mb.ca/aboriginalhealth/services/spiritual.php>.
\textsuperscript{57} Ibid.
\textsuperscript{58} Ibid, “Grand Rounds in Aboriginal Health”, online: <http://www.wrha.mb.ca/aboriginalhealth/education/GrandRoundsinAboriginalHealth.php>.
\textsuperscript{60} Ibid.
will be “governed using two accountability routes: one to St. Michael’s Hospital, and the other to Indigenous communities through the Counsel of Grandparents”. 61

Education about Indigenous healing tradition is a major component of both the Winnipeg and Toronto projects. An effect of the breaches of fiduciary duty described above is that the knowledge of the traditional approaches to health and well-being has been lost, and that has had an impact on the well-being of individual Aboriginal people and their communities. As the RCAP noted, traditional practices were subjected “to years of ridicule, denunciation and prohibition” and “a great deal of traditional knowledge was no doubt lost in the years of suppression.”62 Not only does improving the health and well-being of Aboriginal peoples depend on the provision as of right of traditional healing services but on ensuring that the knowledge of those practices survives when today’s elders are no longer with us.

Of course, such services that are provided through the existing hospital system and covered under provincial healthcare plans and are distinct from the services contained in the existing NIHB. Nevertheless, they are useful for present purposes because they illustrate how conventional services can be combined with traditional healing. The ultimate objective must be to not only provide those traditional services to Aboriginal people but to validate them, bring them in from the margins where they were relegated by colonization, and make them available to anyone who wants them, whether they be Aboriginal or not.

Conclusion

In summary, the practical means to providing the appropriate remedy for the breaches of fiduciary duty I discussed is territory that has been charted by the RCAP and others. We know what the remedy would look like in real life were it ordered in response to a claim for breaches of fiduciary I have described.

61 This latter is a group of Elders for whom “counsel” rather than “council” is used to highlight the advice they are to provide.
This remedy is a prerequisite for the tangible realization of the vision at the heart of section 35\textsuperscript{63}, which, as the court stated in *Van der Peet*, “must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”\textsuperscript{64} One can view reconciliation from a government-to-government perspective, which is the relationship conjured by aspirations of self-determination. However, reconciliation inevitably involves confronting the acute health and well-being needs of Aboriginal peoples, which, as I have suggested, impair individual and community agency and are intimately related to the dispossession of Aboriginal peoples from their land that is at the heart of unresolved sovereignties identified by section 35. The acts of the Crown that caused this dispossession were a breach of its fiduciary duties. Recognizing those fiduciary duties does not require ascribing plenary responsibilities to the Crown, as Binnie J warned against in *Wewaykum*\textsuperscript{65}, but is entirely within the tenets of the fiduciary duty as it has evolved in equity and in Crown-Aboriginal relations specifically.

\textsuperscript{63} Constitution Act, 1982, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
\textsuperscript{64} R v *Van der Peet*, [1996] 2 SCR 507 at para 31, 137 DLR (4th) 289.
\textsuperscript{65} Supra note 5 at para 81.