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**The Abrogation of Responsibility:
The Crown-Native Relationship from *Corbiere v. Canada*
to the Proposed First Nations Governance Act**

by
Natasha Powers

A thesis submitted to the Faculty of
Graduate Studies and Research in partial fulfillment
of the requirements for the degree of
Master of Arts
in Canadian Studies

Carleton University
Ottawa, Ontario
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2001, Natasha Powers

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**“The Abrogation of Responsibility: The Crown-Native Relationship
from *Corbiere v Canada* to the Proposed First Nations Governance Act”**

submitted by Natasha Powers, Hons. B.A.

**in partial fulfillment of the requirements for
the degree of Master of Arts**

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Abstract

In *Corbiere v. Canada*, the Supreme Court of Canada ruled that off-reserve members have the right to vote in band elections. Section 77(1) of the *Indian Act*, which restricted voting to on-reserve members, was found inconsistent with section 15(1) of the *Canadian Charter of Rights and Freedoms* because “Aboriginality-residence” was analogous to enumerated grounds of discrimination and because off-reserve band members have a direct interest in council decisions. Consequently, the entire system must be overhauled. The Supreme Court left an eighteen-month window for good faith consultations to provide a collaborative remedy. But, contrary to good faith and to the principles of landmark cases like *Sparrow* and *Delgamuukw*, the government proposed a First Nations Governance Act that speaks of empowerment and decentralization, but which flees from responsibility and liabilities. This governance initiative -- Ottawa’s purported second phase of Corbiere consultations -- makes only cosmetic framework changes that underhandedly alter its fiduciary obligations.

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Introduction: The Crown-Native Relationship and The Abrogation of Responsibility

In *Corbiere v. Canada*, the Supreme Court of Canada established a new analogous ground of discrimination to those listed in section 15 of the *Canadian Charter of Rights and Freedoms*. It may result in the gradual dismantling of the *Indian Act*. The court found that the seven words “and is ordinarily resident on the reserve” in section 77 of the *Indian Act* which restricts voting to on-reserve band members, violates the intent of the *Charter* section based on “Aboriginality-Residence” as a new analogous ground of discrimination. According to the Supreme Court of Canada, the *Indian Act* electoral system is undemocratic because it discriminates against a disadvantaged group -- off-reserve band members. The entire band council system under the *Indian Act* might be challenged on similar grounds.

Parliament has also recognized that the *Indian Act* must be changed. In the following excerpt from a speech to introduce a nation-wide consultation with First Nations, Minister Robert Nault of Indian and Northern Affairs Canada (INAC) points out some of the problems with the *Indian Act*:

Under the *Indian Act* I control everything in your life, absolutely everything, and have the powers to make changes that quite frankly in this day and age are totally unacceptable and that's what this debate is all about. How do we give back the power to the people in the interim as we move towards self-governance? If it's going to take us 60 more years of negotiation to get on with the inherent right to build our treaty relationship, what do we do in the interim? Do we continue letting the *Indian Act* and this minister run everything in your life? I don't think so. I think it's time that we consider what that means.¹

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¹ Robert Nault. “Robert Nault Announces First Nations Governance Initiative” April 30, 2001. Indian and Northern Affairs Canada. First Nations Governance Act site. www.fng-gpn.gc.ca/RM_SPLaun_c.asp.

Minister Nault is right, the crux of the matter does involve the government's power and control over Natives. These issues, however, must be put into context.

The Minister currently does have complete power over "Indians and land reserved for Indians"² through s.91(24) of the *Constitution Act, 1867*. However, this power is not legitimate because it is based on a presumption of Canadian sovereignty without regard to already existing Native systems -- a presumption that the Supreme Court of Canada has brought into question in decisions such as *Calder v A-G(B.C.)*.³ *Calder* first recognized, the "fact that...when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries,"⁴ and thus at least three of the justices recognized a legal source of Aboriginal rights not based on common law or on constitutional legal structures.⁵

The control about which Nault speaks is also derived from a colonial system, facilitated by the *Indian Act*. Again, this control is not legitimate. The Supreme Court of Canada has found that any infringement of an existing Aboriginal right must be justified. *R v Sparrow*⁶ established that those practices that are integral to Native culture and that were not extinguished before 1982 are protected as Aboriginal rights under s.35 of the *Constitution Act, 1982*. Although it may have been regulated by federal legislation, Native governance, as established in *Calder* has never been extinguished.⁷

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² *Constitution Act, 1867* s 91(24)

³ [1973] S.C.R.313

⁴ *Calder* at 146.

⁵ John Borrows, "Uncertain Citizenship: Aboriginal Peoples and the Supreme Court" *The Canadian Bar Review* 80 (2001), 18.

⁶ [1990] 1 S.C.R. 1075

⁷ Kent McNeill, "Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*." *Osgoode*

These decisions call into question the legitimacy of the government's current jurisdiction over Natives. An interim solution with respect to the government's power and control will have to recognize that Native people have a legal interest that is based on their existence as self-governing societies before contact with Europeans and that this interest is protected under s.35 of the *Constitution*. Above all else, the solution must resolve the nature of the relationship between the Crown and Natives.

In *R v Guerin*⁸, the Supreme Court of Canada characterized the relationship between the Crown and Natives as *sui generis* and fiduciary. These two concepts however are not readily compatible. Native interests were not created by legislation or executive action; they are part of a separate legal order; they are unique, of their own kind: as such, they are *sui generis*. The source then of this difference is that Natives existed in societies and had their own institutions prior to the presumption of Canadian sovereignty. The nature and scope of the relationship between the Crown and Natives then is rightly a nation to nation one. As it stands, the relationship between the Crown and Natives is a fiduciary one not a Nation to Nation one. As a fluid concept, fiduciary duties can change as the nature of the relationship dictates. In order for the relationship between Natives and the Crown to be characterized as a Nation to Nation relationship under fiduciary doctrine, the relationship cannot be based upon the government's all encompassing power over natives. This requires a delicate balance between the responsibility and obligations of the government and the rights of Native peoples as

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Hall Law Journal 34(1)1996, p.65.

⁸ (1984) 13 D.L.R. (4th)

Nations. It follows that the government's fiduciary obligation includes a positive obligation to ensure a *sui generis* right to self-government.

It has been established in *Guerin* that the government has a fiduciary obligation when a band surrenders land to the Crown. And in *Sparrow*, the Supreme Court further established that certain cultural practices are Aboriginal rights protected under s.35 of the *Constitution Act, 1982* and that the government must justify any infringement. This solidified the government's fiduciary obligations to Natives. However, it is unclear what those fiduciary obligations entail. My presumption in this thesis is that Native people have an inherent right of self-government and that this right has never been extinguished in any way. The government then has a fiduciary duty to ensure that Native people enjoy their right to self-government. I argue also that the government has a fiduciary obligation pursuant to the imposition of the *Indian Act* on already existing systems of government. The *Indian Act* cannot simply be dismissed as a colonial piece of legislation. It must also be read into the current Crown-Native relationship, holding the government accountable for its breach of fiduciary duty.

The consequences of failing to hold the government accountable for its policies are demonstrated in the government's response to the recent Supreme Court of Canada decision in *Corbiere v Canada*. The Supreme Court of Canada failed to characterize the historical nature of the relationship between the Crown and Natives. It opted for deference to Parliament instead of protecting Aboriginal rights. As a result, the remedy called for the minimum requirement of ensuring that band council members vote in band elections. Consequently, it is not the government that must deal with the impacts of the decision: it is the band councils. This leaves the band councils at a distinct disadvantage. In the end, the

bands may be coerced into self-government agreements in order to deal with the consequences of an increased constituency without the structure to support it.

The purpose of the *Indian Act* was to wrest control from Indians over their own governments in order to replace them with a more 'democratic' governmental system. In other words, Native Peoples' own forms of government were not legitimate because they were not based on western notions of good government, which equated democracy with an electoral system based on a hierarchical power structure. The Supreme Court of Canada ruled that the *Indian Act* system was not truly democratic because all Indians have certain financial, proprietary interests in the band government. Reasonably, since Indians have no control over the *Indian Act* electoral system, the responsibility would rest with the Canadian government to ensure a properly democratic system. This, however, was not the interpretation taken by the Supreme Court of Canada or Parliament. Instead, they both opted to focus on the accountability of the band council to its members, thereby dismissing the nature of the relationship between the Crown and Natives.

The government's response to the decision was to fulfill the minimum requirements of changing the election and referendum regulations. This response would have been adequate if the government's responsibility was limited to the *Act* itself and not to the fuller way that it actually functions in the communities. This thesis argues that this response is in fact part of a larger government strategy to reduce the risk of liability. This strategy will become all the more apparent in the context of the government's recent initiative, the First Nations Governance Act. The purpose of the new initiative is to democratize the band council system and to provide for new accountability measures. In reality, the initiative is attempting to define the government's responsibility to band

councils, in a way that the *Indian Act* never did. It is going to ensure that band councils are accountable and thereby separates the federal government from further responsibilities regarding Native governance. This, I argue, is not consistent with the Crown's fiduciary obligations to natives.

The primary question in this thesis is: should the federal government have any responsibility to ensure Native governance? I answer this question in the affirmative: they have a fiduciary responsibility to ensure Native governance in a way that respects *sui generis* Aboriginal rights. The government is attempting to avoid this responsibility by ensuring that Native interests are subordinate to the federal government's interests. The reason it is doing this is because it has an interest in the land, resources and power in general that Natives have a legitimate claim upon. Therefore it is in the federal government's interest to ensure that Native government only hold a delegated form of authority.

Perhaps underlying the question regarding the government's responsibilities for Native governance is another question involving whether the current Canadian institutions are compatible with Native systems of government. I think that they currently are not. However if *sui generis* Aboriginal rights can be developed to their fullest potential then possibly Canadian institutions can reconcile themselves with Native peoples' systems of government. Under a fiduciary relationship, the protection afforded by law to beneficiaries may provide a tool for First Nations to ensure fair negotiations.

In the following three chapters, I will consider the government's response to *Corbiere* in order to formulate a concept of the government's fiduciary duties that respects First Nations governance. I reveal three levels of inequality which must be

rectified for any semblance of fair negotiation between Native peoples and the government. First, at the level of the judiciary, in Chapter One, I show that a fiduciary obligation exists and that the Supreme Court of Canada must take into account the federal government's colonial policies when determining its duties to Native peoples. The Court did not do this and as a result, it provided an opportunity for the federal government to off-load its responsibilities. Second, at the procedural level, or bureaucratic level, in Chapter Two, I argue that given the federal government's control over the consultation process, consultation is currently impossible. All the power is currently in the hands of the federal government and the federal government is using its resources to control band councils and Aboriginal organizations through funding. Finally, at the legislative level, in Chapter Three, I demonstrate that the government's solution to their 'Native problem' is to amend the Indian Act so that they are not at all responsible for Natives. This is a permanent solution which would involve limiting Aboriginal rights to self-government. I end my thesis by offering the fiduciary doctrine as a possible solution to the government's consistent abuse of its power.

Chapter One: Determining the Responsibility for Band Governance

The recent Supreme Court of Canada (SCC) decision in *Corbiere v. the Batchewana Band and her Majesty the Queen*¹ will transform Native band politics. The Supreme Court of Canada found that section 77(1) of the *Indian Act* which restricts voting in band elections to members “ordinarily resident on the reserve” violates section 15 of the *Canadian Charter of Rights and Freedoms* based on Aboriginality-residence, a new ground of discrimination.² The remedy calls for the offending words to be struck from the *Indian Act* but its implementation was suspended for a period of 18 months so that the federal government could consult with the affected parties on new electoral procedures. The significance of this decision, however, involves more than the inclusion of non-resident members on voting lists for band elections; the new ground of discrimination requires substantive equality between all members regardless of residence. This does not mean that off and on-reserve members have identical rights. In fact, the Court points out that each group has its own particular interests which must be balanced out. According to the Supreme Court, the interests that affect all members are the ones related to land and capital and revenue money. Therefore, the implications of this decision reach beyond specific band elections to band council decision making.

Corbiere is the first case to examine section 15(1) of the *Charter* with respect to Indian Band councils. Prior to this decision, the application of the *Charter* to Native governments was described as “a political decision” that, because of its implications for

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¹ [1999] 2 S.C.R. 203 (hereinafter *Corbiere*).

² This ground of discrimination is not one of those listed in section 15: race, national or ethnic origin, sex, colour, religion or mental or physical disability. It is analogous to the listed grounds.

Native collective rights, should be “thoroughly investigated and publicly debated.”³ The consequences of the *Corbiere* decision on band governments are still unfolding, however. It is increasingly evident that the consequences are not directly related to the threat of individual rights overriding the collective rights of Aboriginals -- at least, not in the sense that Mary Ellen Turpel argued in which the *Charter* would impose the liberal rights framework on Native systems of knowledge.⁴ Indirectly, the consequences of *Corbiere* concur with those laid out by Turpel because the Supreme Court did apply a liberal conception of the rights of an individual which involve property and financial assets to Indian interests. But more directly the consequences of *Corbiere* involve the relationship between Indian band members, the band councils and the Canadian government because this decision is directly affecting the *Indian Act*.

The *Indian Act* outlines the primary roles and responsibilities of the Canadian government towards Natives -- it also sets out in particular, the jurisdiction and the form of the band system of government . This system is being challenged because the Act is proving to be inconsistent with the *Charter*. Since the equality provision of the *Charter of Rights* came into effect in 1985, Native people have attempted to use it as an instrument to challenge government policies relating to them. In the last ten years there have been fourteen equality rights cases involving challenges to the federal government's Native policies, and according to INAC, there are currently two hundred cases challenging

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³ Kent McNeil, “Aboriginal Governments and the *Canadian Charter of Rights and Freedoms*” *Osgoode Hall Law Journal* 34 (1) Spring 1996, p.98.

⁴ Mary Ellen Turpel, “Aboriginal People and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences” in *Canadian Perspectives on Legal Theory* ed by Richard F.Devlin. (Toronto: Emond Montgomery Publications, 1991), pp.503-38.

various sections of the *Indian Act*.⁵ This decision, in finding Aboriginality-residence as a new ground of discrimination, indicates that there is a good possibility that the Supreme Court of Canada will continue to find certain sections of the *Indian Act* unconstitutional. The real problem then is to figure out how to dismantle the *Indian Act* without creating a power vacuum. This narrows down to determining how the Crown is responsible for Native governance.

Although the *Indian Act* is a colonial piece of legislation, the Supreme Court of Canada's piecemeal approach to dismantling the Act will not be beneficial for Natives. By imposing the *Indian Act* on Natives, the Crown assumed certain responsibilities. Whether those responsibilities include governance is the issue at the heart of the *Corbiere* decision. The only way to determine the responsibilities of the government to Natives is to understand the nature and scope of their relationship. That relationship was characterized as a fiduciary one in *Guerin v R*. However, the Supreme Court did not consider exactly what the obligations of the government were. It is necessary first of all to understand what the relationship between the Crown and Natives is based on, consider the situation and try to figure out the concomitant responsibilities.

The purpose of the fiduciary relationship is to ensure that the fiduciary does not abuse its power within the nature and scope of the relationship with its beneficiary. The fiduciary relationship is a legal tool: it involves one party being entrusted with property or power on behalf of a beneficiary, and it entails certain rights for the beneficiary and certain

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⁵ Indian and Northern Affairs Canada. "Governance". First Nations Governance Act website, www.fng-gpn.gc.ca/pres/fngfeb9/index.html

obligations and duties for the fiduciary. The government assumed certain responsibilities by imposing the *Indian Act*, and it also assumed responsibilities through the Royal Proclamation of 1763, the *Constitution Act, 1982* and other agreements, alliances and treaties.

The relevance of the Fiduciary Relationship to Aboriginals

The nature of the relationship between the government and Natives is directly connected to the status of Native rights in Canada. For example, the *Statement of the Government of Canada on Indian Policy* (1969) on the issue of Native rights to land stated that “aboriginal claims to land...are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indian members of the Canadian community.”⁶ This solution entailed a dismantling of Indian Affairs and the end of special status for Natives. Natives were unified in their opposition to this policy. They pointed to their treaty rights as evidence of their special status in Canada. With the establishment of a fiduciary obligation that respects an Aboriginal right to self-government, Ottawa would not have been able to introduce the white paper. The jurisprudential history demonstrates that fiduciary doctrine can potentially be used as a tool by Natives to curb the Canadian colonial approach to Native title and rights.

The benchmark Privy Council decision in *St.Catherine's Milling and Lumber Co*

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⁶ *Statement of the Government of Canada on Indian Policy* (1969) p.11.

*v The Queen*⁷ found that an Aboriginal right is only recognized if documented in positive acts of the Crown such as a Crown grant or treaty. The case involved a dispute between the Dominion of Canada and the province of Ontario about whether the federal government had the authority to grant a permit to the lumber company. After the Ojibway surrendered their land to the Crown in return for hunting and fishing rights as well as reserved lands, the federal government subsequently sold a permit to cut timber on the now surrendered land. The provincial government of Ontario argued that the federal government did not have the right to sell a permit to the company. The court found in favour of the province of Ontario because “the tenure of Indians is a personal and usufructuary right, dependent upon the goodwill of the sovereign.”⁸ According to this decision, Aboriginal rights were created by the *Royal Proclamation of 1763* and were granted by the Crown to Natives. The nature of this relationship was such that: “The Indians must in the future...be treated with the same consideration for their just claims and demands that they have received in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control.”⁹ Indians were considered wards of the state and the Crown’s obligation to them was purely moral not legal. Native rights were ancillary to the interests of the Crown.

Eighty-Five years after *St. Catherine’s Milling* and 4 years after the federal government’s failed white paper policy of 1969, the Supreme Court of Canada overruled

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⁷ (1888), 14 A.C.46(P.C) (hereinafter *St. Catherine’s Milling*)

⁸ (1888), 14 A.C.46 (P.C.), at 54.

⁹ (1887) 13 S.C.R. 577, at 649. as quoted in Rotman p.20.

the definition of Aboriginal title in *St. Catherine's Milling in Calder v British Columbia (A.G.)*¹⁰ The case involved an action brought by the Nisga'a against the province of British Columbia over title to land. The Nisga'a had never surrendered their land to the government in treaty, yet the province had made grants for development purposes. Based on their right to the land as occupants of it "since time immemorial" and because of the *Royal Proclamation*, the Nisga'a claimed that they had never relinquished title to the land. The Court ruled against the Nisga'a but was evenly split on the question of extinguishment.

Judson J, with whom Marshall and Ritchie JJ concurred, found that their interest in the property was extinguished by legislation and Proclamation before British Columbia entered Confederation. According to Judson J, in this case "the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nisga'a Tribe might have had, when by legislation, it opened up such lands for settlement subject to the reserves of land set aside for Indian occupation."¹¹ The contrary position taken by Justice Hall (with whom Spence and Laskin JJ concurred), found that the title was not extinguished by "colonial proclamations and legislative enactments."¹² Instead of Aboriginal title being rooted in the *Royal Proclamation*, Justice Hall found that the Native interest was rooted in the common law of property. Hall found that the evidence clearly showed that Nisga'a people were "owners of the land that have been in their possession since time immemorial" and "possession is of itself at common

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¹⁰ [1973] S.C.R. 313 (hereinafter *Calder*)

¹¹ *Calder* at 344.

¹² Macklem, p. 409.

law proof of ownership.”¹³ Aboriginal title was not dependent on treaty, executive order or legislative enactment.¹⁴ This marked a significant transition in legal thought on Aboriginal rights because it was recognized that Aboriginal title was rooted in their possession of the land “since time immemorial”, pre-dating and surviving the Europeans’ claim to sovereignty in colonizing North America.¹⁵ In doing so, the three justices recognized that Natives existed in self-governing societies prior to the arrival of Europeans and that these institutions most likely remained despite the presumption of Canadian sovereignty.¹⁶ The main contribution of this finding was that it raised the issue that Aboriginal title was a justiciable right. However, at this point, Native property rights are still dependent on the actions of the Crown and the Crown could extinguish title without compensation or consent as long as it expresses the clear intent to do so. The underlying title to the land therefore still rested with the Crown and the obligations of the Crown were still moral not legal. Indian interest in reserve land still existed at the pleasure of the Crown so their interest was protected by a political trust instead of a legal right.

The Supreme Court of Canada decision in *Guerin v R*¹⁷ changed the relationship from being characterized as a ward-guardian relationship to a nation to nation relationship. The issues surrounding the case involved the terms of agreement for a land surrender by the Musqueam to the Federal Crown and an alleged breach of trust. The Musqueam

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¹³ *Calder* at 375 and 368.

¹⁴ Rotman, p.7.

¹⁵ Patrick Macklem, “First Nations Self-Government and the Borders of the Canadian Legal Imagination.” *McGill Law Journal* 36 (1991), p.410.

¹⁶ Michael Asch, “Introduction” in Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference ed. by Michael Asch (Vancouver: UBC Press, 1997), p.x.

¹⁷ (1984), 13 D.L.R. (4th)

surrendered their land to the Crown because, as established in the *Royal Proclamation 1763* and the *Indian Act*, the band cannot sell or lease reserved land. The band must first surrender the land to the Crown which acts as an intermediary between the band and the third party. Upon surrender of the land, the Crown negotiated a lease with the third party, a golf club owner, the terms of which were far below the market value of the land and contrary to the ones agreed to by the band when they surrendered it. The government's dealing with the Musqueam was also revealed to be quite duplicitous in that they intentionally misled the band on the terms of the surrender. The Supreme Court of Canada found that the government's obligations to the Musqueam were not just moral or political but legal. Therefore, the government was held liable for a breach of fiduciary obligation in leasing reserve land.

Dickson J, who wrote the principal opinion, found that the fiduciary duty was rooted in the nature of Aboriginal title.¹⁸ He supported the definition of Aboriginal title in *Calder* as a legal right that is rooted in the Indians' historic occupation of the land. This means that Indian title exists independent of treaty, executive order, or legislative enactment. It was therefore characterized as *sui generis*. By implication, the relationship between the Crown and Natives is also *sui generis* since the Crown must act in the best interests of the affected Aboriginals. *The Royal Proclamation* is proof of the special relationship between the Crown and Natives because Natives can only cede their lands to the Crown -- not to third parties. Dickson J found that the nature of this Crown-Native

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¹⁸ Dickson J, Wilson JJ and Estey J each provided a separate judgement, none of which received the support of a majority of the eight participating judges. However, Dickson J's reasons have been given the most legal and academic consideration.

relationship was such that upon the surrender of the land a distinctive fiduciary obligation arises for the Crown to deal with the land in a way that is beneficial for Natives. If the Crown does not follow through with its obligations, it must be held accountable.¹⁹

The scope and nature of this fiduciary obligation is unclear because the basis of the obligation is unclear.²⁰ The *Royal Proclamation 1763*, and the *Indian Act* both demonstrate that within the confines of the relationship, Native interests can only be served by the Crown. The *Royal Proclamation 1763* provides that only the Crown can buy or sell Indian Land. Historically, this protected Indian land from encroachment by settlers. The surrender requirements were outlined in the *Indian Act*. The *Royal Proclamation* and the *Indian Act* did not create the responsibility of the Crown; they merely affirmed the relationship between the Crown and Natives. This relationship is more adequately characterized not just by historical events but by the inter-societal relations between Natives and the British Crown and then the Canadian Crown. Treaties, agreements and alliances provide some guidance on the nature of these relations and point to some of the roles and responsibilities assumed by each party.

Guerin dealt specifically with the Crown's fiduciary duty over surrendered land but the extent of the duty also reaches to general Aboriginal interests. The extent of the fiduciary duty is dependent on the nature of the responsibility undertaken by the Crown. If

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¹⁹ Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" *Canadian Bar Review* 79 (2000), p.203-4.

²⁰ Donovan Waters notes the uncertain application of fiduciary duty -- "It may refer in the instance of the Crown and the Indian Peoples or to the total relationship between the Crown and the Indians." Donovan Waters, "New Directions in the Employment of Equitable Doctrines: The Canadian Experience" in *Equity, Fiduciaries and Trust* (Toronto: Carswell, 1989), p.184.

this responsibility is dependent solely on the *Royal Proclamation, 1763* or the *Indian Act* then the extent of the duty can very well be surrender of land. However, the initial understanding by Aboriginals and the Crown was that the Crown would protect the interests of Native rights to the land as well as hunting, trapping, fishing, exercising their cultural, religious and linguistic freedom and practicing self-government.²¹ It is therefore entirely within the confines of the relationship for the Crown to be responsible for ensuring such Native rights.

This understanding of the fiduciary relationship was confirmed in *R v Sparrow*²². This case involved the right of the Musqueam to fish without the restrictions of the federal Fisheries Act. The Supreme Court found that the Musqueam had an Aboriginal right to fish because it was integral to their culture. The Court further found that the federal government must justify infringing an Aboriginal right. The fiduciary obligation then became constitutionally entrenched under s35 of the *Constitution Act, 1982*. The duty clearly involves the protection of Aboriginal rights.

A Fiduciary Relationship Defined

A fiduciary relationship is similar to a trust relationship. A trust “creates a legally binding obligation in which the party or parties controlling the property of the trust (the trustees) hold that property for the benefit of a party or parties (the beneficiaries) and not

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²¹ Rotman, p.109.

²² [1990] 1 S.C.R. 1075.

for themselves in their roles as trustees.”²³ In comparison, the fiduciary relationship is not dependent on the existence of a property interest but the trustee is nonetheless legally bound to act in the best interest of the beneficiary. For example a doctor-patient relationship would constitute a fiduciary relationship but not a legal trust relationship -- the doctor has the duty to perform her obligation to the patient in an equitable manner and for the patient’s benefit. This entails a certain moral obligation in that the duty must be performed honestly and comply with the undertaking the fiduciary has taken on.²⁴ The existence of the trust relationship depends on the property or power which gives rise to fiduciary duties. And the fiduciary relationship is defined by the “the quality and character of the relationship which gives rise to equitable obligations on the part of some or all of the parties in that relationship.”²⁵ Therefore a trust relationship does entail a fiduciary duty but a fiduciary relationship does not necessarily involve a trustee.²⁶ The duties of a fiduciary are dependent on the nature and scope of the relationship.

According to Rotman’s “Back to Basics Approach”, there are four determinants to a fiduciary relationship. First, one party (X) has the ability to affect the interests of the other (Y). Second, within the confines of the relationship, the interests of the potential beneficiary (Y) can only be served by the actions of the potential trustee (X). Third, X has the obligation to act in the best interest of Y, which arises out of the nature of the relationship. Fourth, Y “relies upon the honesty, integrity and fidelity of X towards Y’s

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²³ Leonard Rotman, *Parallel Paths* (Toronto: University of Toronto Press, 1996), p.3.

²⁴ *Canson Enterprises Ltd. v Boughton & Co* (1991), 85 D.L.R. (4th) 129 (S.C.C.), at 146 as quoted by Rotman, p.166.

²⁵ Roman, p.3

²⁶ Rotman, p.3.

best interests as a result of the relationship.”²⁷ The first requirement is the key: X must have enough power to affect the interests of Y. The second determinant, involves the dependence of the beneficiary on the fiduciary -- the beneficiary must have a direct or indirect interest in the actions of Y. The third determinant, the obligations of the beneficiaries arise out of the nature of the relationship which could take many forms. The obligations may arise either out of the fiduciary having control over the beneficiary’s property; where the beneficiary relies on the actions of the fiduciary; where there is inequality between the parties; where the fiduciary undertakes an obligation; or where the fiduciary has power and discretion over the interests of the beneficiary.²⁸

A fiduciary relationship is situation specific. Therefore, one cannot outline exactly the responsibilities of the federal government to Natives. The duty is confirmed in the *Constitution Act*, 1982, the *Royal Proclamation* 1763, the *Indian Act* and in various alliances, treaties and agreements. It is also judicially sanctioned in *Guerin*. The basis of all of this is in the historical relationship between the Crown and Natives since the time of contact. This results in the *sui generis* nature of the relationship. The current relationship, however, is not the same as it was at the time of contact; it is evident from treaties, alliances and the *Royal Proclamation* that the Crown was dealing with Natives as sovereign nations. These compacts do not determine the nature of the relationship nor did they create it; they are simply evidence of the nature of the relationship. With this understanding, the Crown’s duty to Natives involves protecting *sui generis* Aboriginal

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²⁷ Ibid, p.179.

²⁸ Ibid, pp.178-9.

rights.

While the *Indian Act* is not reflective of the nation-to-nation relationship, it does, however, indicate that the government assumes certain responsibilities. The government imposed the *Indian Act* on Native people who already had their own systems of government. This was an attempt at assimilation as revealed in a statement by Deputy Superintendent of Indian Affairs William Sprague in 1881:

The Acts framed in the years 1868-1869, relating to Indian Affairs were designed to lead the Indian people by degrees to mingle with the white race in the ordinary avocations of life. It was intended to afford facilities for electing for a limited period, members of bands to manage, as a Council, local matters -- that intelligent and educated men, recognized as chiefs, should carry out the wishes of the male members of mature years in each band, who should be fairly represented in the conduct of their internal affairs.

Thus establishing a responsible, for an irresponsible system, this provision, by law, was designed to pave the way to the establishment of simple municipal institutions.²⁹

In general, Native people did not react well to this imposition. For example, according to the Six Nations Indians at Brantford, the hierarchical structure was alien to them and they resented intrusion of “white man’s laws”.³⁰ This indicates the involuntary nature of the *Indian Act*. By imposing this system on Natives, the government assumed a certain responsibility for Native governance.

The Band Government System of the *Indian Act*

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²⁹ PAC, RG10 Vol.2116, File 22,155: Letter to the Superintendent General for Agent Amos Wright, Prince Arthurs Landing, 5 March 1881. As quoted in Indian Government Under Indian Act Legislation 1869-1951 by Wayne Daugherty and Dennis Madill, Department of Indian and Northern Affairs Canada, 1st edition, 1980, p.2.

³⁰ Daugherty and Madill, p.5.

The involuntary nature of the *Indian Act* and the governmental systems that were imposed on Natives as steps in the process of colonization should have been considered in the *Corbiere* decision. In order to determine the nature of the relationship between the Crown and Natives, the court should have considered this historical relationship. This analysis would reveal that the western conception of “good governance” is a culturally-biased one. Determining the duties of the fiduciary in this case, the Supreme Court of Canada would also have to consider the current condition of Native governance as a result of the imposition of the *Indian Act*.

The *Indian Act* is a federal statute enacted by Parliament under its British North America Act jurisdiction over “Indians and Lands reserved for Indians.”³¹ It sets out the basic features of a form of Indian government, jurisdiction, territory and population. A band is defined as a “body of Indians for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart ...for whose use and benefit in common, moneys are held by her majesty or declared by the Governor in council to the band for the purposes of this act.”³² Sections 74 to 86 of the *Indian Act* provide for government of bands by chief and council.

Under federal jurisdiction, there are two types of band councils: s.2 (custom code) bands and s.74 (*Indian Act*) bands. *Indian Act* band councils follow ss.74-80 regarding the makeup of the band council and all other election regulations determined by the minister or governor-in-council. This includes the composition of the council, the eligibility of

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³¹ *Constitution Act, 1867*, s.91(24).

³² *Indian Act* s.2(1) in Shin Imai, The 2000 Annotated Indian Act and Aboriginal Constitutional Provisions. (Scarborough: Carswell, 1999), p3.

councillors and chiefs for nomination, the regulations governing elections and referenda, the eligibility of voters, tenure of office, and band and council meetings.³³ Custom code bands differ significantly from *Indian Act* bands because ss.74-80 of the *Indian Act* do not apply to them; they draft their own election regulations and they may have a different form of government than the one set out in the *Indian Act*.

Background to the *Corbiere* Case

John Corbiere, Frank Nolan, Charlotte Syrette and Clare Robinson -- the four respondents in *Corbiere v. Canada* -- are members of the Batchewana Band. The Batchewana Band holds its elections according to the provisions in the *Indian Act* and is comprised of three reserves: Goulais Bay, Rankin and Objadjiwan -- all of which are situated near the city of Sault Ste Marie, Ontario. John Corbiere resides on the Rankin reserve while the other three respondents are off-reserve band members. With 67.2 percent of the band members living off the reserve, most of the members of the band cannot vote in band elections because of the stipulation in section 77(1) that only those members who “are ordinarily resident on the reserve may vote.” The respondents, on their own behalf and on behalf of all the off-reserve members of the Batchewana Band, challenged that this section of the *Indian Act* violates their equality rights as guaranteed by section 15 of the *Canadian Charter of Rights and Freedoms*.

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³³ Ibid, p.104.

Like most other bands across Canada, the Batchewana Band has experienced a large increase in its off-reserve population, which is largely due to Bill C-31(1985). Therefore, a majority of the members who cannot vote are natives who were re-instated in 1985. Many of these members are Native women who lost their status due to the former status provision in the *Indian Act*. Prior to the amendment of this provision, section 12(1)b of the *Indian Act* had stipulated that an Indian woman who married a non-status man lost her status as a federally recognized Indian. The stated reasoning for this provision was to protect the reserve land from exploitation by non-native men. However, the effects of the amendment were most severe on Native women who permanently lost the right to live on the reserve and to enjoy the other rights afforded to other Indians. In order to make the *Indian Act* comply with the equality provisions in the *Charter of Rights* that ensure equality between men and women, this was amended in 1985.³⁴

The Bill C-31 amendment re-instated the following: Native women who lost their status due to section 12(1)(b) of the *Indian Act*; those who had lost their status for other reasons such as enfranchisement; and those children and grandchildren of the above two categories. Section 6, which replaced s. 12, of the *Indian Act* created a new category of Indian -- a 6(2) Indian. Unlike the Indians in the 6(1) category, 6(2) Indians cannot pass their status to their children unless the other parent is a 6(2) or a 6(1).³⁵ This furthers discrimination based on sex because the grandchildren of Indian males who “married out”

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³⁴ Corbiere at 30.

³⁵ Wendy Cornet, “First Nations, Indian Status and the ‘Racialization of Identity’” Research paper prepared for the Assembly of First Nations (Lands and Trust Joint Initiative for Policy Development), November 23, 2000 p.33.

have status while the grandchildren of Indian women who “married out” do not. Further, the right to be a member of a band is different for 6(1) Indians than for 6(2) Indians.

Bands were forced to re-include the band members who had been on their membership list but were taken off for the various reasons listed above. However, the bands do not have to include any of the newly registered Indians -- the Indians defined under s.6(2).

Bands have been stretched beyond their capacity in terms of infrastructure, housing and the provision of programs and services because the federal government did not provide the funds proportional to the surge in membership caused by Bill C-31. Bands have also in some cases made their membership codes more restrictive, significantly affecting Native women. They have found that they still cannot return to the reserves because their bands do not have the capacity to house them.³⁶ The many impacts of Bill C-31 then led to this situation where off-reserve members were granted membership without any rights, including the right to vote.

Lower Court Decisions

The lower Courts had decided the case in favour of the non-resident members. However, at issue was whether the decision should apply to all bands or just the Batchewana Band. The two lower courts in federal court -- trial division and the court of appeal both held that the remedy should be confined to the Batchewana Band. Despite this they differed on the appropriate remedy and the reasons for it. Strayer J found that

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³⁶ Native Women’s Association of Canada. Bill C-31: Unity for our Grandchildren March 23-25, 1998, p.7.

section 77(1) was unconstitutional only in its effects on certain provisions of the *Indian Act* and so the decision only applied to the Batchewana Band because “the pleadings and evidence only applied to that band.”³⁷ In contrast, the court of appeal “held that a constitutional exemption was the appropriate remedy because other bands might be able to demonstrate an Aboriginal right to control their own voting procedures under s.35 of the *Constitution Act, 1982* which would, in the case of those bands, make s.77 (1) a valid codification of Aboriginal rights.”³⁸

On appeal by the Batchewana Band and the Crown, *Corbiere v. Canada* was heard on October 13, 1999 and the Supreme Court decision was rendered on May 20, 1999. The Supreme Court of Canada agreed with the lower courts that there was a violation; however, they determined that a constitutional exemption was not an appropriate remedy. Because they found that section 77(1) violated the *Charter* based on Aboriginality-Residence as a new ground of discrimination, the Supreme Court of Canada determined that this section should be stricken from the *Indian Act*.

The Supreme Court Case

Based on s.1 of the *Charter*, the appellants, the Batchewana Band and the Crown argued that section 77(1) is a valid limitation on the equality rights of non-resident members because the legislation serves to protect the interest of on- reserve members who are most directly affected by band council decisions. The Supreme Court of Canada found

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³⁷ *Corbiere* at 36.

³⁸ *Corbiere* at 107

that the seven words “and is ordinarily resident on the reserve” violate s.15 of the *Charter* based on Aboriginality-residence as a new analogous ground of discrimination and that this discrimination was not a reasonable limit based on section 1. However, the Court did limit this new ground of discrimination based on section 1 to the extent that on-reserve and off-reserve interests must be balanced. Therefore, the Court called for a new electoral regime which would balance these rights. To facilitate this process, the remedy called for off-reserve members to vote in band elections but suspended its implementation for a period of 18 months so that the federal government could consult with the affected parties on new electoral procedures.

Aboriginality-Residence Defined

The new analogous ground of discrimination in *Corbiere* involves intra-group discrimination. Within a disadvantaged minority, the Court must determine whether the legislation violates their human dignity. To determine this, the legislation was subjected to a three-staged analysis which was first established in *Law v. Canada (Minister of Employment and Immigration)*.³⁹ The *Law* decision, for the first time, set a common approach to a section 15 *Charter* analysis. This three-staged analysis involved: the distinction made by the law; the ground of discrimination and the effect of the legislation.⁴⁰

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³⁹ *Law v Canada (Minister of Employment and Immigration)*, [1999] SCC 25374.

⁴⁰ *Law* at 39. In *Corbiere*, the Court was split on the reasons for the second stage but generally agreed on the first and third. McLachlin J and Bastarache J wrote for the majority reasons for themselves and Lamer C.J., Cory and Major. L'Heureux Dube wrote the minority reasons for herself, Gonthier, Iacobucci and Binnie JJ.

These three stages also define Aboriginality-residence. The first stage involves identifying the group and the distinction that is made by the legislation. In this case the group is off-reserve band members and the comparative group is on-reserve band members. The distinction was that off-reserve band members could not vote in band elections. The second stage involved the nature of the distinction such as race, sex or class. The Court found that residency on or off the reserve for Aboriginals was a constructively immutable personal characteristic and therefore an analogous ground of discrimination. In the third stage, the Court considers how the legislation affects this disadvantaged group in order to determine if it violates their human dignity. The Court found that off-reserve band members have an interest in reserve land and band assets and therefore restricting them from voting violates their human dignity.

An undercurrent to all of these determinants is citizenship and accountability. The justices were determining whether the restriction to on-reserve band members for voting in band elections was justified. To determine this, the Court had to consider the power of the band councils to affect the interests of band members. In addition, they had to consider the extent to which band members have an interest in band council governments. However, the Court did recognize the role of the federal government in the disadvantage of the group. And the band council does not have any control over the electoral regime. Therefore, the responsibility of the federal government, not necessarily the band councils, should have contributed to all stages of this analysis in order to ensure substantive equality between off and on-reserve band members.

a) the distinction

In the first stage of the *Law* analysis the Court determines whether the law in question makes a distinction that is based on one or more personal characteristics. The four off-reserve members of the Batchewana Band established on-reserve band members as their comparative group and identified themselves as off-reserve band members. In so doing, with the two groups established, it was evident that section 77(1) does make a distinction -- off reserve band members cannot vote in band elections. As band members, the two groups are not necessarily defined by the *Indian Act*, because band councils have the option of controlling their membership codes. Band councils, however, have no control over the electoral system.

b) the nature of the distinction

The second stage of the analysis involves determining whether the legislation discriminates based on an analogous or enumerated ground in s15(1) of the *Charter*. In *Corbiere*, the Supreme Court of Canada for the first time outlined how to identify a ground that is analogous to the enumerated grounds of “race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”⁴¹ The majority found that if the distinction “goes to a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity”⁴² it is analogous. The minority, on the other hand, outlines a number of factors that must be taken into account, including: immutability, the

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⁴¹ s.15(1) *Canadian Charter of Rights and Freedoms*

⁴² *Corbiere* at 13.

claimant's lack of political power, disadvantage suffered by the claimant and the inclusion of the characteristic in federal and provincial human rights legislation.⁴³ Presumably, according to the minority decision, an analogous ground of discrimination does not then stand as a constant ground of discrimination; it may shift depending on the other factors so that the personal characteristic is combined with the effect of the legislation.

Residency as a ground of discrimination has not been accepted in past *Charter* decisions.⁴⁴ In *Corbiere*, the Court determined that residency on or off the reserve for band members is a personal characteristic that is constructively immutable. They further found that it was largely due to government policies that band members left the reserves. The Court emphasized that the choice to live on or off-reserve is profound for Natives and therefore cannot be compared to the residency choice of non-Natives. Further, this ground was specific to off-reserve member status and therefore not to be applied to Aboriginals in general. It was found by both the majority and minority that "Aboriginality-Residence" or off-reserve member status is analogous because the distinction is "essential to a band member's personal identity": off-reserve Aboriginal band members can "change their status to on-reserve only at great cost, if at all"; and finally "the situation of off-reserve band members is...unique and immutable."⁴⁵ The minority went further by also stating that band members living off-reserve form "a discrete and insular minority defined by race and

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⁴³ Grame G. Mitchell, "Developments in Constitutional Law: The 1998-99 Term -- State Craft and Status Quo" *Supreme Court Law Review* 11 (2) 2000, p.168.

⁴⁴ Mitchell, according to footnote 316 of "Developments in Constitutional Law", the Supreme Court of Canada found that residency was not an analogous ground of discrimination in *R.v.Turpin*, [1989] 1 S.C.R.1296, at 1332-34 *per* Wilson J.; *R.v.S.(S.)*, 2 S.C.R. 995, at 1044-47 *per* L'Heureux Dube J.

⁴⁵ *Corbiere* at 13, 15.

place of residence.”⁴⁶ Also, they argued that living off-reserve was not simply a choice “because of a lack of opportunities and housing on many reserves, and the fact that the *Indian Act*’s rules formerly removed band membership from various categories of band members residence off the reserve has often been forced upon them.”⁴⁷ The ground of discrimination then is largely based on the fact that band members were forced as a result of government policies to leave the reserve.

c) the effect of the legislation on the interests of off-reserve members

The third stage considers the effect of the legislation in light of the purpose of section 15 which, as outlined in *Law*, is to “protect against the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice...”⁴⁸ This stage in the *Law* analysis was an addition to the stages of analysis established in other section 15 decisions. Five further contextual factors are taken into consideration: historical disadvantage; vulnerability or stereotyping experienced by the group; correspondence between the claim and the actual need or circumstance of the individual; the ameliorative purpose or effect of the law; and finally, the nature and scope of the affected interests. In short, the purpose of the third stage of the analysis is to examine “how a person legitimately feels when confronted with a particular law.”⁴⁹ This stage then takes into account the outcome of the discrimination as well as the context.

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⁴⁶ *Corbiere* at 62.

⁴⁷ *Ibid*

⁴⁸ *Law* at 4

⁴⁹ *Law* at 53 as quoted by L’Heureux Dube in *Corbiere* at 63.

In *Corbiere* the Court considers the contextual factors involved, but those contextual factors do not contribute to the determination of band member interests. Instead of widening its analysis to contextualize the interests of band members, the Court resorts to a simple formal equality model by not considering the contextual factors to voting in band council elections in its remedy. Equality, according to the formal model, is geared at protecting civil liberties such as property rights, freedom of speech, freedom of religion and freedom of association.⁵⁰ In the second part of the analysis, L'Heureux Dube attempts to determine how a band member's human dignity might be infringed upon. She does this, first by recognizing "human dignity and right to full participation in society" and secondly, by determining if the distinction "corresponds to the needs, capacities or circumstances of a group that does not affect human dignity."⁵¹ The definition of human dignity for band members, according to the minority, includes respect for their interest in property and to have their interests represented and accounted for. Those interests include land allotted on the reserve, money that is provided to the band to be spent on all members, and representation in land claims and self-government agreements with the federal government. This conclusion does not follow the contextual model. The interests of band members, as discussed by the minority, involve more than interests in property, which the minority points out but it does not factor into the ultimate conclusion regarding the effect of the legislation.

The majority concurred with this analysis respecting the interests or rights of the

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⁵⁰ Rosemarie Tong, *Feminist Thought: A Comprehensive Introduction* (Westview Press, 1989), p.12.

⁵¹ *Corbiere* at 73

group. In the majority decision, to determine whether the effect of the legislation somehow infringes on the individual's human dignity, the authors analyze whether, considering "the present situation of the group"⁵² an Aboriginal who lives off-reserve has an interest in band governance. It was found that they did because off-reserve Aboriginals are co-owners of band assets, they have an interest in the land that is under the control of the band council, the band council represents all band members in negotiations within Aboriginal organizations, and they have a connection to the land because of the cultural significance of the land for ceremonies and traditions. These are the political rights that are "related to the race of the individual affected and to their cultural identity."⁵³ Very succinctly, the majority points out that cultural rights are associated with ceremonies and traditions while political rights are associated with the Court's liberal notion of good governance.

Because this finding of discrimination involves possibly competing interests within a minority group, L'Heureux Dube in writing for the minority found that "one must be especially sensitive to their realities and experiences and to their values, history and identity."⁵⁴ Analyzing the equality rights of Aboriginal people in particular, she further held that one must take into account "the rights of Aboriginal peoples, the protection of the Aboriginal and treaty rights guaranteed in the Constitution, and with respect for and consideration of the cultural attachment and background of all Aboriginal women and

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⁵² *Corbiere* at 19

⁵³ *Corbiere* at 19.

⁵⁴ *Corbiere* at 67.

men.”⁵⁵ The minority found that band members living off the reserve form a “discrete and insular minority.”⁵⁶ In comparison to those living on reserve they experience stereotyping and disadvantage and Aboriginal women in particular are affected by differential treatment. This she connects to the government’s policies which aimed to “displace and assimilate Natives.”⁵⁷

However, government policies on Natives were not what the Court was considering and L’Heureux Dube emphasized that it was not being suggested that Bill C-31 was in any way unconstitutional. Instead, to determine how an off-reserve person legitimately feels, the minority considered the historical context including the sections of the *Indian Act*, that have historically discriminated against off-reserve people. McLachlin and Bastarache, in writing for the majority, found that because band members have an interest in their band’s governance the complete denial of that right “perpetuates historical disadvantage” and “treats them as less worthy and entitled.”⁵⁸ However, none of this is dependent on “the composition of the off-reserve band members group, its relative homogeneity, or the particular historical discrimination it may have suffered.”⁵⁹ Furthermore, in considering the effect of the legislation, the Court determined that even though the government’s policies resulted in discrimination, because the comparator group, on-reserve Aboriginals, also experience the same disadvantage then the policies are

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⁵⁵ *Corbiere* at 67.

⁵⁶ *Corbiere* at 71.

⁵⁷ *Corbiere* at 83.

⁵⁸ *Corbiere* at 17.

⁵⁹ *Corbiere* at 19.

not relevant to the case.⁶⁰ This is an interesting assertion in light of *Lavell*⁶¹ case in 1974 which determined that because all Native women suffer the same disadvantage as a result of the status provisions in the *Indian Act*, there is no equality violation. Later, Bill C-31 was put into effect and the status provisions which were challenged in the *Lavell* case were repealed. This is evidence of faulty logic on the part of the Court in this stage of analysis. The legislation is not ameliorative in purpose so it is not justified that the legislation would not be subject to scrutiny in this case. As pointed out by L'Heureux-Dubé, this approach to equality was later repealed by the Supreme Court of Canada in *Andrews v Law Society of British Columbia*⁶² decision.⁶³

It is evident in both analyses by the majority and the minority that the responsibilities of the band council are extensive. The band council is placed outside of its current relationship with the government and also its current representation as a less than viable form of self-government. Instead, the justices accept that Native governments must be entirely accountable to a much larger constituency. According to the majority, "the band councils are able to affect their interests in particular by making decisions with respect to the surrender of lands, the allocation of land to band members, the raising of funds and making of expenditures for the benefit of all members."⁶⁴ The minority also points out the responsibilities of the band council. First of all, the band government must be accountable to all members because the band controls funds that are meant for all

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⁶⁰ *Corbiere* at 19.

⁶¹ *Attorney General of Canada v. Lavell*, [1974] S.C.R.1349.

⁶² [1989] 1 S.C.R. 143.

⁶³ *Corbiere* at 87.

⁶⁴ *Corbiere* at 19.

members; it also controls land allotments, and the availability of services. Second, leadership in the Assembly of First Nations and other Aboriginal organizations at the regional, national and international levels requires the representation of off-reserve members. The minority then discusses the significance of maintaining a connection to the reserve. Maintaining the cultural connection to the band also involves the right to vote and the band controls who may or may not live on the reserve.

In contrast to the responsibilities of the band council, the federal government's responsibilities are placed squarely in the past. Therefore, the federal government is not held accountable for a system of policies that are aimed at assimilation. The Court's analysis of the impact of these policies illustrates that the government's consistent policies of extinguishment can be narrowed down to a feeling of discrimination. According to the Court, the government's policies of displacement and assimilation "demonstrate the interests in feeling and maintaining a sense of belonging to the band free from barriers imposed by Parliament."⁶⁵ The history of off-reserve member status shows that ties were involuntarily severed by government policies even though off-reserve members' interests in the band council government and in staying connected to their community remained the same. The legislation implies that off-reserve Aboriginals are "lesser members of their bands or persons who have chosen to be assimilated by the mainstream society."⁶⁶ According to the majority opinion, this results in the denial of substantive equality and reaches to the human dignity portion of the analysis. According to the minority, the factors

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⁶⁵ *Corbiere* at 89.

⁶⁶ *Corbiere* at 92.

that were outlined to determine the differential treatment, such as the government's policies of displacement and assimilation, are not to be seen as essential to the conclusion that discrimination exists.

The Section One Analysis

To determine if a limitation to the constitutional guarantee is warranted under s. 1⁶⁷, the minority and majority applied a two-staged analysis:

First, the objective of the legislation must be pressing and substantial.
Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society.⁶⁸

All the judges agreed that the competing interests within a minority group do not mean that a limitation is justified. The Court was satisfied that the "restriction on voting is rationally connected to the aim of the legislation, which is to give a voice in the affairs of the reserve only to those directly affected by the decisions of the band council."⁶⁹ The Court found that on-reserve band members do have different interests than off-reserve members. In particular, for local functions they are the only people with an interest and they have more of an interest than off-reserve band members in land surrenders and in any decisions that affect the reserve lands. However, the onus is on the appellant, the Crown, to demonstrate that the infringement of the equality rights of off-reserve Indians is minimal. The appellant did not show why solutions such as double majorities, and two-

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⁶⁷ S1 of the *Charter* states that "the *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

⁶⁸ *Corbiere* at 97.

⁶⁹ *Corbiere* at 21.

tiered councils could not be implemented except for administrative difficulties and costs involved in setting them up. According to the majority, the appellant did not provide any evidence that administrative inconvenience could justify a complete denial of the constitutional right. The minority uses much stronger language: “the possible failure in the future of the government to provide Aboriginal communities with additional resources necessary to implement a regime that would ensure respect for equality rights cannot justify a violation of constitutional rights in its legislation.”⁷⁰

The Remedy

In considering a remedy the Court must consider its judicial role to “protect the principles of the *Charter*” while at the same time respect the role of the legislature. Remedies should “encourage the government to take into account the interests and views, of minorities.” In cases involving Aboriginal Rights, the role of the Court is a difficult one in that it has to consider the many complexities of Aboriginal identity and culture. In *R v. Sparrow*⁷¹ the Court determined that the practice of fishing deserved the status of a constitutional right because it was and is integral to Aboriginal culture or identity. In *R. v. Van Der Peet*⁷² the Court found that purpose of s.35(1) was to “provide for a constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is ... reconciled with

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⁷⁰ *Corbiere* at 104.

⁷¹ [1990] 1 S.C.R. 1075.

⁷² [1996] 2 S.C.R. 507

the sovereignty of the Crown.”⁷³ *Corbiere*, however, is not an Aboriginal rights case. The Court therefore does not consider the unique relationship between the Crown and Natives.

The Majority did not specify the reason for its 18-month suspension except to state in relation to a constitutional exemption for the Batchewana Band that it would “appear to be preferable to develop an electoral process that will balance the rights of off-reserve and on-reserve band members.”⁷⁴ The minority, on the other hand explicitly stated that the reason for the suspension is “ordered to enable Parliament to consult with the affected groups, and to redesign the voting provisions to the *Indian Act* in a nuanced way that respects the equality right and all affected interests, should it so choose.”⁷⁵

The Crown’s Fiduciary Obligations

The Court’s remedy is not appropriate to the circumstances of the case. The Court did not discuss the relationship between the Crown and the Band Councils as a fiduciary one. However, it is evident that the government does indeed have a fiduciary relationship with bands in responding to *Corbiere*. The government then has a fiduciary obligation to adequately respond to the decision. And the Court, in its remedy should have acted in a purposive manner to ensure this.

Since a fiduciary relationship is situation-specific, it is necessary to analyze the obligations that arise as a result of the *Corbiere* decision. Recall that Rotman’s “Back to Basics Approach” to establishing a fiduciary obligation involves determining four

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⁷³ Patrick Macklem, “Aboriginal Rights and State Obligations” *Alberta Law Review* 36(1) 1997, p.108.

⁷⁴ *Corbiere* at 23.

⁷⁵ *Corbiere* at 121.

elements: first, the Crown must have the ability to affect the interests of the band council; second, within the confines of the relationship the interests of the band council can only be served by the actions of the Crown; third, the Crown has the obligation to act in the best interests of the band council; and finally the band council relies upon the honesty, integrity and fidelity of the Crown towards the band council as a result of the relationship. The first aspect of the relationship is the most fundamental -- it must be determined that the Crown has the ability to affect the interest of the band council at the band council's expense.

This first aspect can be satisfied, in this case, by examining the power of Parliament to affect the interests of the band. The issue is the increased liability of the bands as a result of the decision. The Supreme Court struck down the residency restriction in section 77 of the *Indian Act*. However, it is obvious from the entire Court's analysis of the interests of off-reserve band members as well as its analysis of the application of s.1 of the *Charter* that this decision reaches further than voting rights. The Court specifically pointed out that off-reserve members have an interest in band council decisions "with respect to the surrender of lands, the allocation of land to band members, the raising of funds and making of expenditures for all members."⁷⁶ Unlike other functions in the *Indian Act*, the band council has almost exclusive authority over these functions; therefore, their liability increases. Parliament has the power to affect band council interests in this case because it has exclusive authority over the band council electoral system as outlined in the *Indian Act*. As a result, it has the power to determine how the band council will ensure that off-reserve member interests are taken into account in the band council's decision-

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⁷⁶ *Corbiere* at 19.

making.

Corbiere also opened up new liabilities with respect to band by-laws by finding that off-reserve band members have certain interests in them. Band by-laws are subject to certain restrictions: they cannot conflict with the *Indian Act* and the Minister can repeal them. However, this does not mean that there is no risk of liability for band councils with respect to by-laws. Reasonably, INAC may argue that its responsibility over by-laws is limited because its discretion is limited over how the by-laws are enforced and whom they are enforced upon. The Court specified that the band jurisdiction relating to residence and trespass on the reserve “may affect the ability of non-residents to use the facilities and land on the reserve, and return to live there.”⁷⁷ Also the Court mentioned section 83 which provides for by laws regarding appropriation of money to defray band expenses and payment of remuneration to chiefs and councillors.⁷⁸ These are functions that the bands are now more liable for because the by-law itself is not subject to the new analogous ground. If it was the sections in the *Indian Act* that were being challenged then the Minister would be held responsible because the bands do not have any discretion over the act itself. However, it is the manner in which the by-laws are being implemented that is being called into question. The court found that some of the by-laws may be implemented in a way that would discriminate against off-reserve members.

In determining the financial interest of off-reserve band members the Court found that they are co-owners of band assets. Section 64(1) of the *Indian Act* specifies that the

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⁷⁷ *Corbiere* at 75

⁷⁸ *Corbiere* at 76

band council controls expenditure of band's capital moneys that come from sale of surrendered land or capital assets of the band . Section 66(1) also provides for band councils to have control over appropriating the band council's revenue money. Finally, the Court states that section 69 on "expenditures by the band council may include matters like education, creation of new housing, creation of facilities on reserve and other matters that may affect off-reserve band members' economic interest in its assets and the infrastructure that will be available to help them return to the reserve if they so wish."⁷⁹ These are functions that are clearly the responsibility of the band council because the Minister has no discretion over them. Therefore, they are also clearly liable for them. The fiduciary obligation applies in the sense that the band councils will clearly be affected by the *Corbiere* decision, however they do not have any control over how off-reserve member interests will be adequately represented.

The second determinant to finding a fiduciary obligation is that within the confines of the relationship the interest of the band council can only be served by the actions of the Crown; the band council must be dependent on the actions of the government. The *Indian Act* cannot be the sole evidence of band council dependence because band councils have control over the functions listed by the Supreme Court as off-reserve member interests. The band councils are subject to the terms of the *Indian Act* and do not have any power over the terms of it. However, the sections in the *Indian Act* where band councils do have a certain degree of power and which the Court listed as interests that affect all members are: land surrenders, the management of capital and revenue money, and the use of reserve

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⁷⁹ *Corbiere* at 77

land. According to the *Indian Act*, the Minister requires the consent of the band to affect these issues. To satisfy this requirement it must be shown, first of all, that band councils can actually be held liable for their decisions; secondly, that in this case the band council cannot act in the best interest of off-reserve members without an amendment to the *Indian Act* electoral system; and thirdly that the Crown has a responsibility for Native governance.

Three cases, in particular, point to the fact that bands can be sued. In *Public Service Alliance of Canada v. Francis et. al.*⁸⁰ the decision held that even though the band council was not a corporate body, the relevant legislation still required that the band council be subject to the same liabilities as those of a natural person for the certain powers it did exercise. Two more decisions support this by finding that the band has a legal capacity to sue and be sued. *Clow Darling Ltd. v. Big Trout Lake Band*⁸¹ also clarified that the band has the “capacity to function and to take on obligations separate and apart from its individual members as does a corporation and representative orders.”⁸² Furthermore, in *Joe v. Findlay* it was held that band council “authority to bring and defend legal proceedings on behalf of the band, although not expressed in the Act, must be inferred as a necessary adjunct to give effect to the band’s powers under the Act.”⁸³ The band therefore can sue, but its capacity to be sued is dependent on the statutory powers conferred on it.

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⁸⁰ [1982] 2 S.C.R. 72

⁸¹ (1989), 70 O.R. (2d) 56

⁸² As quoted in *Montana Band v. Canada* at 22.

⁸³ *Montana Band* at 23.

The *Indian Act* band council system does not provide for an electoral structure that will support the interests of off-reserve band members. The *Indian Act* currently provides for a chief and one councillor for every one hundred members (on and off-reserve) of the band. The chief can be an on or off-reserve band member but a councillor, as specified under s.75(1) of the *Indian Act*, must be a resident on the reserve. However, even if the act was amended so as to remove the residency restriction on nominations for councillor, this would still cause liability issues because then, in the case where off-reserve band members outnumbered the on-reserve, the interests of on-reserve members may be threatened.

The obligations of the Crown are not determined by the Indian Act. The government's attempt therefore to limit its responsibility to those specifically outlined in the Indian Act is not consistent with the nature of their relationship with Natives. The formative years of the fiduciary relationship are the most significant in determining the nature of the relationship; it is at this time that the terms of the relationship are understood and agreed to by both parties.⁸⁴ In the early period after contact, as evidenced in treaties, alliances, agreements and the *Royal Proclamation, 1763*, the nature of the Crown-Native relationship was a nation to nation one. With this interpretation of the Crown-Native relationship, one of the Crown's fiduciary duties to Natives, is to ensure that they enjoy their own systems of governance. Consistent with fiduciary doctrine, this is a positive obligation.⁸⁵

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⁸⁴ Rotman, p.284.

⁸⁵ Rotman, p.283.

The third component to a fiduciary relationship is that the fiduciary has an obligation to act in the best interest of the beneficiary. It must be shown here that the nature of the relationship dictates that the Crown has an obligation to the band councils in this case. The fiduciary does not have to voluntarily take on these obligations. It may be shown that there is this obligation if the fiduciary has control over the beneficiary's property; the beneficiary relies on the actions of the fiduciary; an unequal power relationship exists between the two; the fiduciary is unjustly enriched at the expense of the beneficiary; the nature or necessity of the relationship is socially valuable; or finally, the fiduciary has power and discretion over the beneficiary's interest.⁸⁶ The government has control over the voting regime; therefore the bands rely on the actions of the government. However, the government could argue that having control of the voting regime does not translate into a responsibility for band member interests. The government's specific obligation of ensuring that Natives have a voting regime that works is derived from the Crown's general fiduciary obligation of ensuring Native governance which was outlined in the previous section. Also, it seems quite reasonable that since the government imposed the *Indian Act* on Natives, they also assumed certain responsibilities with respect to governance.

To satisfy the fourth component, the band must rely on "the honesty, integrity and fidelity" of the Crown as a result of the relationship. The Supreme Court recommended that the Crown consult with Aboriginals in order to devise a balanced voting system. The band therefore relied on the Crown to follow through with this to ensure that the band

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⁸⁶ Rotman, p. 179

councils do not bear the brunt of the decision. Chapter two will examine the government's response to the decision to determine whether it followed through with its fiduciary obligations.

The *Corbiere* decision required that the federal government devise an electoral regime that would balance the rights of on and off-reserve members. The government has a fiduciary duty to respond to this decision because it has an obligation to ensure that Natives have good governance that is self-government. This was the obligation that they assumed by imposing the *Indian Act* on pre-existing Native systems of government and it is also a general obligation derived from the nature of the Crown-Native relationship as a nation to nation one. The Supreme Court of Canada decision in *Corbiere v Canada* increased the responsibility and therefore liability of band councils; therefore, the federal government also has a responsibility to ensure that there is an electoral system in place to address the interests of off-reserve band members.

Chapter 2: The Inadequacy of the *Corbiere* Consultations

The Supreme Court of Canada in *Corbiere v. Canada*, ruled that the residency restrictions in section 77(1) be struck from the *Indian Act* after an 18-month suspension period. As revealed in the minority judgement, the purpose of the suspension period was so that Parliament could carry out consultations, “should it so choose”, with the affected parties on a new electoral regime. As illustrated in the preceding chapter, the decision will have significant impacts on band council decision-making. Because of these impacts the government has a fiduciary obligation to adequately respond to this decision. In this chapter, I will show that the government deliberately decided against meaningful consultation on the implications of *Corbiere* and opted instead for a response that would minimize its liability. This was done by amending the election and referendum regulations instead of devising a new electoral regime. As discussed in Chapter 3, this government strategy was devised in order to introduce new legislation that would further limit s.35 Aboriginal rights to self-government.

Fiduciary Duty to Consult

Fiduciary obligations change with the nature and scope of the fiduciary relationship. But fiduciary obligations are guided by four general principles: the fiduciary must not benefit from their position; the fiduciary must disclose all relevant information to the beneficiary; the fiduciary must not compromise the interests of the beneficiary; and the

fiduciary may not delegate its authority to another party.¹ The government's first step to fulfilling its fiduciary obligation to First Nations should have been to determine their best interests through meaningful consultation. In the aftermath of *Corbiere*, the government was faced with "Aboriginality-residence" as a new ground of discrimination and the court's opinion that a new electoral regime should be devised to balance on and off reserve interests. The government had various possible options, including but not limited to the following: it could allow the seven offending words to be dropped from the *Indian Act* at the 18-month deadline and only change the voting regulations for elections; it could attempt to amend sections of the *Indian Act* with respect to leadership selection in order to devise an electoral regime that would balance off and on-reserve rights; or it could favour self-government agreements with band councils. Ottawa chose the first option because it was not willing to increase its responsibility and liability for off-reserve member interests. The Assembly of First Nations argued that this option would not address the implications of the *Corbiere* decision on band council decision making.

On December 9, 1999, after 8 months of internal deliberations, the government announced its two-staged response to *Corbiere*. The first stage involved consulting on the election and referendum regulations which meant that the government was not going to amend the *Indian Act* during the 18 month consultation period. In stage two of the response the government stated that it would move forward on more "substantive consultations with First Nation partners and organizations on integrated and sustainable

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¹ Leonard Rotman, *Parallel Paths*, pp. 184-86.

electoral reform.”² I will be discussing the government’s stage two response in Chapter 3 to reveal how it is consistent with its 1995 Inherent Rights Policy -- a proposal to establish self-government agreements with individual band councils. Herein, the Stage One consultation process with the Assembly of First Nations, in particular, will reveal that the government did not consult in good faith with Natives.

The Meaning of Consultation

Numerous court decisions have established that the Crown’s fiduciary duty includes the duty to consult with Aboriginals before engaging in an action that will interfere with existing Aboriginal rights, treaty rights, or title.³ The landmark decisions in *Delgamuukw v. British Columbia* and *R v. Sparrow* establish some guidelines on the extent and subject of consultation. Nonetheless, the *what*, *when*, and *how* of consultation are still left up to the discretion of the Crown. This uncertainty has so far benefited the Crown because consultation has been interpreted as simply one of the requirements set out in *Sparrow* to infringe an Aboriginal right. However, Patrick Macklem and Sonia Lawrence argue that the principles of consultation as set out in *Delgamuukw* have been misinterpreted: instead of consultation being a requirement before a right can be infringed, it is a step in the negotiation process between Natives and the Crown.⁴

The *Sparrow* decision found that certain federal fishing requirements were

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² Department of Indian and Northern Affairs, Responding to Corbiere: Requirements for Amending the Indian Band Election Regulations and the Indian Referendum Regulations May 29, 2000, pg1.

³ For example, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R., *R v. Marshall(1)*, [1999] 3 S.C.R. 1010, *R. v. Sparrow*, [1990] 1 S.C.R. and *R. v. Badger*, [1996] 1 S.C.R. 771.

⁴ Patrick Macklem and Sonia Lawrence, “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult” Canadian Bar Review 79(1) 2000, p.254.

unconstitutional based on s.35 of the *Constitution Act, 1982* because the Musqueams' right to fish was integral to their culture and as of 1982 had not been extinguished by the Crown. Although it was found that the government did have the authority to impose certain restrictions for the purposes of conservation, a number of requirements were established before it could interfere with s.35 Aboriginal rights. Among these requirements was the Crown's duty to consult with Aboriginals before engaging in an action that would interfere with the actual exercise of an existing Aboriginal right. In *Delgamuukw* it was established that an Aboriginal territorial interest is also protected by s.35, but the duty to consult was further defined as relative to the Aboriginal interest. In other words, the duty to consult is a spectrum from a minimum duty to inform to a maximum duty to negotiate and receive consent based on the extent of the Aboriginal interest. The Aboriginal interest, and therefore the duty to consult, is not necessarily dependent on proving an existing Aboriginal right. This leaves room for negotiation as the onus is not necessarily left to First Nations to prove an Aboriginal right; the Crown must first deal with any potential infringement of their interests. The difference between *Sparrow* and *Delgamuukw* is significant because by taking some of the onus away from First Nations to prove their rights, the Crown has the responsibility to take into consideration Aboriginal concerns according to equitable principles of justification which include reasonableness, fairness and good faith.

Unfortunately, numerous lower court decisions do not reflect this shift in

consultation practice,⁵ but seem to have accepted as adequate the minimum requirements of consultation to be informing First Nations. These decisions are thereby creating “a perverse incentive on the crown to engage in ineffective consultations.”⁶ Macklem argues that this is not in keeping with the intent of *Delgamuukw* to reach negotiated settlements instead of litigation; but so far there have not been any cases that follow *Delgamuukw*. If the Crown intends to interfere with an existing Aboriginal right then, according to *Delgamuukw*, there is always a duty to consult and “s.35(1) provides a solid constitutional base upon which subsequent negotiations can take place... moreover the Crown is under a moral if not legal, duty to enter into and conduct those negotiations in good faith.”⁷ So far, post-*Delgamuukw* precedents are not in favour of Aboriginals. If *Delgamuukw* was followed, the courts would have had to enforce a default rule requiring the Crown to make a good faith effort at negotiation.

The extent of the Native interest must be determined in order to determine the duties of the fiduciary. From the *St.Catherine's Milling and Lumber Co.* decision, to the *Calder*, *Guerin*, and *Sparrow* decisions, determining the legitimate interests of Natives has always been at issue. In the *St.Catherine's Milling* decision it was found that the Crown only had a moral obligation to consider Native interests because they were created by the Crown in the first place. In *Calder*, it was found that Aboriginal title pre-existed the presumption of Canadian sovereignty. Aboriginal interests in land were recognized in

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⁵ For example *Kitkatla Band v. British Columbia*, [1998] B.C.J. No.2667 (B.C.S.C.), *Halfway River First Nation v British Columbia*, [1999] B.C.J. No.1880 (B.C.C.A), *Alberta Wilderness Asssocation v. Canada*, [1998] F.C.J., *Mushkegowuk Council et al. v. Ontario*, [1999]O.J. No.3170 (Ont.S.C.J.) As quoted in Macklem and Lawrence p. 265.

⁶ Macklem and Lawrence, p.271.

⁷ *Delgamuukw* at 1123. As quoted in Macklem and Lawrence, p.257.

common law but not based on common law. It was only at this point that government actions which took no regard of Aboriginal interests were questioned.⁸ In *Guerin*, the idea that Native people had an interest in their land since “time immemorial” took legal form and it was found that the Crown owed a fiduciary obligation to Indians with respect to lands. This was based on the *sui generis* nature of Aboriginal title and the historic responsibility assumed by the Crown. In *Sparrow* the fiduciary duty was constitutionally entrenched and it was found that Aboriginal interests which form an integral part of their culture are protected by s.35(1) of the *Constitution Act, 1982*. In *Delgamuukw* it was found that Aboriginal territorial interests must also be classified under a s.35 Aboriginal right.

Stage One Consultations

The purpose of finding a fiduciary relationship is to even out the power relationship so that the fiduciary acts in the best interests of the beneficiary. The fiduciary should be unable to abuse its power. Finding a fiduciary relationship is meant to be a legal tool to monitor the relations between two groups so that the beneficiary will have a means of recourse if their interests are unduly infringed upon. Consultation is a key component to the fiduciary relationship between the Crown and Natives because it is the only way of determining the best interests of the beneficiary. The Assembly of First Nations has pointed out that consultation between the government and First Nations is necessary for

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⁸Referring to government actions such as the 1969 White Paper and the James Bay development by Quebec Hydro Dickson and Laforest stated: “It took a number of judicial decisions and notably the *Calder* case in this court to prompt a reassessment of the position being taken by the government.” *Sparrow*, 1104

reconciliation between First Nations and the Crown. It has also pointed out some of the tactics used by the government to avoid meaningful consultation. These include: determining the subject matter of consultation before the consultations begin; using consultation funding to pit Aboriginal organizations against one another; directing the entire consultation process; and finally, dismissing Aboriginal input or picking-and-choosing whatever fits the government's already determined agenda.⁹

Since 1989 the AFN has taken the position that the *what, when* and *how* of consultation should not be determined unilaterally by INAC. Instead, the AFN and INAC must negotiate their terms. In a resolution passed in 1989, the AFN outlined their "basic principles of meaningful consultation." Consistent with the AFN's current position on the relevance of treaties to current day governance and also used in a 2001 think tank with INAC on consultation, the resolution posits that consultation should be based on a nation to nation relationship. The outlined issues have to do with the power relationship realized by s.91(24) of the *Constitution Act, 1867*; the consultation parameters attempt to dismantle this federalist construction by forcing the federal government to deal with them as distinct First Nations instead of as wards of the state.

According to the 1989 AFN resolution, treaties with sovereign First Nations confirm that the obligation of the Crown to consult in good faith with Natives is a legal rather than moral obligation. It is because of this that the Crown is obligated to inform First Nations, to negotiate without a pre-determined agenda and to allow for a diversity of positions by utilizing the Assembly of First Nations as a tool to harmonize and co-ordinate

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⁹ Assembly of First Nations, Confederacy of Nations Resolution no. 4/89 "Consultation with Non-Aboriginal Governments", October 18, 1989.

the process.¹⁰ As we will see in the *Corbiere* consultation process, the government has not used the Assembly of First Nations to harmonize different positions. Instead, INAC has used the AFN along with other organizations to legitimate its own goals.

The government consulted with Aboriginals on election and referendum regulations which reflected government interests -- not Native interests. The Assembly of First Nations was fully aware that the implications of the *Corbiere* decision were not restricted to voting: governance was always an issue. In their June 1999 preliminary analysis and June 2000 "Discussion Paper", the AFN outlines that the impacts reach beyond elections to the primary issue of governance.¹¹ However, the Assembly submitted a work plan to INAC which authorized restricting consultations for Stage One to election regulations. Consulting on election and referenda instead of on an amendment to the *Indian Act* was a significant restriction. The AFN agreed to the restriction in exchange for consultation funding and the assurance that the Stage Two consultation process would involve extensive consultation on the real implications of *Corbiere*. This would have meant consultation on amending the *Indian Act* to support a new electoral regime.¹²

In the final analysis, funding rather than principles drove the AFN's response to *Corbiere*. It was part of a strategy to use the funding to inform their constituency and devise strategies on the best route to respond. It was also driven by a competition between

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¹⁰ Assembly of First Nations, Confederacy of Nations Resolution no. 4/89 "Consultation with Non-Aboriginal Governments", October 18, 1989.

¹¹ Assembly of First Nations, "*Corbiere v. Canada and the Batchewana Band: A Discussion Paper on the Implications of the Supreme Court of Canada Decision*" Prepared for the Special Session on *Corbiere* in co-operation with the Special Advisor on *Corbiere*, Indian and Northern Affairs Canada. July 2000.

¹² Assembly of First Nations, "Co-ordination of *Corbiere* Work plan on Election Regulations", January 10, 2000.

the AFN and other Aboriginal organizations for funding. The Assembly of First Nations was the only organization to receive funding past the initial \$200,000 in December. Beyond submitting the required consultation report, of the four organizations (National Association of Friendship Centres, the Native Women's Association of Canada and the Congress of Aboriginal Peoples) the AFN was the only organization that was involved in the *Corbiere* response. But, this backfired when the Assembly of First Nations was used to legitimate the government's response. This could have even further implications as the government attempts to use the consultations in Stage 1 of *Corbiere* for their new First Nations Governance Act.

The Assembly of First Nations' response to the *Corbiere* decision fluctuated with the proposition and then retraction of funding by INAC. The strategies used by the AFN included, first of all, a claim of representation, then an attempt to use the Dispute Resolution processes established with the federal government through the Joint Initiative, and finally an application to the Supreme Court of Canada for an extension of time. It was the AFN's position that since the decision allowed for an 18-month interim period on consultation and because it stated that fiscal restraints were not a sufficient reason to deny off-reserve members the vote, the federal government had the responsibility to provide sufficient resources to the AFN for consultation.¹³ The government, on the other hand, was concerned with reducing its responsibility and without a legal impetus to provide consultation funding, AFN's strategies would be futile.

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¹³ Assembly of First Nations, "Preliminary Analysis of the *Corbiere v. Canada*" May 25, 1999.

The Subject of Consultation – A Joint Initiative Rejected

The subject of consultations was unilaterally determined by Indian and Northern Affairs Canada though this did not have to be the case. The Assembly of First Nations proposed to work with INAC through the Joint Initiative which was a system in place to facilitate dialogue between on-reserve status Indians at the national, regional and local level. The government rejected this proposal and instead opted to deliberate internally for 9 months.

The Joint Initiative on Lands and Trust Services was a product of the federal government's response to the recommendations of the *Royal Commission on Aboriginal Peoples*.¹⁴ The new government initiative termed *Gathering Strength – Canada's Aboriginal Action Plan* aimed to improve the Native-federal government relationship by fulfilling four objectives: renewing their partnership, recognizing and strengthening First Nations governments, fostering equitable and sustainable fiscal relationships, and supporting stronger First Nations communities and people.¹⁵ The government had attempted a similar initiative in the late 1980's; however, the Lands, Revenues and Trusts Review failed because it "was totally driven and controlled by INAC [and] failed to involve or respond to First Nations concerns."¹⁶ In contrast, the Joint Initiative was heralded as a step toward a new AFN/INAC partnership where the federal government

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¹⁴ AFN/INAC Joint Initiative LTS, "Joint Initiative Progress Report" in the Conference Kit for the National Gathering, "Banishing the Indian Agent" Choices for Change: Restoring First Nations Governments, Winnipeg, Manitoba June 6-8, 2000, p 7.

¹⁵ Indian and Northern Affairs Canada, *Gathering Strength: Canada's Aboriginal Action Plan*, www.ainc-inac.gc.ca/gs/cng_e.html

¹⁶ Assembly of First Nations, www.afn.ca/Programs/LTS%20Joint%20Initiative.../frequently_asked_questions.html.

and the Assembly of First Nations would work together to develop policy on issues such as membership, elections, leadership selection, the environment and Indian monies.

Under the Joint Initiative, INAC and the AFN established a structure, process and reporting arrangement to ensure an accurate and consistent flow of information. A chief's committee representing all regions of Canada oversaw the workings of the initiative while a technical working group comprised both of INAC and AFN representatives from each region served as an advisory body to them. A regional involvement process involving focus groups and research on issues related to the *Indian Act* were the main thrusts of the initiative. This culminated in a National Gathering in June 2000 where the ensuing discussion papers on Indian moneys, leadership selection, membership, the environment and additions to reserves were presented to representatives from each Native community in Canada. Most importantly, to avoid future disagreement or misunderstanding about the intent of the Joint Initiative, a dispute resolution process was put in place, and both sides agreed that: it would not involve legislative amendment; the work done was not to be construed as consultation for other policies outside of the Initiative; it was not to infringe on Aboriginal or treaty rights; and it was not to affect the fiduciary relationship.¹⁷

The dispute resolution process is the most fundamental feature of the Joint Initiative and the Joint Initiative probably would not have been accepted by Native people without it. The process involved a number of steps -- if there was a disagreement, the chair of the chief's committee would alert the Assistant Deputy Minister, who would then have

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¹⁷ AFN/INAC Joint Initiative LTS, "Joint Initiative Progress Report" in the Conference Kit for the National Gathering, "Banishing the Indian Agent" Choices for Change: Restoring First Nations Governments, Winnipeg, Manitoba June 6-8, 2000, p 7

a certain period of time to respond, after which a meeting would have to take place. If the matter could not be resolved, the process would move up the ladder to a higher official in the department -- this would continue until it reached the Prime Minister and the National Chief. However, for each step there was a time restriction. Unfortunately for the Joint Initiative, the disagreement over *Corbiere* was the first issue to put the Dispute Resolution Process to the test.

Two months after the decision was handed down in July 1999 both the Assembly of First Nations and some of the senior INAC officials of the Joint Initiative agreed that the Joint Initiative would be an appropriate vehicle for responding to the decision. The Assembly of First Nations presented a workplan to INAC in July 1999 which proposed “to put into practice the principles and process established under the Joint Initiative and Gathering Strength”¹⁸ through a Joint Response on *Corbiere*. The chiefs at the Annual General Assembly in July 1999 also mandated the AFN to work jointly with INAC on the condition that it provide the necessary resources and the Joint Initiative’s “structure, processes and reporting arrangements be utilized for the work related to *Corbiere*.”¹⁹ But INAC did not respond to the workplan, despite the fact that the AFN had worked jointly with INAC on the first workplan and had been encouraged by some of the top officials on the INAC side of the Joint initiative that a joint response to *Corbiere* was viable. On May 21, 1999, Robert Watts, the Assistant Deputy Minister for Lands and Trust Services, suggested that as the Joint Initiative is a “First Nations driven process, perhaps it could

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¹⁸ National Chief Phil Fontaine, Letter to Honorable Jane Stewart, Minister of Indian and Northern Affairs Canada, July 18, 1999.

¹⁹ Assembly of First Nations. Resolution no. 3/99, Annual General Assembly July 20-23, 1999. Vancouver, British Columbia.

serve as an appropriate vehicle to propose options and strategies in light of this decision.”²⁰ Further, on June 2, 1999, Ray Hatfield, the Acting Director General of Registration, also stated that since the Joint Initiative is already working on the *Corbiere* issue and it has “already begun addressing options for modifications on existing election policies through National focus groups...[perhaps it]...could serve as an appropriate vehicle to propose options and strategies in light of this decision.”²¹

In August, the Assembly of First Nations utilized their only tool to goad INAC into action: the Assembly initiated the Dispute Resolution Process. At this point, it was evident that INAC was stalling because there was no response to the July workplan and INAC would not provide sufficient funds to respond to *Corbiere*. Informally, the AFN had been advised that they would be expected to utilize existing resources to address *Corbiere* through the Joint Initiative for Policy Development. This was unsatisfactory because the workplan and budget approved by the AFN and INAC on the Joint Initiative did not include work on *Corbiere*, and former National Chief Phil Fontaine also expressed concern that the federal government “would use incomplete work on elections as an indication of consultations with First Nations.”²² Therefore, the AFN initiated the dispute resolution mechanism on August 3, 1999.²³ The resolution process was put on hold for a think tank with INAC on *Corbiere* and when no funds were received, it was re-initiated on

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²⁰ R.B. Watts, Assistant Deputy Minister, Letter to Chief and Council, May 16, 1999. Provided by the AFN *Corbiere* Response Unit

²¹ Ray Hatfield, A/Director General of Registration. Fax sent to Roger Jones, AFN LTS policy analyst. June 2, 1999. Provided by AFN *Corbiere* Response Unit.

²² Phil Fontaine. Letter from National Chief Phil Fontaine to Honourable Jane Stewart, former Minister of INAC, July 18, 1999. Provided by AFN *Corbiere* Response Unit.

²³ Vice-Chief Tom Bressette Co-chair of the LTS Chief's committee, Letter to Robert Watts, Assistant Deputy Minister for Lands and Trusts Services, August 3, 1999. Provided by the AFN *Corbiere* Response Unit.

September 22, 1999.

The Dispute Resolution Process, and consequently the entire Joint Initiative was proving to be ineffective as a First Nations driven process for policy change. INAC was deliberately turning a deaf ear to the AFN's demands and as a result the AFN threatened to end the Joint Initiative if INAC did not respond to the work plan and/or provide sufficient funds.²⁴ The Deputy Minister for INAC responded that she would meet with the Vice-Chief to "discuss the *Corbiere* file but only outside of the Joint Initiative and its resolution mechanism."²⁵ This letter officially took the *Corbiere* file outside of the Joint Initiative. It is unclear what took place at the ensuing meeting, however the Vice-Chief repealed the resolution process. Inferring from his statement that he was satisfied that "the relationship perceptual or otherwise between the Joint Initiative and our response to *Corbiere*" was understood by the Deputy Minister and that he agreed that there was a need for a separate work plan from the Joint Initiative on *Corbiere*, it seems that either they agreed to a funding arrangement or Vice Chief Bressette completely acquiesced to the demands of the Minister. When even a threat to end the Joint Initiative because of *Corbiere* only provokes the response by INAC of removing *Corbiere* from the Joint Initiative, it is evident that the government controls both the Joint Initiative and the response to *Corbiere*.

Indian and Northern Affairs Canada finally unveiled their plans on consultation and they were not in favour of co-operation with the Assembly of First Nations. On December

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²⁴ Vice-Chief Tom Bressette, Letter to Randy Brant A/Assistant Deputy Minister, October 1, 1999. Provided by the *Corbiere* Response Unit.

²⁵ Shirley Serafini, Letter to Vice Chief Tom Bressette from Shirley Serafini Deputy Minister, Indian and Northern Affairs Canada, October 25, 1999. Provided by the AFN *Corbiere* Response Unit.

9, 1999, the Minister announced a two-staged approach and the national consultation strategy which involved the Assembly of First Nations, NWAC, CAP and NAFC.

Consultation funding came with strings attached. In order for the organizations to receive the funding, they had to submit a work plan outlining how they would fulfill the following consultation parameters:

1. The focus of consultations is to be the affected regulations under the *Indian Act* namely the Indian Band Election Regulations and the Indian Referendum Regulations.
2. The Organization is responsible for focusing the discussions around the two regulations. Broader-based consultations will occur in Stage 2.
3. The organization must give DIAND the opportunity to be present during the consultations and to bring other federal government representatives.
4. The organization conducting the consultations must endeavor to reach as many of its members as possible within existing time and monetary limits.
5. Periodic progress reports are to be provided to DIAND.
6. Consultations are to be finished by April 30, 2000.
7. A final report must be submitted to DIAND no later than May 31, 2000 in order to ensure that the regulatory process can be completed in time for the November 20, 2000 deadline.
8. In addition to the results of the consultations, the final report should include details of the consultations, e.g. when and where meetings were held; number of people present, etc...
9. The Organization must agree that its final report may be shared with other Aboriginal Organizations and other federal departments.
10. A percentage of the funds (to be negotiated) may be used to offset the organization's personnel costs associated with management of the consultations.²⁶

After submitting a letter of protest that threatened to re-initiate the dispute resolution process and described the parameters as "oppressive and paternalistic,"²⁷ the Assembly of First Nations submitted a work plan which committed them to form a national working group with regional *Corbiere* coordinators and to complete an analysis of regulations and

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²⁶ Assembly of First Nations, "National Consultation Parameters" www.afn.ca/Corbiere/national_consultation_parameters.htm.

²⁷ National Chief Phil Fontaine. Letter to Minister Robert Nault, January 10, 2000.

Indian Act provisions.²⁸ Also, the AFN *Corbiere* Response Unit was established as a sub-unit to the Joint Initiative. It was not part of the Joint Initiative but it was overseen by the Chiefs committee for the Joint Initiative and the director of the unit was the director of the Joint Initiative.

Such a commitment by the Assembly of First Nations was significant because amending the election regulations would not address the many implications of *Corbiere* for band councils. In the AFN's first work plan that was rejected by INAC in July 1999, the AFN proposed that they work jointly with the federal government on addressing the implications of the decision. In December 1999, their second work plan, which was also rejected by INAC, outlined that the implications of *Corbiere* would be wide ranging "raising issues relating to governance, membership, elections, accountability and the provision of services."²⁹ Realizing that the federal government would determine an approach to *Corbiere* "unilaterally and on terms only suitable to the federal government" and that the AFN's "ability to influence the federal government's decision making process appears to be limited", the AFN nonetheless advocated a national approach so that "First Nations across Canada could make decisions that are informed by the experiences of other First Nations which is a role that can only be fulfilled by this organization."³⁰ On January 10, 2000 the AFN then committed itself to consulting with the federal government on election and referendum regulations. In exchange they were provided with sufficient

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²⁸ Assembly of First Nations, *Coordination of Corbiere Workplan on election regulations*, January 10, 2000.

²⁹ Assembly of First Nations, "Report on *Corbiere*: Report and Revised Workplan to *Corbiere* Decision" prepared for the Confederacy of Nations. December 1999, p.9.

³⁰ Ibid

resources to meet nationally with the Regional technical working group members.

Directing the Consultation Process – The “Co-operative” Relationship

From the events leading up to the actual consultation process, it is evident that funding was the driving force to the process. This included even the consultation process itself. In March 1999, the AFN and INAC agreed to work co-operatively on a response to *Corbiere*. The AFN's terms for participating in the co-operative approach were that substantial resources would be made available and there would be flexibility in shaping Phase 2. Also, the AFN was assured that they “would have input into any policies, operational or otherwise, resulting from the *Corbiere* decision.”³¹ This assurance, however, proves to be hollow when INAC's official position is that *Corbiere* only affects voting. The real issue, as the AFN pointed out in numerous discussion papers, was that the implications of *Corbiere* mainly involve balancing off and on reserve rights. INAC promises then had another motive -- this is evident as we see from the National Technical working group meetings that INAC was ensuring that they had evidence of consultation. The Technical working group at this point was on uneasy ground because their participation could be construed as consultation. The Assembly of First Nations had not received a block of funding since January 1999. Instead, the AFN technical working group meetings were funded directly by INAC and “the technical working group members were compelled to sign contracts with the department on each occasion.”³² The implementation of INAC policy change alerted the AFN and the technical working group members to the

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³¹ Carolann Brewer, Executive Coordinator of the AFN *Corbiere* Response Unit, Letter to Robert Eyahpaise, Special Advisor on *Corbiere*, June 19, 2000.

³² Vice-Chief Tom Bressette, Letter to Shirley Serafini, Deputy Minister of DIAND, June 18, 2000.

“potential that the AFN could be perceived as agreeing with matters to which [they] have not had the human resource capacity to respond.”³³

In June of the same year, the AFN had proposed a budget of \$1.3 million for the administration of the *Corbiere* unit and also reiterated that if INAC did not comply with the AFN’s proposal within 2 weeks as of June 18th, they would end the co-operative relationship. They did not receive that funding until February 14, 2001 -- four months after the implementation of *Corbiere*. The AFN’s June 2000 work plan was the basis of a contribution agreement between it and INAC, on February 14, 2001. At that point the AFN received \$200,000. The work plan proposed that the AFN assist in implementing the election regulations, co-ordinate the regional technical working group’s review, provide feedback on the draft regulatory changes, and analyze the wider implications of *Corbiere*.

The AFN’s strategy of accepting consultation dollars in order to inform First Nations communities failed when they did not receive sufficient funding. This was affirmed at the Special Session held in June by the *Corbiere* Response Unit when “overwhelming evidence indicated that communities were not provided with sufficient information on the *Corbiere* decision and its possible impacts.”³⁴ For this reason, the Assembly of First Nations applied for intervener status in the Lesser Slave Lake Indian Regional Council’s application for an extension of time on the implementation of *Corbiere*. A total of 84 bands also submitted Band Council Resolutions in favour of an extension due to a lack of resources and preparedness. INAC refused to support an extension. This refusal quickly

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³³ Ibid.

³⁴ Assembly of First Nations “Report on the Special Session on *Corbiere*” Winnipeg Convention Centre, June 9, 2000, p.3.

eroded the AFN/INAC relationship and, although the co-operative relationship had not been officially terminated, at this point the correspondence was scarce and INAC was still not following through with the promised funding.³⁵

The product of Consultations

On September 12, 2000, the government pre-published the election and referendum regulations in the Gazette along with a claim that they were the result of “consultations with the AFN technical working group.”³⁶ Even though the AFN national technical working group members had given notice that their participation was not to be construed as adequate consultations and they had not even reviewed the referendum regulations, it was stated that the regulations had been “reviewed by a co-operative working group of representatives from DIAND, the AFN, NWAC and NAFC”.³⁷ In response, the National Chief wrote to Minister Nault that this claim was untrue and there was little if no consultation on the regulations. Minister Nault replied that the AFN’s national technical working group “agreed to co-operate and provide assistance to INAC in an attempt to complete the Stage One consultations, and to assist with the formulation of the Stage Two process.”³⁸ Furthermore, the Minister asserted that regulations were based on the Stage One national reports and the national technical working group members

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³⁵ Assembly of First Nations *Corbiere* Response Unit, “Report and Proposed Workplan”, Confederacy of Nations Meeting, December 13 & 14, 2000, p.3. The LSLRC’s motion for an extension of time was dismissed without stated reason and without oral hearing.

³⁶ Assembly of First Nations, “*Corbiere Response: Report and Workplan*” December, 2000.

³⁷ National Chief Mathew Coon-Come, Letter to Honourable Robert Nault, Minister of Indian Affairs and Northern Development, September 25, 2000.

³⁸ *Ibid*

helped to develop the minimum requirements paper.³⁹ In like manner, the Minister also attempted to consult with communities on the election regulations by faxing them on September 13, 2000 a request for comments by September 23, 2000.

There are many concerns with the new election regulations including that they are confusing; there is a lengthy timeframe for elections and appeals; there is no real requirement for provision of information on the candidates so the off-reserve members may not be well-informed; and there are also problems with capacity and resources. Some bands “due to a lack of resources and preparedness” notified the department that they should take responsibility of their elections. In a letter of protest to the Minister, the National Chief threatened that since the communities had not been adequately consulted, then the AFN would recommend that they leave the “management of elections to DIAND officials until such time as adequate resources have been identified for First Nations to carry out the duties imposed on them by the regulations.”⁴⁰ In response, Minister Nault stated that “if First Nations are not willing to conduct their own elections, INAC will have to and will do so utilizing the resources which were to be made available to those First Nations refusing to conduct their own elections.”⁴¹ Clearly, INAC had all of the power and was willing to use it to the disadvantage of bands and the AFN if they did not comply with the government’s plans.

This same day, September 12, 2000, the AFN ended the co-operative relationship

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³⁹ Robert Nault, Letter to National Chief Coon-Come, October 16, 2000. Provided by the AFN *Corbiere* Response Unit.

⁴⁰ Ibid

⁴¹ Robert Nault, Minister of Indian and Northern Affairs Canada. Letter to National Chief Mathew Coon-Come, October 16, 2000. Provided by the AFN *Corbiere* Response Unit.

with INAC. However, the relationship was not ended over the claim in the Gazette that the AFN had approved of the regulations; instead, the AFN ended the relationship because they had not received funding that fiscal year and therefore they would no longer participate in “*Corbiere*-related activities until the issue of funding has been addressed.”⁴² The AFN December 2000 work plan which was a part of another contribution agreement with INAC conceded both that the mere participation of the Assembly of First Nations could be construed as consultation and that there “were few legal markers to determine what will constitute “adequate consultations” therefore participating could be “considered as fulfilling a minimum requirement.”

Elections and Referenda Regulations Instead of A Response to *Corbiere*

The *Corbiere* decision reaches beyond voting in elections and referenda. The government knew so all along as evidenced in their two staged instead of one staged response to *Corbiere*. The AFN discussion papers also made it clear that the implications would affect band council decision making. The band council structure cannot support the increase in liability. Any band council decisions which the Court mentioned as off-reserve interests such decisions on Capital money, and land allocation and also possibly programs and services will possibly be challenged by off-reserve members because they do not have adequate representation in the band council. The government deliberately decided against consulting on meaningful change to the band council structure because to do so would imply the acceptance of responsibility for off-reserve member interests. Furthermore, it

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⁴² Vice-Chief Charles Fox . Letter to Robert Watts, Assistant Deputy Minister for Lands and Trusts Services, September 12, 2000. Provided by the *Corbiere* Response Unit.

would imply that they were also responsible for ensuring governance for Natives.

There was a government agenda behind the consultation process with the Assembly of First Nations. The government's strategy of reducing its liability with regard to Natives so as to limit rights to self-government will become more evident in Chapter Three. Following the principles guiding a fiduciary obligation: to disclose all relevant information to its beneficiary; to act in the best interests of its beneficiary; and the fiduciary may not delegate its authority to another party, the Stage one consultation process reveals that the government did not fulfill its obligations to Natives. It had an opportunity to utilize an existing consultation mechanism (the Joint Initiative) with the Assembly of First Nations. Nonetheless, it deliberated internally for nine months. Throughout the entire process, it is also evident that the government was not disclosing the relevant information on its plans for a First Nations Governance Act, the subject of Chapter 3.

Chapter 3: From Off-Reserve Voting Rights to Accountability - The Government's Agenda Revealed

On the front page of The Globe and Mail the headline story read that workers from the Virginia Fontaine Addiction Centre-- a Native-run substance abuse centre-- a manager and his assistant from Health Canada, were participating in a "professional development retreat" on a cruise totally funded by public monies.¹ Of course, the subsequent furor resulted in more headlines, an audit and the eventual closure of the Fontaine Centre. This headline added to the many other headlines on the corruption of band administration and added coal to the Reform/Canadian Alliance fire on the need for band councils to account for the 'scandalous' amount of money that goes into their communities. The Reform party's early call for accountability could be dismissed as right-wing propaganda; however, it seems that the general public opinion has shifted -- now a call for accountability is being equated with democratic reform on the reserves and righting of past Canadian wrongs as derived from the "colonial antiquated" *Indian Act*. As demonstrated in the recent events at the Pikangikum reserve where DIAND deemed the chief and council unfit to manage its affairs and appointed an outside firm to manage the band's budget, the solution to this Indian-Canadian problem seems to be calling back to a time of "Indian Agents" -- to save Indians from themselves.

Pikangikum is a relatively small reserve in Northern Ontario that has been branded the suicide capital of Canada. Apparently, due to its deplorable economic and social conditions, an increasing number of young women there have been committing suicide.

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¹ John Stackhouse, "Professional Development, Government Style" The Globe and Mail October 18, 2001, A1

The school is unable to operate because of mould, the water is undrinkable because of a fuel leak in the reserve's water treatment plant and in the last year the council has had three chiefs. As a result, DIAND appointed A.D.Morrison and Associates of London, Ontario to manage their funds. Simultaneously, the proposed First Nations Governance Act has also been publicized as a step towards alleviating the social and economic deprivation on reserves.² The recent initiative is supposed to increase the power and accountability of band councils by making "the administration of public cash so transparent that bands could post their financial dealings and administrative salaries on the internet"³ and by granting them new by-law making powers on such matters as levying taxes, garnishing wages and seizing assets.⁴ According to Minister Nault, this will help First Nations economies and therefore alleviate high rates of unemployment, suicide, poverty and substance abuse.⁵ Along with democratic reform, which involves lengthening the term of office and having Elections Canada supervise voting on reserves, according to Minister Nault, the initiative will be a step towards self-government and welcomed by most Indians who are "not involved in governance."⁶

The combination of social and economic deprivation, complaints of corrupt officials and petitions for band council reform as advocated by such groups as the First Nations National Accountability Coalition, have been manipulated to the disadvantage of band council leaders. As a result, protests by band council chiefs to the new First Nations

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² John Stackhouse, "Reserve in grip of misfortune battles Ottawa to keep control" The Globe and Mail June 8, 2001 A1

³ Rick Mofina. "Indian Act update to grant new powers" The Gazette, Montreal, Thursday, December 7, 2000, A9.

⁴ Brian Laghi, "New law to reform native voting" The Globe and Mail Tuesday, January 16, 2001, A1.

⁵ The Gazette, December 7, 2000, A9.

⁶ The Globe and Mail January 16, 2001.

Governance Act are being reduced to mere self-preservation. Deborah Grey, a prominent Canadian Alliance MP, in a recent house of Commons debate on the First Nations Ombudsman Act, stated that “taxpayers have a right to know that their money is being put to good use, and so do the Aboriginal grassroots members... why is rampant poverty and dire straits not reason enough to dispute greed at the top?”⁷ Another Canadian Alliance member, Darrel Stinson, read a letter from the First Nations National Accountability Coalition stating that mismanagement of funds is a problem across all of Canada and that First Nations’ “very own leaders” as well as DIAND have stripped them of their rights. The letter went on to state that the allocation of funding for *Corbiere* consultations was proof of this as the grassroots members were not consulted; instead, funding went to the organizations.⁸ Implicating leaders of band councils and Native organizations with corruption later served to discount the petitions of Native leaders against the Governance Act as an example of their dictatorial rule: “they are trying to shield their own authority from democratic reform.”⁹ The social and economic ills of Native communities were more explicitly pinned on Native leaders in the same National Post article which stated that “Minister Nault believes leaders who have allowed life on Canadian reserves to resemble that of a welfare state, based on government handouts because of mass unemployment and poverty, must be forced to rethink their priorities.”¹⁰

The complaints against band councils and chiefs are to a certain degree justified.

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⁷ Deborah Grey, House of Commons Debate, “Edited Hansard*1415*Number 078 (Official Version)” http://www.parl.gc.ca/36/2/parlbus/chambus/house/debates/0/8_2000-04-04/han0/8_1415-e.htm

⁸ Darrel Stinson, Private Members Business: First Nations Ombudsman Act.

http://www.parl.gc.ca/36/2/parlbus/chambus/house/debates/0/8_2000-04-04/han0/8_1/15-e.htm

⁹ Justine Hunter. “End Welfare State, Chiefs told.” National Post May 30, 2001 www.nationalpost.com

¹⁰ Ibid

However, they are not the root of the problem and the First Nations Governance Act is not the solution. The current shift towards this new policy of accountability is due to the courts' current shift away from judicial activism and towards deference as we saw in the remedy for *Corbiere*, and also because the political climate is not currently favourable to the recognition of Aboriginal rights. In fact, it is evident that there is currently a backlash to Native rights. This could be a result of a negative reaction to the gains made by Aboriginals in the Nisga'a treaty and in recent Supreme Court decisions on Aboriginal title in *Delgamuukw v. British Columbia*¹¹ and on Aboriginal treaty rights in *R.v.Marshall (I)*¹². For whatever reason, the status of Native rights in Canada is in retrogression and this creates the perfect political climate for the government's consistent policy of limiting the section 35 rights from an inherent right of self-government to an inherent right of administrative control.

The key to understanding why and how the federal government is attempting to limit section 35 Aboriginal rights of self-government is in the federal government's proposal to legally define the relationship between Aboriginal bands and the federal government. As Minister Nault states in the following excerpt from a letter sent to chiefs and council, legally defining the relationship is directly connected to the funding arrangements, which has implications for the meaning of Aboriginal governance:

Under an effective and accountable governance framework, the primary relationship would shift from the relationship between the Government of Canada and Chief and Council to one between First Nation governments and First Nations citizens. The change in Focus would modernize the relationship between First Nations and the Government of Canada -- and

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¹¹ [1997] 3 S.C.R. 1010.

¹² [1999] 3 S.C.R. 456

the relationship between the Chief and Council and First Nation citizens would be more democratic and characterized by transparency, accountability to membership and provisions for redress.¹³

The government's policy of devolution attests to its consistent policy to limit its liability risk. Since the 1960's the funding arrangements between the DIAND and the band councils have devolved in order to transfer responsibility to the band councils. However, the federal government still remains liable. The fiduciary obligation between the Aboriginals and the government is based on protecting existing Aboriginal and treaty rights and these rights can be limited if a number of requirements are fulfilled -- among these requirements is consultation. The funding arrangements are significant in this case because it is unclear what the responsibilities of the federal government and band councils are. By legally defining this relationship, the rights involved in the *sui generis* legal order to self-government may be compromised.

Uncertain Consultation Practices

The stage one consultation process on *Corbiere* is being used by the federal government as a justification for the First Nations Governance Act; however, it is obvious that this proposed act is a DIAND-driven initiative. The Stage two response to *Corbiere* was to involve consultation on the broader implications of the decision. In his December 9, 1999 letter Nault stated that stage two consultations would involve a "more broadly-based look at the overall *Indian Act* "and it would "provide the necessary flexibility to determine what

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¹³ Robert Nault, Letter from Honourable Robert Nault, Minister of Indian and Northern Affairs Canada to Chief and Council, March 29, 2001. Quoted in an AFN Briefing on the Governance Initiative, Booklet 3, p.7.

changes to the Act are both necessary and feasible.”¹⁴ Furthermore, one of the consultation parameters agreed to by the organizations in Stage one specified that Stage 2 would involve broader based consultations. INAC's discussion paper, Responding to Corbiere: Requirements for Amending the Indian Band Election Regulation and the Indian Referendum Regulations, also stated that stage 2 would involve “more substantive consultations with First Nations partners and other Aboriginal organizations on integrated and sustainable reform” and that this may include “adjustments to voting rights” and an “electoral system that is consistent with the *Charter*.”¹⁵ Like most other INAC discussion papers or “official positions” these statements are an example of INAC rhetoric. However, as indicated by discussion papers from Aboriginal organizations, it was understood that stage 2 would actually involve a response to the implications of *Corbiere* which would have to involve the balancing of off and on-reserve rights and the other implications of the decision on custom codes, membership codes, programs and services.

Hopes for consultations on the implications of the *Corbiere* decision were quashed by the proposal for consultations on a new First Nations Governance Act which was officially announced by Minister Nault on April 30, 2001 during a speech at the Siksika First Nation High school. It is obvious from the proposed Act that the implications of the *Corbiere* decision on band council decision making will not be considered. To address the *Corbiere* decision, four issues are mentioned by INAC with regard to balancing off and on-reserve rights, band council decisions on programs and services must be protected from

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¹⁴ Robert Nault. Letter to chief of Sawridge Band from Honorable Robert Nault, Minister of Indian and Northern Affairs Canada. December 9, 1999. Provided by the AFN *Corbiere* Response Unit.

¹⁵ Indian and Northern Affairs Canada, Responding to Corbiere- Requirements for Amending the Indian Band Election Regulations and Indian Band Referendum Regulations - Draft. May 17, 2000 p.1.

interference by off-reserve voters. The nomination provisions for councillor may need to be changed so that off-reserve members can nominate and be nominated as councillor. However, according to the INAC proposal the provision of programs and services to off-reserve members and a complete review of the *Indian Act* for sections that discriminate against off-reserve members will not be subjects for consultation.¹⁶ Although the government states in its consultation materials that protecting programs and services from off-reserve interference and amending the nomination provisions in the *Indian Act* address *Corbiere*, they do not. Band council decision-making does not have to be protected from off-reserve voters. Off-reserve members do not have access to on-reserve programs and services and it is the position of the federal government that they should not. The Assembly of First Nations, on the other hand, argues that off-reserve members may be able to claim that their exclusion from these services may constitute a violation of their *Charter* rights based on Aboriginality-residence as a new ground of discrimination. The real issue in balancing off and on reserve rights is (as discussed in Chapter one and two) band council liability.

From the outset, these consultations were government-driven. Even though the federal government was considering a legislative amendment or a stand-alone First Nations Governance Act since at least April 3, 2000, the prospect of the new Governance Act was first leaked to the press on December 7, 2000.¹⁷ At this point, the Assembly of

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¹⁶ Indian and Northern Affairs Canada, *Communities First: First Nations Governance Under the Indian Act*, A discussion paper for the purpose of community consultations. May 2001. Provided by the AFN *Corbiere* Response Unit.

¹⁷ Robert Nault. Letter to National Chief Phil Fontaine. April 3, 2000. Provided by the *Corbiere* Response Unit. He stated that he would include more stage 2 like issues in the phase one consultations including a stand alone First Nations Elections Act.

First Nations still did not know of the First Nations Governance Act and on January 5, 2001 Vice-Chief Charles Fox sent a letter to Minister Nault requesting information on the First Nation Governance Act. Minister Nault replied by sending a deck (hard copy of a presentation) entitled "First Nation Governance: *Corbiere* Stage 2."¹⁸ On February 9, 2001 the AFN National Chief did not know any more about the governance initiative than what was provided in January on First Nation Governance. Requesting more information from Minister Nault in February, the National Chief was told that the legislation was to be introduced in the fall, that consultations were going to occur and there was going to be an attempt to reach the grassroots members directly via internet.¹⁹ An AFN resolution at the Confederacy of Nations in early May rejected the consultation process and initiated a resistance project that would utilize local, regional, national and international bodies.²⁰

The AFN rejected the consultation process because it was going to be DIAND driven and there was a possibility that the new legislation may limit Aboriginal and treaty rights. The proposed consultation process on the Governance Act is geared towards "grassroots" band members. As a result, the leadership at a national, regional and provincial level are being by-passed. The process involves regional consultation teams which are comprised of federal and First Nations leaders but facilitated by DIAND Regional Directors General. At a national level, the consultation is to be co-ordinated by a consultation co-ordinator who is assigned and/or employed by DIAND. Furthermore, a

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¹⁸ Robert Nault. Letter to Vice-Chief Fox, Assembly of First Nations from Honorable Robert Nault, Minister of Indian and Northern Affairs Canada. January 29, 2001.

¹⁹ Matthew Coon-Come. Letter to First Nation Chiefs from AFN National Chief Matthew Coon Come. February 20, 2001.

²⁰ Assembly of First Nations, "Response to Proposed First Nations Governance Act" Confederacy of Nations, May 8, 9 2001 Vancouver, British Columbia.

Joint FNG Steering committee with representation from the four national organizations would play an advisory role to the whole process. However, the FNG steering committee is not necessary to the whole process and the co-operation of the organizations is not mandatory. A national organization such as the AFN would then only be involved in assisting INAC consultation teams and in reviewing the outcomes. DIAND has total control over the consultation process as well as complete control over the community consultation materials.²¹

The Proposed First Nations Governance Act

The government aimed for the First Nations Governance Act to be introduced in the fall of 2001. Reminiscent of the earlier *Corbiere* consultations, the Governance consultations are to occur in three stages over a period of two years. The first phase was to begin at the end of April 2001 and end in October. Directed at the regional level, this phase was to involve gathering and disseminating information on the Governance Initiative. The second phase between fall 2001 and spring 2002 is to focus on the study of the proposed bill and allow for public input. The third phase between May to November 2002 will involve consultations on regulations to support the new bill.²² However, the Assembly of First Nations is sceptical about the whole consultation process and in particular the consultation process after the first phase. They argue that after the bill is drafted it will be extremely difficult to change it.

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²¹ Nahwegahbow, Nadjiwan, Corbiere, Barristers and Solicitors, "RE: First Nations Governance Act" in AFN Briefing on Governance Initiative Booklet 3 Legal Analysis, pp.15-16.

²² Indian and Northern Affairs Canada. "First Nations Governance Community Consultations" www.fng-gpn.gc.ca/CC_e.asp. 5/1/01.

The First Nations Governance Act, according to the government, has not yet been drafted -- it will not be drafted until they consult with Aboriginal individuals and organizations. However, the proposal for the act does outline the topics that will be addressed. These include: legal standing and capacity, leadership selection and voting rights and accountability to First Nation members. Supposedly, these were the subject matters that were brought to light in the consultations on *Corbiere*, the Joint Initiative on elections, and academic research on accountability.²³ DIAND's main objectives from the outset of consultations are to off-load responsibilities. As an analysis of the Funding Arrangements between DIAND and the Band councils will illustrate, the government means to reduce its liability risk with First Nations.

Funding Agreements

Funding agreements between the federal government and band councils lay out the "terms and conditions of expenditures including community service standards and accountability and performance expectations."²⁴ The purpose of the arrangement is to ensure that services and programs such as education, social assistance, infrastructure development, and housing services are delivered to on-reserve status Indians. In the early 1990s contribution agreements were the most common funding arrangements. These devolved into Alternative Funding Arrangements and then Funding Transfer Arrangement in the late 1990s and now the Canada/First Nations Funding Agreement. The evolution of

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²³ Indian and Northern Affairs Canada. "Governance". First Nations Governance Act website. www.fng-gpn.gc.ca/pres/fngfeb9/index.html

²⁴ Auditor General of Canada, Report of the Auditor General of Canada Chapter 10, April 1999, at 10.8. <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/9910ce.html>

these agreements from the late 1960s to 2000 is an example of the government's policy of devolution, as each agreement represents a transfer of authority and responsibility to band councils. As a result, INAC has become, among other things, an Indian funding agency that designs and oversees funding arrangements with First Nations.²⁵

INAC's duty to fund First Nations consists of "obligatory and discretionary responsibilities of the Department arising out of treaties, and legislation such as the *Indian Act* and *Appropriation Acts*."²⁶ Consensus has not been reached over which of these duties are discretionary as opposed to treaty-based; however, INAC has a federal mandate to provide funding for services such as education, housing, roads, water and sewage systems, and social and family services to registered Indians residing on the reserve. Before implementing the government's policy of devolution which involves a phasing out of INAC's responsibilities to Indians and downsizing the department, INAC was responsible for delivering services directly to the bands.

Prior to 1996, there were six types of Funding Agreements. Some were Contribution Arrangements, others were Financial Transfer Payments or the Comprehensive Funding Agreement which incorporated the Contribution Arrangement and the FTP. For the bands that demonstrated sufficient capacity, there was the Alternative Funding Agreement which was implemented in 1986. The Contribution Agreements were the most popular form of funding agreement prior to 1996 and are still in use because they decrease the risk of litigation for band councils. However, the terms

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²⁵ Auditor General of Canada. Report of the Auditor General of Canada November 1996, Chapter 33, at 33.22. <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/9633ce.html>

²⁶ Auditor General of Canada. Report of the Auditor General of Canada November 1996, Chapter 33, at 33.13.

and conditions of the agreements are restrictive and may not meet the program and services needs of the community. These agreements involve conditional transfer payments for a specified purpose. Each program and service is outlined in detail, the band cannot transfer funds between the programs, and the funding for each service is to be accounted for to determine adherence to the agreement. Any extra money left over at the end of the fiscal year must be returned to the department; however, the council cannot incur a deficit and all responsibilities still lie with the department. Therefore, in the case of litigation the band council will not be held liable. Financial Transfer Payments (FTP) were similar to contribution agreements in that they were as restrictive on the terms and conditions of delivery. As opposed to contribution agreement, with FTPs, the band could carry over the unexpended balance and they could also incur a deficit.²⁷ The term of all of these agreements was one year which did not allow for long-term infrastructure planning on the reserves. Also, the responsibilities of the band councils were not clearly outlined.²⁸

To move along the road to devolution, INAC attempted to implement the Financial Transfer Arrangement to replace all of the other funding agreements. This agreement was intended to: "strengthen accountability, enable First Nations to better meet community needs, establish a stable funding base and achieve better value for money."²⁹ Although the agreement was designed to be more flexible and dependable for First Nations because the term of the contract was for five years, the funding was set and Natives could design their own programs, this also increased their responsibility and any deficit would be carried over

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²⁷ As defined in the Sample Funding Agreement in the Native Investment and Trade Association, "Financing the Aboriginal Economy in the 21st Century" Conference Booklet, June 22-23, 1995

²⁸ Auditor General of Canada, The 1996 Report of the Auditor General of Canada, November Chapter 33, at 33.13.

²⁹ Auditor General of Canada, Report of the Auditor General of Canada April 1999, Chapter 10, at 10.16.

into the next year. It also included numerous provisions such as reporting requirements, action plans, review and feedback on audited statements and remedial management plans to increase the band's accountability to First Nations. On its face, this agreement would seem ideal for First Nations. However, without the institutional or human resource capacity to implement these programs, implementation has not been effective and numerous bands have incurred a deficit.³⁰

After numerous complaints about the administrative difficulties of co-ordinating the services as outlined in the funding agreement along with services provided from other Departments such as Health Canada, INAC has recently developed the Canada/First Nations Funding Arrangement to replace the FTA. This new arrangement is designed to co-ordinate the funding agreements between multiple departments with INAC in charge of administering and managing the cash flow from other departments.

The 1996 report by the Auditor General revealed many problems with DIAND's management of funding arrangements for Native communities. In 1996, two hundred and seventeen bands had a deficit. INAC's stated reasons for this were "deficient management capabilities, losses from activities carried outside of department-funded programs, weak accountability regimes and inadequate management systems."³¹ Band councils, on the other hand, stated that deficits were as a result of "inadequate base-level funding, populations that have increased dramatically over the past years and changing social imperatives."³² The auditor general pointed to a poorly-managed department that did not take into account the needs of the people they were apparently serving.

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³⁰ Ibid at 10.20 and 10.29.

³¹ Auditor General of Canada. Report of the Auditor General of Canada, November 1996 33 at 33.88.

³² Ibid

In 1996 the Auditor General pointed out that the numerous funding agreements were not conducive to definitive roles and responsibilities for the band as well as the Department.³³ The major issues concerned capacity, program and service delivery, control, responsibility and co-operation. The Auditor General noted that none of the funding agreements had been designed with any input of First Nations. This proved to be a major obstacle in getting First Nations to adopt the new funding agreements. Many bands refused to transfer from contribution agreement to the FTAs. As of January 1999, only 117 First Nations and tribal councils were using the FTAs which is only 20 percent of all First Nations. The Assembly of First Nations passed a resolution which rejected the FTA because it did not meet their needs and Natives were not consulted on it. The auditor general recommended that because "The Department still has a long way to go if it wishes to achieve its objective of implementing the FTA as the appropriate funding mechanism to replace other types of funding arrangements. It will need to find ways to expedite the conversion process while improving co-ordination with other federal departments."³⁴

A critique that is a constant throughout the auditor-general's report is that accountability needs to be improved. However, the auditor general did not recommend that arrangements between the government and Natives be more restrictive; instead, it recommended that INAC follow through with its own regulations. For example, the major purpose of the self-assessment workbook was to assure parliament that there is a certain degree of accountability between INAC and the bands. However, the department did not follow through with these --no level of corroboration was required, not even in "high risk

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³³ Ibid at 33.13.

³⁴ Auditor General of Canada, Report of the Auditor General of Canada April 1999, pt 10.2.

cases". There was also no evidence that these assessments were accepted or viewed by First Nations. A major problem identified by the Auditor General was that INAC was not ensuring consistency or accuracy in the local accountability measures put in place after the AFA which significantly increased their liability.³⁵

There is a connection between treaty rights and the delivery of programs and services because the roles and responsibilities of the Canadian government and the band councils are in part determined by treaties. Therefore to define those roles, especially through legislative amendments, is to modify those treaty rights. In a 1988 audit, it was recommended that DIAND introduce legislation that would define the rights and responsibilities of the band as well as the department for the purposes of accountability and liability to the government.³⁶ In this same audit DIAND was highly criticized for the mismanagement of funds and the numerous band deficits. The Department would regularly re-allocate money from Capital funds for housing to pay off the debts.³⁷ As a result, numerous houses were not built. Also, DIAND did not monitor the use of funds. Because of downsizing, there were not as many fieldworkers.³⁸ DIAND did not make sure the info was accurate, they looked at audits after making the funding arrangement recommendation.³⁹ All of these pointed to the DIAND as a liability to the government. They could not account for the funds to parliament and they were increasing liability risk by being incompetent. Reducing this liability risk has been a constant objective of the federal government and is continued in the proposed First Nations Governance Act.

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³⁵ Ibid at 10.34 and 10.35.

³⁶ Auditor General of Canada. Auditor General Report 1988 Chapter 14 at 14.122.

³⁷ Ibid at 14.108.

³⁸ Ibid at 14.106.

³⁹ Ibid at 14.96.

According to Minister Nault, “First Nations hold limited accountability to their members”⁴⁰ therefore disclosure, transparency and redress must be enforced through the legislation. The funding arrangements currently provide for all of these accountability measures; however, the government claims that they are difficult to enforce. Therefore, they need to be enforced through legislation which will hold them completely accountable instead of the current contractual agreements. As evidenced in the Auditor General report, it is INAC as a result of their policy of devolution that is not accountable and it is this which increases their risk of liability. In order to reduce the risk of liability without changing the policy of devolution, the government is introducing a new Act that will legally define the relationship between First Nations and the government. According to Minister Nault, legally defining First Nations will set out “a clear capacity of bands to sue, to contract, to borrow etc...” Accordingly, with clear powers to borrow and invest money, to pass certain by-laws that regulate businesses and by-law enforcement, and to “go about the normal business of contracting for goods and services” the new band council powers will further the economic development in communities.⁴¹

There are no statutory provisions for the legal capacity of a band. This does not mean that the band or band councillor is not liable. The capacity of a band “to sue or be sued arises by implication from and is tied to the statutory powers and obligations conferred on it.”⁴² Although the band council does not have corporate status, it has status

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⁴⁰ David C. Nahwegahbow. “Re: First Nations Governance Act” In AFN Briefing on the Governance Initiative, Booklet 3, p.24.

⁴¹ Indian and Northern Affairs Canada. “Communities First: First Nations Governance Under the *Indian Act*” A discussion paper for community consultations on the First Nations Governance Act, May 2001. Provided by the AFN Corbiere Response Unit.

⁴² *Montana Band v. Canada* 140 F.T.R. 30 [1998] 2 F.C 3 para.26.

inferred from council functions. As a result, the band is subject to the same liabilities as the law imposes on natural persons.⁴³ It is unclear to what extent functions and controls of band councils are tied into the Crown's fiduciary obligations.

The Federal Government's Position on Self-government

The meaning of accountability is stewed in a history of Canadian national policies on Native peoples, which all had the same objective of minimizing the responsibilities of the federal government while also restricting the impacts of Aboriginal and treaty rights. The 1969 White Paper, the 1992 Charlottetown Accord, the 1995 Inherent rights policy on Native self-government, the Gathering Strength policy in 1998 and the proposed First Nations Governance Act all attest to the government's consistent application of risk-management principles to Native policy. The shifting paradigms of minority rights within Canadian federalism are reflected in the rhetoric of these policies; however, the objectives remain relatively the same.

The demise of the Charlottetown Accord in 1992 caused a shift of focus on the means of attaining Native self-government. As the political scene was obviously not conducive to the aspirations of Natives on self-government, constitutional reform was replaced with attempts to realize the inherent right of self-government in s.35 of the *Constitution Act*. This new focus then became the federal government's gambit as they recognized the s.35 inherent right of self-government but defined self-government in minimalist terms. The meaning of self-government then is coupled with the government's

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⁴³ *Public Service Alliance of Canada v. Francis et. al.*, [1982] 2 S.C.R. 72.

administrative control of Indians as realized in the *Indian Act*. This has resulted in a deliberate miscomprehension of “what Indians want”. With the excuse that the honouring of treaties is not a workable plan, the government has attempted to appease Indians by giving them “control over their own lives” without actually recognizing any of their grievances. In effect, by using the self-government rhetoric the government gets what it wants which is to pass off administrative control to Indians while at the same time minimizing the liability of the federal government. This is evident in the most recent government initiatives, the First Nations Governance Act, the 1995 Inherent Rights Policy and the Gathering Strength Policy of 1998.

The government of Canada's official approach to self-government as set out in their 1995 Inherent Rights Policy outlines their acceptance of an inherent right to self-government as protected in the constitution under section 35 of the Constitution Act. However, as evidenced in the overall rejection of this policy, Native people hold a different definition of an inherent right. According to the federal government, inherent or existing right means contingent on negotiations with federal and provincial governments. Since Native governments must work within the existing Canadian Constitution and since litigation is “costly and ineffective”, according to the government negotiation is the only practical alternative. The source of the right is based on “the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and

their resources.”⁴⁴ Native people then have a right to be a group that can protect their cultures as long as it does not affect already existing federal and provincial jurisdictions. Much like the government's multicultural policy, Native people may have their cultural events as long as they do not presume to impose their right outside of the allotted cultural space. The assertion that Native people have always had their own form of government, and that they have always had a nation to nation relationship with Canada falls on deaf ears.

The government implicitly rejects the notion of a nation to nation relationship in the inherent right policy because to ensure “the proper functioning of the federation” the scope and status of Aboriginal self-government must be negotiated with provincial and federal governments.⁴⁵ Under the arrangement the federal government would negotiate with Aboriginals over the establishment of all core aspects of the government such as “governing structures, internal constitutions, elections, and leadership selection process, membership, Aboriginal language and culture, property rights and natural resource management.”⁴⁶ All areas are up for negotiation and any laws and regulations that “tend to have impacts that go beyond individual communities” would have to harmonize with federal or provincial laws.⁴⁷ It follows then that “primary law-making authority would remain with the federal or provincial government” and these laws would prevail over any

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⁴⁴ Government of Canada, Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government (Ottawa: Minister of Public Works and Government Services Canada, 1995), p.3.

⁴⁵ Ibid, p.3.

⁴⁶ Ibid, p.5.

⁴⁷ Ibid, p.6.

Native law.⁴⁸

Beyond negotiating jurisdictions, the 1995 Inherent Rights policy also outlines terms for funding arrangements and accountability between the bands and their members. Ultimately, this policy increases the responsibility of Aboriginal governments, thereby decreasing the responsibility and the liability of the federal government. To decrease the risk of litigation for the federal government, first it must ensure that the Aboriginal government has an adequate system in place for law-making and the exercising of authority which will respect the principles of "transparency, disclosure and redress." Secondly, the Aboriginal governments instead of DIAND, must be held accountable to Parliament for the funding provided. And a mechanism must be put in place so that Parliament can assess whether the money is being used for the designated purpose. Furthermore, funding would take the form of cost-sharing agreements that would specify the responsibilities of the federal government for on-reserve Indians and the provincial and territorial governments would have responsibility for off-reserve Indians.⁴⁹ This means then that DIAND would be gradually phased out as the self-government agreements are put in place.

The federal government's conception of a right to self-government is not separate from federal administrative control -- the right, which involves, for example, jurisdictions, leadership selection, and citizenship, is delegated by parliament and negotiated with the provinces. The federal government therefore does not recognize the right of self-government as inherent or as protected under the *Constitution Act*. To recognize a right

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⁴⁸ Ibid.

⁴⁹ Ibid, p.12-15.

to self-government as an Aboriginal right would mean that this right would be protected from federal or provincial jurisdiction, except where the federal government would fulfill the requirement to infringe an Aboriginal right as set out in *R. v. Sparrow*.⁵⁰

The First Nations Governance Act is in many ways similar to the Inherent Rights policy. The government is not attempting to enter into “modern treaties” with Aboriginals through the Act but it is being described as a means of “positioning First Nations to engage in more effective self-government negotiations under the Inherent Right policy.”⁵¹ The proposed act, as an interim step to implementing the Inherent rights policy, will provide for the accountability measure as well as the shift in responsibility as outlined in the Inherent rights policy.

Self-Government according to RCAP and the AFN

In response to the First Nations Governance Act, the Assembly of First Nations outlined its vision of governance which is based on the recommendations of the Royal Commission on Aboriginal Peoples.⁵² According to the RCAP Report, the inherent right of Aboriginal self-government must be recognized and this right must encompass all matters related to good governance. To implement this, the RCAP warned against “tinkering with the *Indian Act*” and instead outlined two areas of jurisdiction, core areas and peripheral areas, for which only the peripheral require negotiation.⁵³ The core areas

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⁵⁰ Kent McNeil, “Aboriginal Government and the Canadian *Charter of Rights and Freedoms*” *Osgoode Hall Law Journal* 34 (1) Spring 1996, 66.

⁵¹ INAC, “First Nations Governance” A beck.

⁵² Assembly of First Nations, “Discussion Paper on Governance” AFN Briefing on Governance Initiative Booklet 2. Confederacy of Nations May 8-10, 2001, p.14.

⁵³ David Nahwegahbow, p.22.

would be exercised without the interference of other governments and negotiation would not be necessary because Aboriginal people have capacity to implement this core area of jurisdiction through self-starting initiatives. Therefore, a legislative amendment on jurisdiction with the federal and provincial government would be unnecessary.

The RCAP envisioned a balanced and harmonious concept of Aboriginal self-government within the Canadian constitutional framework. The principles of renewed relationship, self-determination, self-reliance and healing were meant to work interdependently to change the Canadian dynamic to be more receptive to Aboriginal self-government. Relating as equals and co-existing according to separate laws and institutions is the principle behind a renewed relationship. Healing will be facilitated through all of these principles with a "respect for culture, sharing and mutual responsibility."⁵⁴ By recognizing existing treaties and entering into modern agreements that are protected under section 35 of the *Constitution Act*, the political and economic relations will be restructured and contribute to self-reliance. New treaties, including a new Royal Proclamation which would "signify a new relationship between Canada and First Nations" accompanied by legislation to facilitate the recognition of Aboriginal treaties would transform the Canadian-native dynamic under the current constitutional framework. The new legislation would include an Aboriginal Treaties Implementations Act, an Aboriginal Lands and Treaties Tribunal Act, an Aboriginal Nations Recognition and Government Act, an Aboriginal Parliament Act, an Aboriginal Relations and Indian Services Act, an International Human Rights Instruments Act and new federal ministers with the

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⁵⁴ Marlene Brant Castellano, "Renewing the Relationship: A Perspective on the Impact of the Royal Commission on Aboriginal Peoples" in Aboriginal Self-Government in Canada ed. by John H. Hylton (Saskatoon: Purich Publishing Ltd, 1999), pp.97-99.

responsibility to implement the acts.⁵⁵ The Assembly of First Nations accepted these recommendations and lobbied the government for their implementation. The government responded with Gathering Strength and the Aboriginal Action Plan which paid lipservice to the recommendations.

The Assembly of First Nations diverges from the RCAP recommendation by advocating a constitutional amendment which recognizes Aboriginal governance as a third order of government. First Nation governments would then be on equal footing with the provincial and federal government, therefore First Nation laws would have “paramountcy over conflicting federal and provincial laws.” The Assembly of First Nations further argues that the *Canadian Charter of Rights and Freedoms* would not apply to First Nation governments; it would be replaced by a First Nations Charter of Rights. Their authority would be consistent with ensuring the protection of First Nations’ right to “preserve, promote and protect aboriginal languages, cultures and relationships with the land and environment.”⁵⁶

An alternative conception of self-government

In grappling with the definition of an Aboriginal right of self-government Sally Weaver concluded that there is no such thing as a section 35 Aboriginal right to self-government because this right is not recognized by Canadian institutions and in fact those institutions do not have the capacity to recognize an inherent right of self-government.⁵⁷

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⁵⁵ Assembly of First Nations, Discussion Paper on Governance p.14.

⁵⁶ Assembly of First Nations, Discussion Paper on Governance , May 2001.
[www.afn.ca/Programs/governance/Federal Government/GovernanceAct.htm](http://www.afn.ca/Programs/governance/Federal%20Government/GovernanceAct.htm)

⁵⁷ Sally Weaver, “An Assessment of the Federal Self-Government Policy” in Justice for Natives: Searching

Sakej Henderson disagrees. He argues that the Aboriginal conception of an inherent right involves the constitutional recognition of a "*sui generis* Aboriginal order" which entails customs, traditions and laws that have been passed down by elders since time immemorial.⁵⁸ The courts have interpreted this *sui generis* Aboriginal order as one that exists and must be protected under the constitution. The courts also established that the Crown has a fiduciary obligation to protect these rights and that the Crown also cannot infringe upon these rights without following set regulations. The relationship between Aboriginals then is defined according to the fiduciary one but the nature of the *sui generis* Aboriginal order also transforms the relationship into a nation to nation one within the current constitutional framework. Therefore, contrary to Weaver's assertion, an Aboriginal right to self-government is not dependent on the Crown.

As mentioned in Chapter Two, Aboriginal rights were first interpreted as *sui generis* in *Guerin v. R.*⁵⁹ In *Guerin* the judges were deliberating over the terms of a lease whereby the Natives from the Musqueam Indian Band had surrendered their land for lease to the Crown so that it could negotiate on their behalf. In attempting to understand the nature of Indian title, the court found that common property law could not be applied to Natives' because "Aboriginal land rights were inherent, did not depend upon prior recognition or affirmation by the Crown, and did not need to correspond to additional common law conceptions of property rights to receive the common law's protection."⁶⁰

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for *Common Ground*, ed by Andrea Morrison (Montreal&Kingston: McGill-Queen's Press, 1997),p.112.

⁵⁸ Sakej Henderson, "Analysis of INAC documents: Key Aspects of First Nations Governance Act and Core Elements for Governance and Accountability" prepared for the AFN, p.27.

⁵⁹ (1984), 13 D.L.R. (4th) 321 (S.C.C)

⁶⁰ John Borrows and Leonard I. Rotman "The *Sui Generis* Nature of Aboriginal Rights: Does it make a difference?" *Alberta Law Review* 36(1) 1997,p.20.

Recognizing Aboriginal title interests as *sui generis*, the court recognized the existence of a separate Aboriginal legal order. The court recognized a legal order that was unique and different but also co-existed with English law and the Crown's assertions of sovereignty. This interpretation of Aboriginal rights has extended to an interpretation of the relationship between the Crown and Aboriginals and to treaty rights.⁶¹

The principles of an Aboriginal legal order can be recognized within the current constitutional framework and are consistent with Supreme Court decisions on Aboriginal and treaty rights. Since the courts have established that treaties must be interpreted through historical context and must be interpreted in a liberal manner to the benefit of Indians, then Aboriginal traditions may be interpreted through the current constitutional framework.⁶² This indicates that they are not to be read literally, thereby leaving the door open for translation. For example, Borrows argues that, when read in historical context, the Royal Proclamation affirms a positive right to self-government.⁶³ This means that the federal government has the duty to ensure that Native people enjoy the rights of self-government, which would also involve the financing of these governments. The very nature of section 35 implies a positive as opposed to negative right, which means that the government has a duty to act upon, not just to protect, Aboriginal and treaty rights.

However, an inherent Aboriginal right to self-government is not dependent on the interpretation of treaties; it is protected as an Aboriginal right under section 35 of the *Constitution Act*. As established in *R.v. Van der Peet*, "in order to be an Aboriginal right

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⁶¹ Ibid, pp.11-12.

⁶² *R.v.Badger*, [1996]4 W.W.R.457

⁶³ John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government" in *Aboriginal and Treaty Rights in Canada* ed. by Michael Asch (Vancouver: UBC Press, 1997),p.155.

an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal claiming the right.”⁶⁴ It is based on the traditions, oral histories and cultures of Aboriginals and therefore “Aboriginal speaking elders and designated persons are primary sources for and authorities on *sui generis* Aboriginal legal orders.”⁶⁵ Since the *Constitution Act* does not specify how an Aboriginal right of self-government is to be exercised then it is up to the “Aboriginal peoples who are free to choose their own traditions, values and present needs.”⁶⁶

The Crown's fiduciary obligation is always applied when it takes any action that may affect Aboriginal or treaty rights. There are two interpretations of this responsibility: one is a trust interest which “implies strict accountability to the interests of the beneficiary”; the other is a “sacred trust of civilization” notion which is a more “paternalistic and oppressive” as it vests in the crown the power to determine what is a reasonable limitation on Aboriginal rights.⁶⁷ However, in *Sparrow*⁶⁸ it was established that to infringe an Aboriginal right the Crown must first prove that the legislation fulfills a valid legislative objective and the legislation is consistent with the government's fiduciary duty. What this duty entails is still uncertain. *Delgamuukw*⁶⁹ extended the duty to negotiate; however, this was dependent on the effect of the potential infringement which is up for interpretation.

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⁶⁴ *R.v. Van der Peet*, [1996] 2 S.C.R.507, para 46. As quoted in Shin Imai, *The 2000 Annotated Indian Act and Constitutional Provisions* (Scarborough: Carswell, 2000),p.362.

⁶⁵ Henderson , “An analysis of INAC documents on the First Nations Governance Act” p.28.

⁶⁶ Kent McNeil p.66.

⁶⁷ Russell Lawrence Barsh and James Youngblood Henderson, “The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand” (1997)42 *McGill Law Journal* ,p.1002.

⁶⁸ [1990] 1 S.C.R.

⁶⁹ [1997] 3 S.C.R

There is a connection between accountability and good governance. The relationship between a citizen and a state consists of mutual obligations. With charges of dictatorial rule, the federal government has unilaterally determined that Native leaders and has not fulfilled its obligations due to the current system imposed upon Natives in the *Indian Act*. But the Native situation within the Canadian state is more complicated than that. Native people do not necessarily recognize their obligations to the Canadian state and the Canadian state does not recognize the legitimacy of Native nations. This, of course, has always been the case. The Canadian state has a legal obligation to protect the interests of Natives in the case of land surrenders and if there is the possibility of infringing an Aboriginal right. Self-government is an Aboriginal right and this right must be protected. However, the government has had a consistent policy of attempting to limit this right for the purposes of risk management; it is attempting to reduce its risk of litigation which is inconsistent with the *Constitution Act*. The First Nations Governance Act is a continuation of this policy and is equally as illegitimate.

Conclusion: Relationship, Rights and Responsibilities

“Let’s face it, we are all here to stay.”¹ Lamer C-J’s oft-quoted statement from the Supreme Court of Canada decision in *Delgamuukw v. British Columbia*² expresses a need for a reconciliatory relationship between the federal government and Natives. And it is a prelude to the court’s stance that the two parties must avail themselves of negotiation instead of litigation to settle the rights-claims that are protected under section 35 of the *Constitution Act*. Following this, consultation with the federal government may become the mainstay of Aboriginal rights discourse, representing a significant shift in the relationship. As evidenced in the deficient consultations on *Corbiere*, such a shift would also require that the power relationship between the Crown and Natives be balanced. Enforcing fiduciary duties on the Crown which will respect *sui generis* Aboriginal rights can be a step towards balancing this power relationship and also towards ensuring that negotiations do not degenerate into the government dictating its terms and conditions for surrender.

The response to *Corbiere* and the decision itself represent the struggle to define and determine Native governance and this translates into a struggle to determine the terms and conditions of the Crown-Native relationship. The federal government has responded to the decision by attempting to shift all responsibility for governance onto Natives. On the other hand, Natives and, in particular, the Assembly of First Nations have argued that they have an inherent right to self-government and must be dealt with as Nations. I have argued for a compromise between these two opposing positions: in order to ensure Native

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¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 par. 186.

² [1997] 3 S.C.R. 1010

governance, Natives should use a fiduciary relationship which as its basis is powerlessness in order to secure a position of power. To ensure that the fiduciary relationship develops into a Nation to Nation relationship, changes will have to occur at the legislative, procedural or bureaucratic and judiciary levels. The government must be held to certain obligations as a result of its history of colonial policies. It is not useful to disregard hundreds of years of policies that were directed at destroying Natives for what is being promoted in the proposed First Nations Governance Act as accountability. This leads to a partial conclusion that before fiduciary duties lead to a transformed Crown-Native relationship, the concept of governance that the Court and Parliament have been attempting to impose on Natives will first have to be revealed as a further step in a process of colonization.

The key component to finding a fiduciary obligation is “the need to control the potential for the fiduciary to abuse his or her power to the detriment of the beneficiary.”³ In the context of the Crown-Native relationship, the abuse of power must be attributed to processes of colonization. The *Indian Act* and the *St. Catherine's Milling* case are both examples of a colonial mentality where the Crown determined the best interests of Natives. Natives in these cases were considered powerless and according to *St. Catherine's Milling*, Native interests were personal and usufructuary and enjoyed at the pleasure of the Crown. This line of thought contributed to the 1969 White Paper policy which meant to solve the “Indian Problem” by dismantling Indian Affairs and the *Indian Act*, thereby integrating Native people into mainstream society. Native peoples’ negative

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³ Arne Peltz and Luningning Alcutas-Imperial, “Fiduciary Obligations as a Source of Remedies against Public Officials: The Aboriginal Context and Beyond.” The 1993 Pitblado Lectures: Fiduciary Duties/Conflicts of Interests (Manitoba: The Law Society of Manitoba, 1993) p.34.

reaction and co-ordinated efforts to resist the 1969 policy contributed to the 1973 Supreme Court of Canada decision in *Calder* which recognized that the source of Aboriginal rights was not dependent on legislative action; the source of Aboriginal rights stemmed from pre-existing, distinct societies with their own systems of government. The *sui generis* nature of Aboriginal rights may be used to Native Peoples' advantage in order to ensure that the Crown-Native relationship does not remain a fiduciary one. Natives can use these rights to their advantage within the fiduciary relationship without having the Courts define, determine and regulate Aboriginal rights.

At the level of the judiciary, the courts must recognize Native governance as a legal right. A fiduciary obligation which takes into account current and historical circumstances is necessary to secure this right. To move towards reconciliation, the nature of the Crown-Native relationship must be clearly understood and interpreted in a purposive manner by the courts. This includes an understanding of the nation-to-nation relationship of treaties, alliances and agreements as well as an understanding of the historical relationship under the *Indian Act*. Since the time of first contact between Europeans and Natives, their relationship was based on mutual interests and obligations. The First Nations and the Crown related to one another as nations. A history of colonial policies has severely altered this relationship so that Natives are now gravely dependent on the government. To shift responsibility for governance onto the band council is no solution because they are clearly disadvantaged in determining the terms. The federal government has complete jurisdiction over Natives, showing a clear power imbalance between the two. The application of fiduciary doctrine to the Crown-Native relationship would be a step towards balancing this out because the Crown would have to abide by fiduciary principles

of equitable conduct.

In *Corbiere*, the Supreme Court failed to consider the effect of the government's colonial policies as a factor in finding s.77(1) of the *Indian Act* discriminatory. Instead, the Court recommended that band councils be accountable to all of their members. In effect, the Supreme Court of Canada upheld a certain form of governance for Natives and opened an opportunity for the federal government to impose its own conception of Native governance onto Native communities.

To ensure that the federal government does not impose its own conception of governance onto Natives, it must be recognized that the government has a fiduciary duty to ensure good faith consultations. Currently good faith consultations are not possible. As evidenced in the *Corbiere* and First Nations Governance Act consultations, the government controls Aboriginal organizations and band councils through funding. The difficult process of consulting with Aboriginal groups will have to be a priority for the government. This cannot be done through individual internet consultations. Instead, the relationship between the Crown and Natives is going to have to be rebuilt on premises that do not involve legitimating certain Aboriginal groups as official representatives over others.

At the legislative level, the fiduciary cannot unilaterally change the terms of the relationship. The government abused its power in responding to *Corbiere* by pursuing its own interests to the detriment of Natives. The government was clearly in a conflict of interest with respect to its fiduciary obligations when it chose to respond to the decision without first consulting with First Nations because the response will affect the very nature of the Crown-Native relationship within the *Indian Act*. This was exacerbated by the

Supreme Court's interpretation of the government's responsibilities to band councils and the band councils' responsibilities to its members. Band councils do not currently have the structure or capacity to support the increased responsibility of a larger constituency with competing interests. The consequent liability risks will lead to instability because councils will not be able to be fully accountable to their members. As a result, band councils may be forced into agreements that they likely would not have agreed to otherwise -- such as the agreements that were proposed in the federal government's 1995 Inherent Rights Policy. The government's response to *Corbiere* and the issue of liability and accountability is governance -- not Native governance but the Court's and Parliament's conception of governance for Natives.

The Supreme Court's interpretation of *Corbiere*, coupled with the Liberal government's fat majority in Parliament, opened the door to the Proposed First Nations Governance Act -- a policy that attempts to limit Native rights to self-government. It is reminiscent of the colonial approach to Aboriginal rights in the 1888 *St. Catherine's Milling* case and the 1969 White Paper policy. Ottawa's response to *Corbiere* -- like the decision itself -- is not consistent with the principles laid out in *Calder*. The government's obligation to ensure the *sui generis* Aboriginal right to governance is not just political; it must be recognized as a legal right.

Fiduciary doctrine, as shown in this thesis, may be used as a means of regulating the negotiations between the Crown and Natives. Cultivating the relationship so that it will be empowering for Natives is the tricky part. Unlike a doctor-patient relationship the Native-Crown relationship must be cultivated so that the government is not determining the best interests of Natives. If the courts were to recognize Native self-government as a

s.35 right, reconciliation between the Crown and Natives would be more likely to occur. Applying fiduciary doctrine to this relationship could satisfy both parties. Both Aboriginals and the Crown would be directed by mutual obligations. The Crown's obligations to ensure Aboriginal self-government would shift as the situation dictates. And by balancing out the power relationship and providing Natives with the necessary tools to negotiate, Natives would be more likely to want to do so. The government would be forced to enter into negotiations with Aboriginals on equal terms. From *Calder* to *Guerin* to *Sparrow*, recognizing Native governance as one of the Crown's fiduciary responsibilities seems to be a logical step -- a step away from the abrogation of responsibility.

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