SHOULD S. 91(24) LANDS REMAIN IN PLACE IN POST-TREATY BRITISH COLUMBIA?

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I. INTRODUCTION

This paper is being presented in the context of "Canada's Responsibility for Aboriginal Peoples". I commence the discussion with a review of the s. 91(24) provision with respect to "Lands reserved for Indians". The oft-cited "made in B.C." Treaty Process to which Canada is a full party is a significant setting to assess Canada's actual role and legal obligations to protect aboriginal interests under s. 91(24). It is important to put this discussion in the context of the significant legal issues which are presently arising in British Columbia as a result of the B.C. Treaty process and Canada's positions in that treaty process and the obligations imposed by the Courts on the Crown to fulfill its obligation to consult prior to infringing aboriginal rights and title. For that reason, I shall discuss the B.C. Treaty Process.

I propose to address the questions of where the federal Crown's fiduciary duty to Aboriginal peoples fits within the Treaty making process. I will also address the scope of the Provincial Crown's fiduciary duty.

I will also provide some comments on the importance of s. 91(24) in relation to the Treaty Process and the present Crown position in the treaty process.

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II. SECTION 91(24) OF THE *CONSTITUTION ACT, 1867*

When looking at this section of the *Constitution Act, 1867*, it is necessary to look at both branches together, for they are intertwined in that together they represent an historic promise given by the Crown, to Aboriginal peoples. In other words, the protection of Aboriginal Nations necessarily includes the protection of their culture, of which land is an integral component.

Section 91(24) of the *Constitution Act, 1867* confers upon the federal Parliament the power to make laws in relation to "Indians, and lands reserved for the Indians". This section thus contains reference to two branches of power:

> ...a power over "Indians" and a power over "lands reserved for the Indians". The first power may be exercised in respect of Indians (and only Indians) whether or not they reside on, or have any connection with, lands reserved for the Indians. The second power may be exercised in respect of Indians and non-Indians so long as the law is related to lands reserved for the Indians.[2]

As Peter Hogg notes, the main purpose of the section is the protection of Aboriginal Nations:

> The main reason for s. 91(24) seems to have been a concern for the protection of the Indians against local settlers, whose interests lay in an absence of restrictions on the expansion of European settlement. The idea was that the more distant level of government - the federal government - would be more likely to respect the Indian reserves that existed in 1867, and generally, to protect the Indians against the interests of local majorities. A second reason was probably the desire to maintain uniform national policies respecting the Indians. The Royal Proclamation of 1763 had established that treaty-making with the Indians was the sole responsibility of the (imperial) Crown in right of the United Kingdom. After confederation, the federal

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[2] Hogg, P.W. 1999. *Constitutional Law of Canada*, Volume 1, Toronto: Carswell, at page 27-4.

> government was the natural successor to the responsibility.[3]

The second branch of s. 91(24), "lands reserved for the Indians" includes lands set aside as Indian reserves. However, as Professor Hogg has stated:

> it also includes the huge area of land recognized by the Royal Proclamation of 1763 as "reserved" for the Indians, that is, all land within the territory covered by the Proclamation that was in the possession of the Indians and that had not been ceded to the Crown. In *Delgamuukw v. British Columbia* (1997), the Supreme Court of Canada went even further, holding that the phrase extends to all "lands held pursuant to aboriginal title". For that reason only the federal Parliament had the power to extinguish aboriginal title. [4]

Kent McNeil reviewed the legal consequences for federal jurisdiction of Indian lands following the *Delgamuukw* ruling:

> The Delgamuukw decision clarified that federal jurisdiction over "Lands reserved for the Indians" extends to Aboriginal title lands. Moreover, Lamer C.J.C. held that this jurisdiction, because it is exclusive, prevents provincial laws from extinguishing Aboriginal title, either directly or indirectly. This is because s. 91(24) of the Constitution Act, 1867 "protects a core of federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity." [See Note 148 below] As Aboriginal rights, including Aboriginal title, are "part of the core of Indianness at the heart of s. 91(24)," even prior to their recognition and affirmation by s. 35(1) of the Constitution Act, 1982 "they could not be extinguished by provincial laws of general application." [5]

As far back as 1888, the Privy Council held with respect to the scope of s. 91(24):

> ...the words actually used [in s. 91(24)] are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian

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[3] Hogg, *supra* at page 27-2.

[4] Hogg, supra at p.27-5

[5] Kent McNeil, AAboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction@ , 61 Sask. L. Rev. 431

> occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.[6]

Indeed, Lamer C.J.C. affirmed in *Delgamuukw,* that "Aboriginal title is a right in land" and that "[Aboriginal title] at common law is protected in its full form by s. 35(1)", thus making it a form of property right protected by the Canadian Constitution.[7]

From an aboriginal perspective, the protection of "lands reserved for Indians" is consistent with the protection of "Indianness" under the first branch of s. 91(24). Aboriginal people are tied to their lands through their basic identity of "Indianness". The aboriginal relationship with the land is part and parcel of the relationship to the culture and how the people govern themselves. Thus, the two branches of s. 91(24) are intertwined, and should be considered as such when applying the purposive approach to determining what s. 91(24) is intended to protect. Although it is clear that in assessing legislative intent, the aboriginal interpretation is not a factor to be addressed[8] , the inter-relationship between Indianness and "Lands reserved for Indians" and the concurrent federal obligation to protect those interests is a significant factor in assessing the scope of the Crown's fiduciary duty and the breach of that duty.

When the *Constitution Act, 1867*, was agreed to by the then colonies and later, British Columbia, it was recognized that the protection of "Indians and lands reserved for Indians" would remain with the federal government. The interests considered in 1867 as to these protections are the same interests that Aboriginal peoples continue to express in 2004: to guarantee the continuation of the people, the land is integrally tied into the equation, and how the Aboriginal people manage their institutions includes how the land base will be managed. Thus, the *Royal Proclamation of 1763* and the 1867 inclusion of s. 91(24) were evidence of the Crown's promise that these integral aspects of

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[6] *St. Catherines Milling and Lumber Co. Ltd v. The Queen* (1888) 14 A.C. 46 at 59

[7] *Delgamuukw v. The Queen,* [1997] 3 SCR 1010 at pars. 111, 133

what it means to be, and to continue to remain Aboriginal Nations, would be honoured by the Crown. Any Treaty with an Aboriginal Nation, therefore, should include a land component, which remains protected under s. 91(24).

The British Columbia Supreme Court has confirmed a wide constitutional power under s.91(24) in *Chingee v. British Columbia*.[9], in which the Court found that off-reserve lands were granted protection because Canada had the constitutional power and capacity under s. 91(24) to recognize the lands as being under its jurisdiction:

> The Indian Act is but one vehicle which has been used to define Indian interests in land protected by Canada, but it is not the only mechanism that has been used for this purpose...In my view, the opinions expressed in both *Delgamuukw* and *Ross River* make it clear that the federal government has jurisdiction, pursuant to s. 91(24), over all lands set aside for the benefit of Indians, even if those lands do not constitute reserves as defined by the Indian Act. Similarly, in the case at bar, I think that Canada has the constitutional power and capacity, under s. 91(24) to recognize severalty lands as being under its jurisdiction. [pars. 81-86]

The broad interpretation given to "Indian lands" under s. 91(24) was justified as being consistent with Canada's historical fiduciary duty. Canada could not rely on a technical argument to deny the Band its rights under the Treaty regarding the lands:

> Although the proviso as to non-alienation does not require Canada to maintain legal control over severalty lands, as it does reserve lands, it is nevertheless, in my view, an extension of the historical protection of Indians from improvident bargains. It is, as plaintiff's counsel stressed, a hallmark of the Crown's traditional fiduciary duty, one of the most basic principles of Indian land law, and is therefore indicative of s.91(24) jurisdiction. [par. 78]

Section 91(24) was created for the purpose of protecting Aboriginal peoples and their land base is

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[8] *Mitchell v. Peguis Indian Band* [1990] 2 S.C.R. at pars. 33, 35

[9] *Chingee v. British Columbia* [2002] B.C.J. No. 2544 (British Columbia Supreme Court).

inextricably connected to the Crown's fiduciary duty to Aboriginal peoples.

III. THE B.C. TREATY PROCESS AND SECTION 91(24)

Both Canada and British Columbia are maintaining a negotiating position [which they imply is non-negotiable] in the British Columbia Treaty Process that Aboriginal Nations, in exchange for treaty lands, are being asked to forgo the protection of s.91(24) so far as it applies to "Lands reserved for Indians" Aboriginal Nations are also being asked to forgo the protection to their rights and their lands arising from the Crown's fiduciary duty to Aboriginal peoples.

The present position of the Crown parties is such that lands over which Aboriginal Nations will have "treaty rights" must be s.92 Lands under provincial jurisdiction. Although Aboriginal Nations can negotiate a right of self-governance over those lands, the Crown parties are insisting that such governance agreements must be outside the Treaty and therefore, not have constitutional protection[10]. As a result, Aboriginal Nations are being asked to revoke the constitutional protection of s.91(24) with respect to their lands and the constitutional protection of s. 35 with respect to the right to govern those lands in a post-treaty environment. The implication of these two concessions is the extreme limiting of the Crown's fiduciary duty as a result of the treaty negotiations.

Perhaps the Crown parties believe that if the lands remained s. 91(24) lands there is no ability to agree to provincial rights of access for certain purposes. However, this can be set out in the Treaty. Or, it could be that the Crown parties believe that if the lands remained s. 91(24), there would be a patchwork of lands. However, this is and has been the case across Canada since before

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[10] *Campbell v. British Columbia (Attorney General)*, cited to [2000] BCSC 1123; [2000] 4 C.N.L.R. 1 (B.C.S.C.). This position is as a result of the B.C. Supreme Court decision in *Campbell v. B.C. and Canada* in which the present provincial Premier and Attorney General, Geoff Plant, while in opposition, challenged the Nisga'a Final Agreement [B.C. language for Treaty] on the basis that it was unconstitutional in attempting to create a "third order of government@ within the Canadian constitution. Williamson, J. held that there could be an aboriginal right of self-government protected by s. 35 of the *Constitution Act, 1982* pre-treaty. When they became the government Mr. Campbell and Mr. Plant dropped the Appeal.

Confederation. It is unrealistic to think that treaties will not be different across Canada, due to the different time periods in which they were negotiated. Or, it could be that the Crown parties believe that eliminating section 91(24) lands will ensure that the antiquated *Indian Act* will not apply. However, Section 91(24) lands are not dependent on the existence or maintenance of the Indian Act. There are Aboriginal Nations which have section 91(24) lands with other federal legislation applying such as the *Cree-Naskapi (of Quebec) Act*.

Obviously there are serious problems for Aboriginal Nations with this situation. The Crown parties have put up their hands to repeat the obvious refrain, "This is a voluntary process. Each Party has a right to its position." However, the choices for Aboriginal Nations are to refuse to enter treaty negotiations [which several Aboriginal Nations in B.C. have done] or to withdraw from the B.C. Treaty Process. The problem with the second option is that a significant amount of the negotiation costs over the last decade have been "loans" to the Aboriginal Nations and have to be repaid. For those Aboriginal Nations in the Treaty process, the Crown's non-changing position on S. 91(24) and a right of governance outside the Treaty are very serious impediments to achieving a treaty.

The reality is that the majority of Aboriginal Nations involved in the Treaty process find themselves with ten years of accumulated debt, no closer to making a Treaty than when they began the process. Certainly, there are four Aboriginal Nations who have reached Agreements-in-Principle and are now grappling with the reality of facing the prospect of making a final Treaty with the knowledge that they are being asked to sign away their constitutional protections of s.91(24)[with respect to Lands] and s. 35 with respect to Governance.

This raises the issue as to whether the Crown is in breach of the fiduciary duty owed to Aboriginal Nations, as articulated by the courts, as they maintain these untenable and exploitative positions at the Treaty table.

Further, within the context of this the B.C. Treaty negotiations whilst the Parties are in the midst

of negotiating the location of Treaty lands and the scope of rights within Aboriginal territories outside Treaty Lands at the Treaty table, the Provincial Crown is authorizing logging and other resource exploitation activities, thereby alienating the land base and the resources which are essentional to maintain the ability to exercise aboriginal rights. Individual Aboriginal Nations continue to receive several consultation referral requests per week from provincial ministries and third parties, with no financial or human resources with which to respond.

When the Aboriginal Nation seeks Interim Measures at the Treaty table to address these continuous encroachments on their traditional lands and resources and the impact on their ability to exercise their rights, the provincial Crown puts up their hands and give the following refrain, "I'm sorry, but you will have to address your concerns to the line ministries involved."

At the same time, the provincial Crown has been rewriting legislation [forestry is the prime example], to attempt to remove Crown consultation obligations and transfer those obligations to third parties after a series of court decisions which made it very clear that the Crown obligation to consult arose at each stage at which the Crown made decisions which could effect the aboriginal rights.

Add to this the fact that the Provincial Crown has cut its budget to negotiate treaties and is advocating changes to previously agreed upon work plans such as longer breaks between meetings and more meetings in Victoria to accommodate their overextended staff. The Province, which has set a fixed election date in May, 2005, has decided to focus on the four Aboriginal Nations who have signed an Agreement in Principle and to limit the negotiations at other tables with less meetings, junior negotiators and less resources.

It certainly does not appear to reflect an atmosphere conducive to good faith negotiations of long overdue Treaties in British Columbia.

Where does Canada fit into this picture? Canada maintains that it cannot negotiate treaties in B.C. without the provincial Crown. In fact, the jurisdiction to negotiate treaties has been within Federal jurisdiction and has been so held since *St. Catherines Milling Ltd v. The Queen*.[11]

Secondly, Canada has recognized the protection of Indian lands under s. 91(24) for most of its treaty-making history up to the signing of the *James Bay and Northern Quebec Agreement* adopted in 1984. In the negotiation of the *Sechelt Indian Band Self-Government Act,* 1986[12], which was outside treaty negotiations, Canada relied on its jurisdiction under s. 91(24) and retained the reserve lands over which there would be self-government as section 91(24) lands.

Thirdly, Canada has publicly maintained that it will negotiate in British Columbia without priorizing certain tables and, in fact, both British Columbia and Canada agreed to that in the tri-partite Agreement leading to the B.C. Treaty Process[13].

In the context of British Columbia's behaviour both within the Treaty process [its positions on s. 91(24) and the right of self government] and its attempt at off-loading or eliminating its constitutional obligation to consult, the question is what role should Canada play with respect to protection of its constitutional obligations to protect the rights of aboriginal peoples.[14] Surely, it is time for Canada to stand up and maintain its fiduciary obligation to the Aboriginal Nations in British Columbia.

IV. THE CROWN IS INDIVISABLE

It is clear from the aboriginal perspective, as described by Dickson C.J. in *Mitchell, infra*, at 108-109,

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[11] (1888) 14 A.C. 46

[12] [1986] c. 27

[13] See the B.C. Treaty Commission Agreement between Canada, British Columbia and the First Nation Summit dated September 21, 1992

[14] See *Sparrow v. The Queen* [1990] 1 S.C.R. 1075, at p. 1108

that the relationship between Aboriginal peoples and the Crown is not contingent upon a separation of the Federal and Provincial fiduciary duty. Rather, Aboriginal Nations see their dealings with the Crown as a "one-window approach" when negotiating treaties or otherwise:

> ... the Indians' relationship with the Crown or Sovereign has never depended on the particular representatives of the Crown involved. From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed upon itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations. This is not to suggest that aboriginal peoples are outside of the Crown, nor does it call into question the divisions of jurisdiction in relation to aboriginal peoples in federal Canada.

Despite this the Province of British Columbia, in particular, has argued that it does not have a fiduciary duty to Aboriginal peoples. However, the Supreme Court of Canada held in 1996 that the Provincial Crown has a fiduciary duty, as evidenced by the Supreme Court requiring the Alberta Government to justify the infringement of a Treaty right in the *R. v. Badger*, [1996] 1 S.C.R. 771. This legal principle has been followed by lower courts in such cases as the following: *Cree School Board, Halfway River, Taku, Haida, Gitxsan* and *Powley*.[15]

Indeed, Williamson J, in *Gitanyow First Nation v. Canada*, [1999] 3 C.N.L.R. 89, dealt succinctly with the provincial government's denial of fiduciary responsibility, at par. 47:

> In 1867, the powers, duties and responsibilities of the Crown pre-Confederation were enumerated and assigned to either the Crown in Right of Canada and or the Crown in Right of the Provinces. But, as can be seen above, the fiduciary obligation of the Crown which characterized its relationship with Aboriginal peoples has continued after 1867 as before. As a result, in its dealings with native peoples within its jurisdictional powers, the Crown in Right of British Columbia must act in light of

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[15] See also *Cree School Board v. Canada (Attorney General)*, [1998] 3 C.N.L.R. 24; *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666 (B.C.C.A.); *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project* (2002), 211 D.L.R. (4th) 89; *Haida Nation v. British Columbia (Minister of Forests)* (2002), 99 B.C.L.R. (3d) 209 (B.C.C.A.)[*Haida I*]; *Haida Nation v. British Columbia (Minister of Forests)* (2002), 5 B.C.L.R. (4th) 33 (B.C.C.A.) [*Haida II*]; *Gitxsan and other First Nations v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4th) 126; *R. v. Powley*, 2003 SCC 43

> that duty even as its predecessor, the Crown of colonial times, should have done... I conclude that the duty to negotiate in good faith, founded upon the fiduciary relationship between Aboriginal people and the Crown, **applies equally to the Crown in Right of Canada and the Crown in Right of British Columbia**. [Emphasis added].

This finding has also been reiterated by Lambert J. in *Haida I*, at par. 23[16]:

> [23] [T]he authorities do establish, as a matter of law, that the federal Crown stands in a fiduciary relationship with all Aboriginal peoples of Canada, *and the provincial Crown stands in a similar relationship to the Aboriginal peoples of British Columbia.* [Emphasis in original].

[16] *Haida I*, supra, also see pars. 34 and 36: [34] "The trust like relationship is now usually expressed as fiduciary duty *owed by both the federal and Provincial Crown* to the aboriginal people...; [36] So the trust-like relationship and its concomitant fiduciary duty permeates the whole relationship between the Crown, *in both its sovereignties, federal and provincial*, on the one hand, and the aboriginal peoples on the other.@[emphasis in the original].

V. THE CROWN'S FIDUCIARY DUTY

As a result of the present positions of the Crown parties at the treaty negotiation tables, on s.91(24) and governance, in British Columbia, in particular, it is arguable that the Crown parties are in breach of their fiduciary duties owed to those Aboriginal peoples with which they are presently negotiating Treaties. Rather, I propose to refer to those elements of its history and judicial analysis which form the basis to assess the Crown's breach of the fiduciary duty in the context of the Crown's position on the protection of s. 91(24) lands and the protection of the right of self-government.

Any discussion of the federal fiduciary duty towards aboriginal peoples must begin with *Guerin*[17], which has been described as a landmark case which "blazed a new path in Canadian aboriginal rights jurisprudence" entailing a "complete overruling of the principles which had shaped judicial considerations of aboriginal rights in Canada for almost a hundred years"[18].

In the words of Professor Brian Slattery:

> The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a >weaker' or >primitive' people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.[19]

In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the Supreme Court of Canada extended the fiduciary relationship between the Crown and Aboriginal peoples to apply to the constitutional protection of Aboriginal and treaty rights in s.35 of the *Constitution Act 1982*. The Crown was obliged to justify any regulation that infringed upon those rights. Indeed, as stated by Dickson C.J. and LaForest J:

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[17] *Guerin v. The Queen*, [1984] 2.S.C.R. 335

[18] Rotman, L., *Parallel Paths: Fiduciary Doctrine and the Crown - Native Relationship in Canada* (Toronto: University of Toronto Press, 1996).

[19] Brian Slattery, "*Understanding Aboriginal Rights*" (1988), 66 Can. Bar Rev. 727at 753, also quoted in *Wewaykum Indian Band v. Canada* (2002), 220 D.L.R. (4th) 1 (S.C.C.); *Mitchell v. Peguis Indian Band* (1990), 71 D.L.R. (4th) 193.

> [T]he Government has the responsibility to act in a fiduciary capacity with respect to aboriginal people. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[20]

Following *Sparrow*, the Courts have further enunciated Canada's fiduciary duty with regards to aboriginal rights.[21] Most recently in *Wewaykum*, Binnie J. at par. 77 stated:

> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with **unrecognized aboriginal title in traditional tribal lands**. The Indian interest in the land is the same in both cases.. [Emphasis added].

Interestingly, from the point of view of negotiating Treaties, which is expressed fully later, Binnie J. went on to state, in par. 77:

> [77] However, he [Dickson J.] was speaking of disposition of the Indian band interest in an existing Indian reserve in a transaction that predated the Constitution Act, 1982. Here we are speaking of a government program to create reserves in what was **not part of "traditional tribal lands"**. [Emphasis added.]

Binnie J. went on to state, at par. 81 that:

> ...The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests. In this case we are dealing with **land, which has generally played a central role in aboriginal economies and cultures.** [Emphasis added.]

At pars. 91-92, Binnie describes more fully the apparent limit to the fiduciary duty:

> ..[t]he federal Crown in this case was carrying out various functions imposed by statute or undertaken pursuant to federal-provincial agreements. Its mandate was not

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[20] *Sparrow, supra* at 1108.

[21] Such cases include *Blueberry River*, [1995] 4 S.C.R. 344; *Osoyoos*, [2001] 3 S.C.R. 756; *Ross River Dene*, [2002] 2 S.C.R. 816; and *Wewaykum, supra at note 5.*

> the disposition of an **existing Indian interest in the subject lands**, but the creation of an altogether new interest in lands to which the **Indians made no prior claim by way of treaty or aboriginal right.**
> That is not to suggest that a fiduciary duty has no role to play in these circumstances. It is to say, however, that caution must be exercised. [Emphasis added.]

In the context of his earlier comments, Binnie J. recognizes the need for caution in the imposition of the fiduciary duty in circumstances where the claim is for an Indian interest in lands which are not part of the traditional lands of the Aboriginal Nation. Thus, in relation to making Treaties with Aboriginal Nations with respect to their traditional Lands, the *Sparrow* principles apply and the Supreme Court in *Wewaykum* has stressed the application of the Crown's fiduciary duty when dealing with aboriginal title lands and resources.

In the circumstances of the B.C. Treaty process as described above, Canada should be insisting to B.C. that the Crown's fiduciary duty must be upheld in the treaty negotiation process. That is not to say that there is not the ability to negotiate but the insistence on the termination of s. 91(24) Lands and the Aboriginal right of self-government protected by s. 35 should not be non-negotiable positions. To force that termination as a condition precedent to treaty-making is a breach of the Crown's fiduciary duty.

Treaty making, therefore, and the concomitant position of the parties, must be conducted in the context of the Crown's fiduciary duty to the Aboriginal Nations. The question remaining, however, is how the Crown can adequately meet this duty when doing so might conflict with the Crown's other duty to the general public when negotiating treaties.

Case law has enunciated principles regarding the Crown's duty in situations of conflicting duties. In *Wewaykum*, at par. 104, Binnie J. refers to circumstances where the federal crown may have competing duties, which are analogous to treaty negotiations:

> ...With respect, the role of honest referee does not exhaust the Crown's fiduciary obligation here. **The Crown could not, merely by invoking competing interests, shirk its fiduciary duty**. The Crown was obliged to preserve and protect each band's legal interest in the reserve which, on the true interpretation of events, had been allocated to it. [Emphasis added.]

In *Semiahmoo Indian Band v. Canada*, [1998] 1 C.N.L.R. 250 (F.C.A.) Issac C.J., at p. 263, also addressed the topic of the Crown, as fiduciary, acting for a public purpose, which again, is analogous to the negotiations of Treaties with Aboriginal Nations:

> In order to fulfill this obligation, the Crown itself is obliged to scrutinize the proposed transaction to ensure that it is not an exploitative bargain. As a fiduciary the Crown must be held to a strict standard of conduct. **Even if the land at issue is required for a public purpose, the Crown cannot discharge its fiduciary obligation simply by convincing the Band to accept the surrender, and then using the consent to relieve itself of the responsibility to scrutinize the transaction.** [Emphasis added.]

Specifically, in relation to negotiating treaties in British Columbia, Williamson J's, direction to the Crown provincial, in that case, is directly on point:

> ...I conclude that the **duty to negotiate in good faith**, founded upon the fiduciary relationship between Aboriginal people and the Crown, applies equally to the Crown in Right of Canada and the Crown in Right of British Columbia.[22] [Emphasis added.]

In the same case, Williamson, J. declined to fully define the nature of the "duty to negotiate in good faith" but did set out that it included:

> In general terms, that duty must include at least the absence of any appearance of "sharp dealing" (*Badger*, at p. 794...), disclosure of relevant factors (*Cassels*, at p. 83) and negotiation "without oblique motive" (*Chemainus*, at para. 26)[23]

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[22] *Gitanyow First Nation, supra*, par. 47.

Thus, in the situation at present in British Columbia, where both Crown parties are advocating the removal of the constitutional protection to treaty lands in s.91(24) at the negotiating table, an argument can indeed be made that the Crown has not scrutinized the transaction to ensure that it is not an exploitative bargain. Nor can the Crown relieve itself of the responsibility to do so by stating that the Aboriginal Nation has a choice of whether or not to accept this bargain without addressing itself, with the Aboriginal Parties, to the potential repercussions of such a result. Unfortunately, thus far, the Crown appears unwilling to discuss any negotiated compromise of this position which could potentially go some distance in meeting its fiduciary duty to Aboriginal Nations at the Treaty tables.

Neither Crown party appears willing to address the justifiable concerns of the Aboriginal Parties that to leave governance outside of the Treaty, as a separate agreement with delegated authority flowing from the Province, results in Aboriginal Nations left vulnerable to any unilateral future change in provincial policy or legal amendment, rather than maintaining the reciprocal obligations of all Parties to the Treaty notwithstanding the whims of any particular Provincial government.

Furthermore, the Crown's position effectively ignores the fact that Aboriginal Nations have inherent rights to self-government recognized and affirmed through section 35 of the *Constitution Act, 1982* which was acknowledged by the Federal Crown in its Inherent Right Policy[24], and has received confirmation from the Courts in *Campbell v. British Columbia (Attorney General)*, in the context of British Columbia and the conclusion of the Nisga'a Treaty.[25]

In that decision, Justice Williamson analyzes whether the distribution of legislative authority under the British North America Act had the effect of precluding or extinguishing the inherent right of

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[23] *Gitanyow First Nation, supra,* par. 74

[24] The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government, Federal Policy Guide, Department of Indian and Northern Affairs Canada.

[25] *Campbell v. British Columbia (Attorney General)*, C.N.L.R. 1 (B.C.S.C.). See also *Canada (A.G.) v. Come*, [1991] R.J.Q. 922, (QCA) where Mr. Justice Lebel, now of the Supreme Court of Canada, referred to s. 35

Aboriginal self-government and concludes, at par. 81, it did not:

> A consideration of these various observations by the Supreme Court of Canada supports the submission that aboriginal rights, and in particular **a right to self-government akin to a legislative power to make laws, survived as one of the unwritten "underlying values" of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867.** The federal-provincial division of powers in 1867 was aimed at a different issue and was a division "internal" to the Crown. [Emphasis added.]

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as possibly recognizing a third order of Government in Canada.

In the result, there is indeed justification to question whether Canada has breached its fiduciary duty to Aboriginal Nations when continuing to put forward a position at the treaty table which would effectively be an exploitative bargain, as it is a position that is contrary to Federal Crown policy, and the law as enunciated in British Columbia, where the treaties are being negotiated, has already affirmed governance as a continuing aboriginal right.[26] The consideration of the breach on the basis of an "exploitative bargain" must be considered in the context of the debt load of the Aboriginal Nations who have been at the treaty table for ten years who are faced with the obligation of repayment of a large debt without a treaty if they walk from the treaty table.

VI. CONCLUSION

Since the scope of s.91(24) is broad, and the courts' interpretation of its content has expanded over the years, any position at the Treaty table which will effectively relinquish the protection afforded by s. 91(24) would be unwise since the scope of this protection continues to shift and expand.

Given Canada's historical failure to protect the aboriginal interest in lands as cited in *Sparrow*[27], the Federal Crown's failure to protect the aboriginal interest in lands in B.C. post-treaty, may arguably be a breach of the Crown's fiduciary duty as well as a failure to negotiate in good faith in the treaty process.

In fact, what is needed today is the active protection of the aboriginal interest in lands and the assurance that those constitutional protections will also apply to the post-treaty Settlement Lands just as they do in other provinces. This is even more significant in view of the continuous reduction of environmental protection, the privatization of the forestry regime and the potential opening of

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[26] The decision has not been appealed for the reasons set out above.

[27] *Sparrow v. The Queen*, supra, pp. 1110

offshore oil and gas exploration being advanced by the provincial Crown. These are the types of initiatives which reinforce the need for protection of the aboriginal interest in Lands by the federal Crown.

As such, the present Federal Crown position vis a vis s. 91(24) lands being replaced by s.92 provincial lands arguably places the Crown parties in breach of the fiduciary duties to the Aboriginal Nations with whom the parties are presently negotiating.

Cases have confirmed that the continuing fiduciary duty, before and after making Treaty, includes the duty to negotiate in good faith[28], which includes at a minimum, the absence of any appearance of "sharp dealing",[29] disclosure of relevant factors[30], and negotiation "without oblique motive"[31].

To suggest to Aboriginal Nations which are presently in the process of making Treaty with the Crown, that it is essential to renounce the constitutional promise and protections of section 91(24) in order to make a Treaty with the Crown and to further suggest that through this they lose nothing but rather will benefit most definitively calls into question the Crown's compliance with its fiduciary duty to the Aboriginal Nations at the treaty tables, and specifically, its duty to negotiate in good faith.

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[28] *Gitanyow, supra* at par. 47.

[29] *Badger, supra* at p. 794.

[30] *Cassels*, at 83. cited in *Gitanyow, supra*.

[31] *Chemainus* at par. 26, cited in *Gitanyow, supra.*