THE IMPACT OF THE *GUERIN* CASE ON ABORIGINAL AND FIDUCIARY LAW*

By James I. Reynolds

First, I would like to thank the organizers of this event for inviting me to participate in this panel discussion of the *Guerin* case. Acting for the Musqueam in that case was a major event in my career, and I am pleased to be here with Professor Michael Jackson, Councillor Delbert Guerin, Lew Harvey and Mitch Taylor to discuss its impact over the last 20 years.

I would like to acknowledge that we are in the traditional territory of the Musqueam people, whose main reserve lies just down the road.[1] That reserve is at the site of their main village, which has existed for thousands of years.[2] It was the lease of one third of that small reserve, the highest and best land, that was the subject of the *Guerin* case.[3]

Since we are in the law faculty building, I would also like to acknowledge the role of legal scholars in advancing Aboriginal law over the last 30 years or so. There must be few other areas of law where one finds so many references to the works of scholars in Supreme Court of Canada decisions. Legal scholars have been in the vanguard of the fundamental changes we have witnessed over the last 30 or so years.[4] I would like to mention, in particular, Doug Sanders, a former UBC law professor, and Professor Michael Jackson. Michael has been involved in this area longer than I have and was part of the Berger Inquiry into the proposed development of the Mackenzie Valley and the impact on Aboriginal peoples during the 1970s. He has continued, of course, to teach and write in the area and to act as legal counsel for Aboriginal clients in major cases such as *Delgamuukw*[5] and the recent *Haida*[6] case. Doug Sanders was the primary author of *Native Rights in Canada*, the first book devoted to Aboriginal law issues, published in 1970.[7] He was also the first lawyer for the Musqueam in the *Guerin* case and started the action on behalf of the band.

I will now briefly summarize the case. In 1958, the federal government leased part of the Musqueam Reserve lands to the exclusive Shaughnessy Golf Club for a term of 75 years and at a fraction of its value. The terms of the lease were not those agreed to by the band members. They were very favourable to the club. The government concealed the true terms of the lease from the band for 12 years, until 1970, when Chief Guerin discovered it in a dusty basement of the Depart-

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ment of Indian Affairs. The Musqueam sued and eventually, in 1984, the Supreme Court of Canada found that there was a fiduciary relationship between the Crown and the Musqueam. It went on to find that the Crown had breached its fiduciary obligation to act in the best interests of the Musqueam in the way it had leased the lands. An award of $10 million was made to the Musqueam for the breach. I note in passing that, in arriving at this amount, the trial judge took into account the contingency that the club would leave in 1988 or at some future date before the end of the lease in 2033. The club has not, of course, left, so justice has yet to be fully done.

I have been asked to say a few words about the impact of the *Guerin* case on the law. The case has been ranked by a panel of legal experts as the tenth most important decision of the Supreme Court of Canada in the 20th century and among the top 30 significant legal events.[8] Writing for the Supreme Court of Canada in the 2003 case of *Wewaykum*, Justice Binnie (who was one of the lawyers for the Crown in *Guerin*) referred to *Guerin* as a watershed decision.[9] In *Authorson v. Canada*, the Ontario Court of Appeal described it as a seminal case.[10] Professor Leonard Rotman (who has written extensively on the Crown's fiduciary relationship with Aboriginal peoples) has referred to *Guerin* as a landmark case.[11] "Watershed", "seminal" and "landmark"—these are fairly weighty adjectives for any case to bear. In the view of Professor Rotman, the case "blazed a new path in Canadian aboriginal rights jurisprudence" and resulted in "a complete overruling of the principles which had shaped judicial considerations of aboriginal rights in Canada".[12] The leading authority on the law of trusts in Canada, Professor Donovan Waters, noted: "For the first time, certainly so far as reserve lands are concerned, the Indians now have right of access to the courts in order to determine the propriety of the Crown's administration of their affairs and the Indians themselves regard this decision concerning their interests as perhaps the most important to have been handed down since Canada was formed."[13]

Other judges and scholars have also noted the significance of *Guerin* to the development of Aboriginal rights. Professor Brian Slattery, one of Canada's leading authorities on Aboriginal law, noted in his influential article "Understanding Aboriginal Rights" that *Guerin* "provides the stimulus and much essential material for reflection on the fundamental nature and origins of aboriginal law".[14] Most important, "in *Guerin*, the Supreme Court shows a willingness to consider the topic of Aboriginal rights afresh, and to initiate a dialogue concerning the broad principles that alone make sense of the subject".[15]

How did *Guerin* have such a fundamental impact on Aboriginal law? There are a few reasons. Its major ruling was that Aboriginal peoples could obtain a legal remedy for wrongs done to them by government. It is perhaps difficult to believe now that it took nine years of litigation and a visit to the Supreme Court of Canada to get confirmation of what one might have expected to be a fundamental principle of the rule of law—namely that the government will be held legally accountable for its actions. Before *Guerin*, the law was not entirely clear but the widely held view was that the Crown could not be held liable in law for the way in which it managed

reserve lands or other assets of Indian bands.[16] The relationship was said to be based on a political trust rather than a legally enforceable trust.[17] This meant that the government could be held responsible at the ballot box but not in a courtroom. I note that, at the time of the Shaughnessy lease in 1958, Indian people did not generally have the right to vote in federal elections so the power of the ballot box would, for them, have meant nothing in practice.[18] In my view, this defence of political trust has more to do with the absolute right of kings in 17th-century Europe than a modern democratic system of government.[19] It is fundamentally inconsistent with the rule of law as a restraint on the arbitrary exercise of government power.[20] The defence was vigorously pursued by the lawyers for the government and upheld by the Federal Court of Appeal in a unanimous decision rejecting the Musqueam claim.[21] Fortunately, it was rejected by the Supreme Court of Canada in an equally unanimous decision which held that there was a fiduciary relationship between the Crown and the Aboriginal peoples of Canada.[22]

The granting of a legal remedy for mismanagement of Indian assets held by the Crown has led over the last 20 years to the receipt by Aboriginal peoples of many hundreds of millions of dollars for breach of fiduciary duty either through litigation, settlement or the specific claims procedure.[23] To that extent, it has alleviated the poverty and hardship of Aboriginal peoples.[24] However, as important as the compensation for the loss of the relatively few assets left to Aboriginal peoples was the holding in *Guerin* that the government had a duty to consult with the Musqueam before entering into the lease.[25] That holding has led to a broader duty of the Crown to consult and accommodate the interests of Aboriginal peoples whenever those interests may be adversely affected by the action of government.

This duty of consultation was recently affirmed in the *Haida* case[26] (in which Professor Jackson was one of the counsel for the Haida). The court held there the duty to consult existed prior to a formal determination of the Aboriginal interest. In practice, as shown by the recently announced agreement between the Tsawwassen First Nation and the Ports Corporation over the proposed expansion of the Roberts Bank superport, any major economic development in the province must share some of the opportunities with First Nations through the consultation and accommodation process.

Guerin's most important impact on Aboriginal law has been to give much-needed substance to the constitutional recognition and affirmation of existing Aboriginal and treaty rights in s. 35 of the *Constitution Act 1982*.[27] It is difficult now to look back and appreciate just how empty was that recognition and affirmation. It had no more substance to it than the reference to the principle of the supremacy of God in the preamble to the *Charter of Rights*, which courts have held gives rise to no enforceable rights.[28] I ask you to consider the words of s. 35: "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." What on earth was intended by that vaguely worded provision? Their subsequent accounts have made it clear that the politicians involved had no idea what they were adding to the Constitution of Canada.[29] It was a half-baked political compromise included without proper consideration. It is important to

note that s. 35 does not form part of the *Charter of Rights*.[30] Section 1 of the *Charter* expressly guarantees the rights set out in the *Charter*. There was no such guarantee for the undefined Aboriginal and treaty rights—they were merely recognized and affirmed, whatever that meant. The *recognition* and *affirmation* of existing Aboriginal and treaty rights was reminiscent of the *recognition* and *declaration* of certain rights in the *Bill of Rights Act* of 1960.[31] A generally held view prior to *Guerin* was that, like the old *Bill of Rights*, s. 35 was simply a rule of statutory interpretation requiring clear wording before Aboriginal and treaty rights could be extinguished or infringed. Richard Bartlett, a leading Aboriginal law scholar, expressed his view that, far from protecting or guaranteeing those rights, s. 35 provided for their abrogation.[32] Some First Nations were so concerned that they went to the courts of England in an unsuccessful attempt to prevent passage of the section until it was strengthened.[33] Early cases showed that their concerns were not without foundation.[34] We might also ask what would be the value of the rights recognized and affirmed by s. 35 if the Supreme Court of Canada *had* upheld the Federal Court of Appeal decision in *Guerin* and held that the government *could not* be held accountable for its breach of the rights of Aboriginal peoples. Of what value are "rights" that cannot be legally enforced?[35]

Fortunately for Aboriginal peoples, the Supreme Court of Canada reversed the Federal Court of Appeal in the *Guerin* case. Furthermore, it subsequently gave substance to s. 35 and provided protection for Aboriginal and treaty rights by expressly incorporating the fiduciary relationship established in *Guerin* into s. 35. In the *Sparrow* case decided in 1990, which was another case involving the Musqueam, the court held that the fiduciary relationship was incorporated in s. 35.[36] Therefore, the section should be interpreted in the light of that relationship and should receive a generous, liberal interpretation.[37] The court went on to hold that the Crown must justify any proposed infringement of an Aboriginal or treaty right and the justification had to be consistent with the fiduciary relationship.[38] It was subsequently decided by the court in the 1997 *Delgamuukw* case that the justification test *always* imposes a duty of consultation and *ordinarily* a duty of compensation.[39] This duty of the Crown to justify any infringement of existing Aboriginal and treaty rights is another of the direct progeny of *Guerin*.

We can evaluate the importance of *Guerin* and the fiduciary relationship by comparing Canadian Aboriginal law with the sorry state of Aboriginal rights in Australia.[40] Australian writers have recognized the fundamental importance of the fiduciary relationship to the protection of the legal rights of Aboriginal peoples.[41] In that country, there has been no ruling similar to *Guerin* and the rights of Australian Aboriginal peoples have been narrowly interpreted by the courts and severely limited by government.[42] As one Australian law professor has said, "in Australia, the lack of a clear court finding that the fiduciary relationship arises has meant that Indigenous peoples are left with little to ensure that the government will consult on policies and actions that may infringe on or extinguish their rights. It has meant that Indigenous peoples...are captive to the whim of the legislature...Australia offers sobering reflection of what can happen if there is not

recognition of the [fiduciary] doctrine."[43] One of the lawyers for the Aboriginal claimants in the famous *Mabo* case[44] on Aboriginal title in Australia has said that, if he were to do it again, he would have sought a ruling of a freestanding fiduciary duty owed by the Crown to traditional owners when dealing with their land.[45]

One aspect of the *Guerin* decision which has perhaps been somewhat overshadowed by subsequent case law has been its holding that the Indian interest in reserve lands is the same as that in traditional lands and that Aboriginal title is an interest recognized by the common law.[46] In the words of Professor Slattery, the decision had "a profound significance for aboriginal land claims" by ending the controversy over whether Aboriginal title existed as a legal right.[47] Eleven years earlier, in the 1973 decision of *Calder*[48] involving the Nisga'a, the Supreme Court of Canada had split on the existence of Aboriginal title in British Columbia. Three judges said it still existed. Three said, if it had existed, it had been extinguished by colonial laws. The remaining judge said nothing on this issue and decided on procedural grounds against the Nisga'a, thus upholding the B.C. Court of Appeal decision against the claim. By recognizing the existence of unextinguished Aboriginal title in the province, *Guerin* had important consequences for the pursuit of Aboriginal title claims. Professor Tennant notes in his history of Aboriginal peoples and politics in British Columbia that the case "gave new life to land claims activity in British Columbia" and that "[i]t was evident almost immediately that the *Guerin* decision had major practical implications in British Columbia concerning the role of the courts and the means by which Indian groups could protect their interests in the land against the efforts of the Province."[49] In 1997, the Supreme Court of Canada confirmed in *Delgamuukw* the existence of Aboriginal title in British Columbia and gave guidance on its content.[50] I note that we never intended to argue Aboriginal title in *Guerin*. We were forced to do so by the objection by the Crown to the comment of the trial judge that the reserve lands in question were the lands and the future of the Musqueam.[51] The Crown took the position that the Musqueam had no legal interest in their reserve lands and that, therefore, there was nothing that could form the subject matter of a trust.[52]

I would like to conclude by making a very brief reference to the impact of *Guerin* outside the Aboriginal context. *Guerin* led to significant development of the general fiduciary law in Canada.[53] Professor Flanagan has commented that "[t]he development of modern Canadian law dealing with new fiduciary relationships can be traced to the Supreme Court of Canada's decision in *Guerin v. The Queen* in 1984" and that the case "opened the door to the extension of fiduciary obligations in relationships not traditionally recognized as fiduciary".[54] In *Authorson*, the Ontario Court of Appeal referred to *Guerin* as "the foundation of this line of general jurisprudence".[55] I has been cited in over 300 cases in Canada, involving both Aboriginal and non-Aboriginal people, and continues to influence the development of the law.

In finding a fiduciary relationship between the government and Aboriginal peoples, the Supreme Court of Canada restated the legal basis of fiduciary relation-

ships generally. In particular, it stressed the importance of a discretion to act for another as a key ingredient of such relationships.[56] This restatement set the Canadian law on fiduciary obligations on a course that is very different from that of other Commonwealth jurisdictions. This development has been very controversial and has been criticized by some, including members of the High Court of Australia.[57] Chief Justice McEachern, the former chief justice of British Columbia, described *Guerin* as part of a flawed experiment that ought to be abandoned.[58] I also refer you to the article by Professor Robert Flannigan in the current online issue of the *Canadian Bar Review*.[59] He states that *Guerin* "has had a profound and problematic significance in the Canadian jurisprudence".[60] He recommends that the fiduciary relationship between the Crown and Aboriginal peoples be "formally disconnected" from general fiduciary law.[61] I disagree with those criticisms.

In my view, the development of fiduciary law by the Supreme Court of Canada in *Guerin* and subsequent cases has been an outstanding example of the use of law to achieve justice for Canadians. Fiduciary law can be traced back to the England of the late 15th century.[62] The early ecclesiastical chancellors who first gave voice to equitable principles cannot have imagined the use of those principles to resolve a dispute over the leasing of lands in an Indian reserve in Vancouver. Nor could they have imagined that those principles would be incorporated into the protection for Aboriginal and treaty rights in the Canadian Constitution. It would certainly have been beyond them to contemplate that fiduciary principles would become an integral part of the unique intersocietal law derived from both the English legal system and Aboriginal legal systems which constitutes Canadian Aboriginal law.[63] The application of ancient equitable principles to achieve justice is an impressive example of the ability of the law to continue to grow and adapt to new situations.

In my view, *Guerin* is a tribute to the Canadian legal system and our highest court. Above all, it is a tribute to the determination of the Musqueam people to achieve some measure of justice for the wrong done to them. I am pleased to have this opportunity to acknowledge their important contribution to the development of our legal system. I think the *Guerin* case is an example of how, in the words of Tom Berger, the legal system can "move us incrementally towards a just society".[64] He also notes in his book, *One Man's Justice*, "One of the joys of law practice is the chance which comes along more often than you think, to set the world right."[65] I was privileged to have that chance early in my legal career. I trust that those of you who choose to follow a legal career will have a similar opportunity. My advice is to seize it. You will never regret it. I never have.

ENDNOTES

1. See generally Homer G. Barnett, *The Coast Salish of British Columbia* (Eugene: University of Oregon Press, 1955).
2. See R.T. Matson & Gary Coupland, *The Prehistory of the Northwest Coast* (San Diego: Academics, 1995) at 154–177, 220–225.
3. [1982] 2 F.C. 385 (F.C.T.D.), rev'd [1983] 2 F.C. 656 (F.C.A.), rev'd [1984] 3 S.C.R. 335. See generally, Leonard Rotman, *Parallel Paths: Fiduciary Doctrines and the Crown–Native Relationship in Canada* (Toronto: University of Toronto

Press, 1996) and James I. Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* (Saskatoon: Purich, 2005).

4. Alan C. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) at 211.
5. [1997] 3 S.C.R. 1010.
6. 2004 SCC 73.
7. Douglas Sanders, ed., *Native Rights in Canada* (Ottawa: Indian and Eskimo Association of Canada, 1970).
8. (2000) 9 The National 17.
9. [2002] 4 S.C.R. 245 at para. 73.
10. (2002), 215 D.L.R. (4th) 496 (Ont. C.A.) at para. 61.
11. *Supra* note 3 at 3–8.
12. *Ibid.*
13. Donovan W.M. Waters, "New Directions in the Employment of Equitable Doctrines: The Canadian Experience" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) at 414.
14. Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 728–731.
15. *Ibid.*
16. L.C. Green, "Trusteeship and Canada's Indians" (1976) 3 Dal. L.J. 104.
17. See *Kinloch v. Secretary of State for India* (1881–82), 7 App. Cas. 619 (H.L.); *Rustomjee v. The Queen*, [1876] 1 Q.B.D. 69 (Eng. C.A.); *Tito v. Waddell*, [1977] 3 All E.R. 129 (Ch.).
18. The restriction on voting in federal elections was imposed by the *Electoral Franchise Act*, S.C. 1885, c. 40, s. 11, and was not removed until *An Act to Amend the Canada Elections Act*, S.C. 1960, c. 7, s. 1.
19. See *R. v. Hampden* (1637), 3 St. Tr. 825 (Exch).
20. See *Reference Re Language Rights under s. 23 of the Manitoba Act 1870*, [1985] 1 S.C.R. 721 at 748.
21. [1983] 2 F.C. 656.
22. [1984] 3 S.C.R. 335.
23. Michael Hudson, "Crown Fiduciary Duties under the *Indian Act*" in Andrea Morrison & Irwin Cotler, eds., *Justice for Natives: Searching for Common Ground* (Montreal: McGill–Queen's University Press, 1997) at 257–258. See, for example, *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344.
24. See *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services Canada, 1996), esp. vol. 3, for the social conditions of Aboriginal peoples in Canada.
25. *Supra* note 22 at 355, 389.
26. *Supra* note 6.
27. *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35(1).
28. *Johnson v. British Columbia (Securities Commission)* (1999), 67 B.C.L.R. (3d) 145 at para. 25 (S.C.).
29. David C. Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Montreal: McGill-Queen's University Press, 1989) at 9–10.
30. Part 1 of the *Constitution Act 1982*, *supra* note 27.
31. S.C. 1960, c. 44.
32. Richard H. Bartlett, "Survey of Canadian Law: Indian and Native Law" (1983) 15 Ottawa L. Rev. 431 at 500.
33. *The Queen v. Secretary of State for Foreign and Commonwealth Affairs*, [1982] 2 All E.R. 118 (Eng. C.A.); *Manuel v. A.G.*, [1982] 3 All E.R. 786 (Eng. C.A.).
34. *R. v. Eninew* and *R. v. Bear*, [1984] 2 C.N.L.R. 126.
35. See H.L.A. Hart, "Definition and Theoey in Jurisprudence" (1954) 70 Law Q. Rev. 37. esp. at 49; P. Birks, "Rights, Wrongs and Remedies" (2000) 20 Oxford J. of Legal Studies 1 at 22–24; James I. Reynolds, "Aboriginal Title: The Chippewas of Sarnia" (2002) 81 Can. Bar Rev. 97 at 114.
36. [1990] 1 S.C.R. 1075 at 1109.
37. *Ibid.* at 1106.
38. *Ibid.* at 1112–1119.
39. *Supra* note 5 at paras. 167–169.
40. See James I. Reynolds, "Recent Developments in Aboriginal Law in the United States, Australia and New Zealand: Lessons for Canada" (2004) 62 Advocate 59, 177.
41. See Richard Bartlett, Larissa Behrendt & Raymond Cross in *In Whom We Trust* (Toronto: Irwin Law for Law Commission of Canada and the Association of Iroquois and Allied Indians, 2002).
42. In *Thorpe v. Commonwealth of Australia (No. 3)* (1997), 144 A.L.R. 677 at 688

(H.C.A.), Kirby J. said, "whether a fiduciary duty is owed by the Crown to the indigenous peoples of Australia remains an open question."

43. Behrendt, *supra* note 41 at 264–265.
44. (1992), 175 C.L.R. 1 (H.C.A.).
45. B.A. Keon-Cohen, "The *Mabo* Litigation: A Personal and Procedural Account" (2000) 24 Melbourne U. L. Rev. 35.
46. *Supra* note 22 at 379–382.
47. *Supra* note 14.
48. *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313.
49. Paul Tennant, *Aboriginal Peoples and Politics* (Vancouver: University of British Columbia Press, 1990) at 222.
50. *Supra* note 5.
51. [1982] 2 F.C. 385 (T.D.) at 409.
52. Appellant's Memorandum of Fact and Law in the appeal to the Federal Court of Appeal, *supra* note 21, at 22–26.
53. See Reynolds, *supra* note 3 at chapter 6.
54. W.F. Flanagan, "Fiduciary Duties in Commercial Relationships: When Does the Marketplace Set the Rules?" in A. Anand & W.F. Flanagan, *Selected Topics in Corporate Litigation* (Kingston: Queens' Annual Business Law Symposium, 2001) at 3, 17.
55. *Supra* note 10 at para. 70.
56. *Supra* note 22 at 384.
57. *Breen v. Williams* (1996), 138 A.L.R. 259 (H.C.A.) at paras. 24, 40.
58. *A(C) v. Critchley* (1998), 166 D.L.R. (4th) 475 (B.C.C.A.) at paras. 75–84.
59. Robert Flannigan, "The Boundaries of Fiduciary Accountability" (2004) 83 Can. Bar Rev. 35.
60. *Ibid.* at 56.
61. *Ibid.* at 67.
62. See Robert Megarry, "Historical Development", in *Special Lectures of the Law Society of Upper Canada 1990* (Scarborough: De Boo, 1991).
63. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 546; see generally John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).
64. Thomas R. Berger, *One Man's Justice: A Life in the Law* (Vancouver: Douglas & McIntyre, 2002) at 4.
65. *Ibid.* at 298.