PARALLEL PATHS: FIDUCIARY DOCTRINE AND THE CROWN — NATIVE RELATIONSHIP IN CANADA by Leonard Ian Rotman[1] (Toronto: University of Toronto Press, 1996)

Parallel Paths[2] is a particularly timely and important book in light of the current and evolving legal, political and financial relationships between the Crown and Aboriginal peoples in general, and First Nations in particular.

In *Guerin* v. *R.*[3] the Supreme Court affirmed that a fiduciary relationship exists between the Crown and Aboriginal peoples, which has deep historical, political and legal roots. Dickson J., as he then was, noted:

> Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie.
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> ...
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> [W]here by statute, agreement or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[4]

Since then, Aboriginal peoples, the Crown and the courts have grappled with not only the nature and scope of this fiduciary relationship, but its political, legal and financial implications.

After *Guerin*, the Supreme Court affirmed in *R.* v. *Sparrow* that this fiduciary relationship has "constitutional status" arising from the existing Aboriginal and treaty rights of Aboriginal peoples[5] as enshrined in s. 35 of the *Constitution Act, 1982*.[6]

However, the court's characterization of the nature and scope of the obligations flowing from this fiduciary relationship remains incomplete, and whether it is an all-encompassing permanent feature of the relationship or one arising only under particular circumstances has not yet been finally determined. As Rotman notes:

> The Crown's fiduciary duty to the aboriginal peoples applies to virtually every facet of the Crown-Native relationship. It has its basis in the historical relationship between the parties dating back to the time of contact, which describes the period ensuing immediately after the first meeting of Europeans and indigenous peoples in North America. It may also be noted in the terms of various

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

3 (1984), (1985) 13 D.L.R. (4th) 321 at 340 (S.C.C.) [hereinafter *Guerin*].

4 *Ibid.* at 341.

5 *R.* v. *Sparrow* (1990), 70 D.L.R. (4th) 385 (S.C.C.).

6 Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

> treaties, compacts, and alliances between the groups. In addition to being judicially sanctioned in the *Guerin* case, the Crown's fiduciary duty to Native peoples has been constitutionally entrenched in Section 35(1) of the Constitution Act, 1982.[7]

There has been a great deal of academic writing and political rhetoric about the Crown's fiduciary obligations to First Nations. However, the eventual outcome of the ongoing judicial consideration of this fiduciary relationship is very significant to Canadians, when viewed in light of the Specific Claims Policy of the Government of Canada entitled *Outstanding Business*.[8] This policy, established in 1982, was based on a recognition that the Crown in Right of Canada had failed to properly fulfil the terms of treaties and during the course of its historic dealings with First Nations had, in many instances, illegally dispossessed them of their lands, assets and rights. The policy was intended to establish a process to fulfil outstanding treaty obligations and to provide compensation where the Crown had breached lawful obligations to First Nations, which include statutory and fiduciary obligations.

The policy was intended to address the political concerns of the government. In 1973, the Honourable Jean Chretien, then Minister of Indian Affairs, said when introducing the federal government's *Statement on Claims of Indian and Inuit People*:

> There is a deep-seated sense of grievance in the Indian community.
>
> This is often expressed in discussions about treaties and about claims but it is often behind other statements too.... It has been fed and nourished by the indifference of Canadians to legitimate complaints which are justified, but we must not lose sight of the fact that many are not.
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> The remedy of grievance is an important determinant of social change. It is a commonplace that an aggrieved people cannot function effectively in working out their own destiny. The Indian grievances are legion. Their remedy is a prerequisite to improving their social lot.[9]

There are at present over 450 claims submitted by First Nations to Canada under the Specific Claims process, with perhaps hundreds more to come. The types of specific claims involved include wrongful surrender of Indian lands, mismanagement of the sale of Indian lands, wrongful disposition of Indian lands to third parties, destruction of Indian lands through environmental abuse, misuse of Indian monies, failure to provide land promised under treaty, failure to provide economic benefits promised under treaty, and so on. I estimate that in Alberta alone there are 70 to 100 such claims either in the system or in the development stages. It is not an exaggeration to say that billions of dollars will be involved in the settlement of validated specific and comprehensive claims. The validity of many claims will depend on whether fiduciary obligations are found to exist and to have been breached.

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7 *Parallel Paths*, *supra* note 2 at 4 [footnotes omitted].

8 *Outstanding Business: A Native Claims Policy (Specific Claims)* (Ottawa: Minister of Supply and Services, 1982).

9 (Ottawa: Dept. of Indian and Northern Affairs, 1973).

Unfortunately, as Rotman notes, the current specific claims process itself is fundamentally flawed by an obvious conflict of interest (and breach of fiduciary conduct) on the part of the Crown. At present, it is the federal Department of Justice (DOJ) which provides the definitive legal opinion to its client, the Department of Indian Affairs and Northern Development (DIAND), as to whether there has been a breach of lawful obligation or unfulfilled treaty entitlement by the federal Crown. DOJ is to provide independent and impartial advice to its client on the merits of a claim. DIAND, based upon DOJ's legal advice, sits in judgment of the claims brought against itself.

This policy and practice of having the Crown's own legal counsel determine their client's culpability has been thoroughly and justly criticized as an unfair and biased process which breaches a fundamental rule of natural justice expressed in the *nemo judex* rule, namely that "no one shall be a judge in their own cause." As Rotman notes:

> The Department of Indian Affairs and the Department of Justice are both appendages of the federal Crown responsible for discharging its duties and obligations. Moreover, as the lawyers of the federal Crown, the Department of Justice is bound, first and foremost, to represent and protect the federal Crown's interests. How is it then possible that these departments may impartially decide on the merits of a particular Indian claim which seeks to reclaim revenue-generating lands from the federal Crown whose best interests the departments both represent and seek to protect? Quite simply, it is not possible.[10]

The Canadian Bar Association, Assembly of First Nations and Royal Commission of Aboriginal Peoples (R.C.A.P.) have all criticized this process as slow, biased and unsuited to achieving a sense of justice and reconciliation between the Crown and First Nations over unfulfilled treaties and illegal acts perpetuated by the Crown on First Nations.

In 1992, following the Oka crisis, the Mulroney government established the Royal Commission on Indian Specific Claims (ISCC). The ISCC, which is Canada's only ongoing Royal Commission, conducts public inquiries into claims rejected by DIAND and provides recommendations to DIAND as to whether claims should be accepted for negotiation and settlement.

As of the fall of 1997, the ISCC has provided over 33 reports to DIAND, but only *one* claim for which acceptance for negotiations was recommended by the ISCC has actually proceeded.[11] On the other twenty-two claims recommended for negotiation by the ISCC, DIAND has taken no action. They remain under review by DIAND officials and DOJ lawyers — the very parties whose views were rejected by the ISCC after a thorough review of the facts, receipt of written and oral submissions by legal counsel, and a careful review of the law.

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10 *Parallel Paths, supra* note 2 at 51.

11 "Cold Lake and Canoe Lake (Primrose Lake Air Weapons Range)" in *Review of the Indian Specific Claims Commission* (Ottawa: Concorde Inc., 1996) Appendix G.

The inaction and delay on those ISCC recommendations which favoured acceptance of claims has further discredited the Specific Claims process, angered First Nations at the lack of good faith and integrity on the part of the Crown, and increased demands for an independent, binding tribunal to review and assess claims and set compensation.

As well, many First Nations, frustrated with the lack of fiduciary conduct and integrity by the Crown, have now asked the courts to address their claims where statutes of limitations have not precluded an action. Accordingly, without a new claims process the courts can expect to be inundated with hundreds of First Nation claims. The courts at all levels have indicated that they believe that these matters are most appropriately dealt with through an alternative process.

For this reason, First Nations and R.C.A.P. have pressed the Canadian government to establish an independent lands and claims commission and tribunal which would provide binding decisions on questions of fact and law in relation to Indian claims, and the Crown's fiduciary obligations. Even the Liberal Party Red Book recommended that the government establish an independent tribunal to make binding decisions on the validity of claims against the Crown. The Party promised:

> A Liberal government will be prepared to create, in cooperation with Aboriginal peoples, an independent claims commission to speed up and facilitate the resolution of all claims. This commission would not preclude direct negotiations.[12]

Such a quasi-judicial tribunal, to be established under federal legislation, is presently under active consideration by the federal Cabinet. Certainly, the establishment of such a tribunal with legislative powers, resources and specialized expertise to address the nature and scope of the Crown's fiduciary and lawful obligations to First Nations people would be an important step in bringing a sense of fairness and integrity to a relationship whose characteristics, to date, have been anything but honourable and fiduciary in nature.

The purpose of this commentary on the Indian claims process is to provide an historical background and political context to the subject matter of Rotman's important book. Claims are frequently made by First Nations based on a breach of a particular fiduciary duty or obligation which they contend was owed by the Crown to the First Nation. It is a failure to perform such alleged fiduciary duties in an appropriate manner which often constitutes the breach of lawful obligation by the Crown in denying or depriving First Nations of rights, lands or assets and the benefits thereof.

Understandably, given the hundreds of allegations of breaches of fiduciary obligation claiming hundreds of millions of dollars in compensation, the Crown and First Nations have a significant vested interest in the proper legal interpretation and analysis of the Crown/First Nation fiduciary relationship and the nature and scope of the obligations arising thereunder. In this context then, Rotman's book provides an important

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[12] *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: Liberal Party of Canada, 1993) at 103.

foundation for examining this unique relationship and a springboard from which to explore the many issues and aspects of the fiduciary relationship in greater depth. It provides an historical perspective and contemporary legal analysis of the fiduciary relationship and obligations of the Crown to First Nations essential for all parties to appreciate.

The fiduciary relationship between the Crown and First Nations was brought to national prominence by the Supreme Court decision in *Guerin*.[13] In this high-profile case involving the Crown's lease of surrendered Indian lands to a private golf club, the court reviewed the nature and history of Crown/First Nation relations predating the *Royal Proclamation of 1763* (often characterized as the Indian Bill of Rights), through the making of treaties and the introduction of the *Indian Act* in 1876. The court determined that the fiduciary relationship was rooted in the history of the political and legal relationship between the Crown and First Nations, and in particular the role the Crown had taken in interposing itself between Indians and third parties desiring to acquire an interest in Indian lands or to interfere with Indian rights.

Rotman's text is particularly effective in succinctly outlining the history of the political, military, social and legal relations between the Crown and Aboriginal peoples. An appreciation of this historical relationship is a prerequisite to understanding the basis of the contemporary fiduciary relationship and the nature and scope of specific duties and obligations of the Crown. In particular, he indicates that the original relationship between the Crown and First Nations was on a nation to nation basis and that the relationship was one of equals.[14] It was only during the period of racism and colonialism in the last half of the nineteenth and the twentieth century that the fiduciary relationship changed to one more resembling a guardian/child relationship, thus permanently damaging the integrity of the political, moral and trust-like relationship that had originally existed between the parties. During this unfortunate period, paternalism and colonialism replaced the original fiduciary relationship based on mutual need and respect. Mutual trust and interdependence was superseded by the goals of assimilation, racism and exploitation.

In his very incisive and thorough analysis of the *Guerin* case, Rotman notes that while the court found a fiduciary obligation arose upon the surrender of reserve lands to the Crown for dispositions to third parties, the three opinions on the subject created considerable ongoing uncertainty as to the nature and scope of the Crown's fiduciary obligation.[15] A narrow "black letter" interpretation of *Guerin* favoured the view that a fiduciary obligation only arose in the circumstances after a surrender of reserve lands and that no fiduciary obligation existed outside of these circumstances. This narrow view is, of course, favoured by the Crown for obvious reasons. However, numerous scholars, and the courts themselves, have gradually accepted an expanded and purposive approach to determining the nature and scope of the Crown's fiduciary obligations to First Nations.

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[13] *Supra* note 3.

[14] *Parallel Paths*, *supra* note 2 at 51.

[15] *Ibid.* at 101.

Rotman, rightly in my opinion, views the fiduciary relationship as permeating Crown/First Nation dealings. He rejects the narrow view that fiduciary obligations on the Crown arise only in the context of post-surrender disposition of Indian lands, arguing instead, with considerable persuasiveness and support, that fiduciary obligations arise in a wide variety of dealings between the Crown and First Nations. He notes:

> To buttress the assertion that the Crown's fiduciary obligations to Native peoples extend beyond situations involving the surrender of reserve lands, one need only consider the historical basis on which the Crown protected aboriginal peoples and their interests. The duty which arose from this undertaking was not initially restricted to the protection of aboriginal lands. It extended to a protection of the aboriginal peoples in the enjoyment of their pre-existing rights *in rem*, such as the right to hunt, trap, and fish, as well as to exercise religious, cultural, and linguistic freedom, and to practice self-government. To limit the application of the legally enforceable Crown duty affirmed by *Guerin* to something less than the initial intention behind the Crown's undertaking of that duty is inappropriate. Consequently, the Crown's fiduciary obligation found in *Guerin* cannot be restricted in its application to Indian land interests, but extends to all aboriginal interests; in its broadest form, it is a general, all-encompassing duty.[16]

Rotman notes that the *Sparrow* decision should have put to rest the argument in favour of restricting the Crown's fiduciary duty to situations involving surrender of reserve lands.[17] The Supreme Court noted that in interpreting s. 35(1) it is to be borne in mind that

> the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[18]

In their examination of the scope of s. 35(1), the Supreme Court embraced the notion of a general fiduciary duty that extended to all situations involving Aboriginal and treaty rights. Section 35(1) "constitutionalized" the Crown's fiduciary duty, making any exercise of legislative power subject to restraints contained in s. 35(1). Consequently, any interference with the exercise of treaty or Aboriginal rights or avoidance of fulfillment of treaty obligations must be reasonable and justifiable. The implications of the *Sparrow* decision for the nature and scope of fiduciary obligations of both federal and provincial Crowns are still being unravelled by the courts.

Rotman is, at times, critical of the Court's lack of appreciation of the origin and basis of this particular fiduciary relationship and of the fiduciary doctrine itself. This has led to inconsistency and, at times, confusing decisions. As Rotman himself notes, it is more than ten years since *Guerin* was decided and the courts have done little to enhance the judicial understanding of the fiduciary relationship articulated in that ground-breaking

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16 *Ibid.* at 109-10 [footnotes omitted].

17 *Ibid.* at 123.

18 *Sparrow*, *supra* note 5 at 408 [hereinafter *Sparrow*].

case.[19] This is unfortunate as both the Crown and First Nations are looking to the courts to provide greater certainty and clarity to the nature and extent of the Crown's obligations in a variety of circumstances.

Following the *Guerin* decision, courts have cautiously expanded the scope of fiduciary obligations of the Crown. For example, fiduciary obligations now arise when the Crown grants land to third parties pursuant to s. 28(2) and s. 35 of the *Indian Act*[20] (the expropriation provisions of the *Indian Act*).[21]

In *Ontario (Attorney General)* v. *Bear Island Foundation*[22] the Supreme Court accepted the characterization that promises and commitments made during the course of treaty negotiations constituted fiduciary obligations on the Crown. Thus the promises in the treaty are not merely contractual in nature but also fiduciary. Consequently, the First Nations believe that when dealing in the context of treaty relations and obligations, the Crown must act honourably, with integrity and in good faith, and most importantly, in a manner that recognizes the best interests of the Indians. The principles of treaty interpretation as articulated in *Nowegijick* v. *R.*; that any ambiguities in Indian treaties must be construed liberally, generously and in favour of the Indians,[23] is now reinforced by the need for fiduciary conduct on the part of the Crown when dealing with Indians on issues of treaty negotiation. The implementation of these principles, however, is overshadowed by the reality of Crown-Indian relationships in Canada. It is interesting to note that while the Supreme Court has characterized Crown obligations arising under treaties as fiduciary in nature, DOJ/DIAND still object to any reference to fiduciary obligations or conduct in protocol agreements or memorandums of intent setting out the purpose, manner and scope of land claim negotiations. Consequently, the Crown's conduct in negotiations frequently does not reflect fiduciary principles.

Needless to say, the Crown takes a much narrower, more restrictive and often adversarial approach, despite the admonition of the Supreme Court that the relationship of First Nations and the Crown should be trust-like and non-adversarial. For many First Nations, discussing the "honour of the Crown" in the context of land claims and treaty entitlement negotiations and implementation is an oxymoron. They are much more familiar with slow, adversarial and coercive relationships with cynical and financially driven bureaucrats assigned to address the "grievances." An occasional gloss of politically correct rhetoric by a Minister about the importance of treaties and the fiduciary relationship is often the only homage the Crown pays to the fiduciary principles and the historic obligations that the courts have identified as binding the Crown.

As well, the courts have said there is a fiduciary obligation on the Crown to ensure that any transactions between First Nations and third parties in relation to Indian lands

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19 *Parallel Paths*, *supra* note 2, c. 1 "Introduction."

20 R.S.C. 1985, c. I-5.

21 *Kruger* v. *R.* (1985), 17 D.L.R. (4th) 591 (F.C.A.) [hereinafter *Kruger*].

22 (1991), 83 D.L.R. (4th) 381 (S.C.C.).

23 *Nowegijick* v. *R.* (1983), 144 D.L.R. (3d) 193 at 198 (S.C.C.).

or assets are not exploitative, tainted or subject to undue influence.[24] This implies pre-surrender or pre-expropriation fiduciary duties on the Crown to ensure that Indian consent to such transactions is fully and effectively informed and voluntary.

Stone J. of the Federal Court of Appeal in the *Kruger* decision wrote "the doctrine of fiduciary duty enunciated ... in *Guerin* ... will, of course, require elaboration and refinement on a case-by-case basis."[25] Consequently, the lawful obligations owed by the Crown to First Nations will continue to be a major subject of judicial consideration as First Nations in particular push to press their historical grievances against the Crown, not only in a "rights context" but now in a fiduciary context.

The courts have yet to definitively address the scope of the Crown's fiduciary obligations to First Nations in relation to a number of important questions, including the following:

(1) What is the full scope of the Crown's fiduciary obligation in relation to the surrender, sale and disposition of oil and gas interests on reserves?

(2) What is the nature and extent of the Crown's fiduciary obligation, if any, to warn, prevent, mitigate or compensate a First Nation in relation to prospective or actual damages done to reserve or traditional lands by the actions of third parties, causing environmental destruction through flooding, unpermitted timber harvesting, unauthorized overgrazing, and so on.

(3) What is the nature and scope of the Crown's fiduciary obligation, if any, in relation to the management of billions of dollars of Indian funds which it retains in its capital and revenue account, and to the investment of these funds in the best interests of the First Nation?

(4) What is the nature and scope of the Crown's fiduciary obligation, if any, to protect Indian treaty and Aboriginal rights from infringement or extinguishment by provincial or federal legislation, regulations or permitted practices and provide compensation for loss?

(5) What is the nature and scope of the Crown's obligation to enter into treaties with First Nations where Aboriginal title remains unextinguished?

(6) What is the nature and extent of the Crown's obligation to ascertain and fulfil any outstanding treaty promises — both written and oral?

These and many other questions of the nature and scope of the Crown's fiduciary obligations are currently before the courts or the ISCC. As well, there may be numerous other unidentified specific fiduciary obligations (UFOs) waiting to be identified by creative First Nation litigants.

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[24] *Blueberry River Indian Band* v. *Canada* (1996), 130 D.L.R. (4th) 193 [the *Apsassin* case].

[25] *Supra* note 21 at 658.

In his chapter entitled "Characteristics of the Crown/Native Fiduciary Relationship," Rotman discusses a number of interesting questions which will no doubt receive much greater judicial analysis and academic discussion. These include the following:

(1) Is the Crown/Native fiduciary relationship terminable? (He concludes it may be but only with the voluntary and informed consent of the Aboriginal peoples as to the specific nature and scope of the reduction of Crown fiduciary obligations).

(2) May the Crown's fiduciary obligation be reduced in scope?

(3) What is the purposive nature of the Crown's fiduciary duty?

(4) Where does the Crown's duty create an actual or potential conflict of interest?

Despite the considerable ongoing uncertainty regarding the Crown's fiduciary obligation, Rotman's book is a very thorough critique of the important Canadian decisions to date regarding that obligation. His review of the cases is thorough and concise and certainly constitutes the most readily available comprehensive source on the subject.

Rotman also explores the Aboriginal understandings of the fiduciary relationship and the nexus between governmental power and fiduciary responsibility. In my opinion, Rotman's research and analysis of the Aboriginal understandings of the Crown lacks an in-depth appreciation of the oral history of Aboriginal people as reported by the elders and the light which leading Indian writers can shed on the subject matter. This may, in part, be attributable to his lack of experience in working directly with First Nations or insufficient research of the writings of Aboriginal people setting out their understanding of the Crown/First Nation relationship, particularly as it arose through treaties.

In this regard, he is reflecting the general lack of judicial appreciation and understanding of the First Nations' views of their treaties and their relationship with the Crown. While the Supreme Court has held that the Aboriginal understanding of treaties, promises and agreements between the Crown and First Nations is crucial to any judicial interpretation of their meaning,[26] in practice the courts generally have very little appreciation or understanding of the Aboriginal view of treaties and appear only to adopt the testimony of elders when it tends to support the Crown's views. Generally, the courts appear uncomfortable with Aboriginal testimony regarding the nature of their agreements, treaties and relationship with the Crown. Given that a fiduciary relationship involves understanding and analysis of the expectations and obligations of both parties, this continues to be an important omission in jurisprudence and academic writing in this area.

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[26] *R.* v. *Badger* (1996), 133 D.L.R. (4th) 324 (S.C.C.).

Rotman also reviews the principles and characteristics underlying fiduciary relationships in general. As Rotman notes, the views of the Courts on whether a fiduciary relationship exists have been diverse.[27] Most of these cases address the issue of determining whether or not a particular relationship is fiduciary in nature and the character and extent of the obligations thereunder. These cases address the issue in the context of identifying *new* relationships which may have fiduciary obligations inherent as a result of the specific relationship and dealings between the parties. In the case of Crown/First Nation relationships, the Court has already determined in *Guerin* and *Sparrow* that the relationship is fiduciary. The issue, then, is the nature and scope of the particular obligations arising from this fiduciary relationship. This helps to place the Crown-Aboriginal fiduciary relationship in the context of fiduciary relationships in general and helps the reader identify what circumstances will give rise to legal obligations rather than political or moral ones.

The view of the Crown, as articulated before the Indian Specific Claims Commission, is that a fiduciary relationship does not give rise to any particular set of fiduciary obligations.[28] In short, the Crown asserts that the court's characterization of a relationship as fiduciary is merely an empty, descriptive term implying no specific obligations, particularly in relation to management or the administration of Indian lands or monies, fulfilment of agreements or treaties, or the manner in which the Crown extinguishes or infringes Aboriginal or treaty rights. Moreover, the Crown has argued that describing the relationship as fiduciary in nature imports no basic requirements for fiduciary conduct (honour, good faith, and best interest of the beneficiary) on the Crown and in particular imposes no positive purposive obligation on the Crown in relation to Indian lands or assets. Given this view, extensive future litigation over the consequences of characterizing this relationship as fiduciary is sure to continue in the coming decades.

In an important and concise chapter on fiduciary doctrine, Rotman reminds the reader of the basic elements of a fiduciary relationship and the conduct expected of a fiduciary.[29] This clear statement of basic and well-known principles serves as a reminder to all parties that a fiduciary has unique considerations and higher standards of conduct when acting on behalf of a beneficiary.

The recently completed Royal Commission on Aboriginal Peoples recognized that any change in the socio-economic and political circumstances of Aboriginal people is premised on the establishment of a new relationship based on mutual respect, healing of grievances and recognition of the political/economic aspirations of First Nations people in the context of their right to self-government.[30] To achieve this new relationship, the Crown must first understand and take seriously its obligations as a

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27 *Parallel Paths*, *supra* note 2 at 149.

28 See oral and written submission of DOJ to ISCC re: Athabasca Chipewyan First Nation (30 September 1997).

29 *Parallel Paths*, *supra* note 2, c. 8 "A Re-examination of Fiduciary Doctrine."

30 R.C.A.P., *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996).

fiduciary. This requires that they first understand the basics. A reading of *Parallel Paths* would help.

For many Canadians who believe First Nation peoples should not have special rights nor be the recipients of any unique or special treatment by government, Rotman's book may be dismissed as placing a moral and legal gloss on the history and jurisprudence of Crown/Aboriginal interaction in support of an Aboriginal political agenda. To his great credit, Rotman maintains an objective and scholarly approach to this legal subject which has so many political overtones. For Canadians without an ideological axe to grind or a preconceived agenda, it is an excellent opportunity to explore and understand the political and legal relationship between Canada and Aboriginal peoples.

Rotman's book should also be read by the Aboriginal leadership. There are many misunderstandings in the Aboriginal community about the character, nature and scope of the Crown's fiduciary relationship. Some First Nation leaders believe that recognition and implementation of the fiduciary relationship will be a panacea for the problems facing Aboriginal communities. While this would undoubtedly be a start, Aboriginal communities themselves must take initiatives to move beyond the need for such a fiduciary relationship if they are to assert the level of self-government, responsibility, and autonomy which most insist is necessary for the socio-economic development and sustainability of their communities.

There is a paradox and inconsistency in First Nations' insistence in maintaining the fiduciary relationship. On the one hand, they argue that the fiduciary relationship requires Canada to undertake various initiatives to protect their rights, lands and assets while at the same time criticizing DIAND in particular for exerting undue interference in the management and administration of their affairs, lands and monies. The self-government initiatives in the next decades will, at their heart, lead to a fundamental change in the nature of this fiduciary relationship. As Rotman points out, it is important that the evolution of this fiduciary relationship occur in a non-coercive, consensual manner until First Nations have the capacity to carry out the obligations currently lying with the Crown.[31] For the Crown merely to unload its fiduciary obligations onto unprepared and incapable First Nations would clearly be a breach of a fiduciary's obligation to act in the best interests of the beneficiary. In conclusion, negotiating an end to the fiduciary relationship is fundamental to the emergence of Aboriginal self-government in Canada. It is a complex legal, political and financial issue and in this context, Rotman's text can provide guidance to both parties.

Among the important issues Rotman addresses is the potential for fiduciary obligations of provincial Crowns to Aboriginal peoples. This subject matter has received little judicial comment (all of which is noted in Rotman's book) and been the subject of only occasional academic works. However, it can be expected that this will become a major area of litigation. As Rotman notes:

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[31] *Parallel Paths, supra* note 2 at 257-60.

> In light of the judicial entrenchment of the Crown's fiduciary obligations in *Guerin*; the constitutional responsibility of the federal and provincial Crowns to purposively act to further the aboriginal and treaty rights contained within s. 35(1) of the *Constitution Act, 1982*; the nexus between governmental power and responsibility; the link between the division or sharing of power and resultant benefits; the inferences of provincial duties owed to aboriginal peoples in the *St. Catherine's Milling* and trilogy cases ... and the more recent judicial suggestions regarding provincial fiduciary responsibilities owed to aboriginal peoples, the notion that provincial Crowns owe fiduciary obligations to aboriginal people is ready for explicit judicial recognition.[32]

Rotman's book is unlikely to be appreciated by federal or provincial governments. Generally, he takes the view that honouring the nature of the fiduciary relationship increases the actual responsibilities of both Crowns and necessitates that they contribute significantly more resources to settling breaches of their fiduciary obligations and ensuring their future actions either do not infringe upon the treaty and Aboriginal rights of First Nations, or do so only in a manner that meets the guidelines set out by the Supreme Court in *Sparrow* and subsequent cases. It is clear that the federal and provincial governments are uneasy, to say the least, about the potential scope of their fiduciary obligations to Aboriginal people. It is exceedingly rare for ministers to recognize and acknowledge that the relationship is fiduciary, much less that specific obligations arise thereunder. The concept is, frankly, politically unpalatable, but nevertheless an unavoidable legal focus and consideration in federal and provincial decision-making regarding Aboriginal peoples. For politicians who doubt the existence, import or relevance of the fiduciary relationship to their decision-making process, Rotman's book would be an important and necessary read.

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[32] *Ibid.* at 254.