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The Crown has neither the power nor the duty to invest Indian monies: The use of legislation to limit trust duties

By Nigel Bankes

Cases Considered:

Ermineskin Indian Band and Nation v. Canada, 2009 SCC 9.

The “money management” part of the long-running Samson\Ermineskin Case has now come to a close. A unanimous seven person panel of the Supreme Court of Canada in a judgement authored by Justice Marshall Rothstein has ruled that the Government of Canada is not liable when it fails to invest First Nation royalty monies and instead deposits those monies to the credit of the Consolidated Revenue Fund (CRF) and pays the First Nations interest on those monies. In fact, the Court has ruled that the *Indian Act* makes it illegal for the Crown to invest Indian capital monies. The Court also ruled that the provisions of the Act which require this conclusion do not constitute discrimination within the meaning of s.15 of the *Charter*.

The Facts

The case involved the treatment of oil and gas royalties from production on the Pigeon Lake Reserve and Samson Reserves in Alberta. Both the Samson First Nation and the Ermineskin First Nation are Treaty 6 First Nations. The reserve lands in both cases were surrendered under the terms of 1946 surrenders which provided that:

> TO HAVE AND TO HOLD the same unto his said Majesty the King, his Heirs and Successors, forever, in trust to grant in respect of such land the right to prospect for, mine, recover and take away any or all minerals contained therein, to such person or persons, and upon such terms and conditions as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people. [Emphasis added by Justice Rothstein.]

The Crown deposited royalties from oil and gas production on the reserves in the CRF and credited the two First Nations with interest calculated on the basis of long-term government bonds. The First Nations argued that the Crown’s failure to invest these proceeds of production in a more diversified portfolio had deprived them of hundreds of millions of dollars that would otherwise have accrued. It was common ground between the parties that the Crown owed the First Nations fiduciary obligations with respect to the royalties; the debate was as to the basis and

content of those obligations (at para. 44). In particular, the Crown argued that any powers or duties that a fiduciary or trustee might ordinarily have in relation to trust monies had been modified by statute, principally the *Indian Act*, R.S.C. 1985, c. I-5 and the *Financial Administration Act* (*FAA*), R.S.C. 1985, c. F-11.

An outline of the arguments

The plaintiff First Nations argued that the Crown had a fiduciary duty to invest the royalty receipts based on: (1) the language of Treaty 6, or, (2) the language of the mineral surrenders.

The Crown in turn argued that even if a fiduciary might ordinarily have a duty to invest, such a duty was modified by relevant legislation, in particular the *FAA* and the *Indian Act*. The result of the modification was that the Crown (1) had a duty to deposit those monies into the CRF, (2) had a duty to pay interest on Indian monies held in the CRF, but (3) had no duty to invest those monies in, for example, a balanced investment fund.

In determining an appropriate rate of interest the Crown should be held to the standard of prudence that a person would display in managing their own affairs. The Crown argued that the Crown's practice of fixing interest rates on the basis of the government's long term bond rate met this test. The Crown was not unjustly enriched by having these Indian monies available to it in the CRF since, had they not been available, the evidence at trial suggested that the Crown would have borrowed short term money at a lower interest rate than that which it was paying on the Indian monies deposited into the CRF (at paras 182 - 184).

The Crown also argued that it was not a breach of duty for the Crown to refuse to transfer monies to the First Nations so that they could invest them. Before making such a transfer the Crown had to satisfy itself that the transfer would be in the best interests of the band. Absent an appropriate financial plan and a release of continuing responsibility for the management of those monies once transferred it was reasonable for the Crown to refuse to transfer monies for investment purposes.

The treaty argument

The First Nations led with the treaty argument on the grounds that: (1) if the treaty itself created a common law trust (at para. 49) or other form of a fiduciary obligation, and (2) if a trustee had a duty to invest rather than just to earn interest, then (3) any effort by the Crown (whether through legislation or in some other way) to modify such a duty would be (a) of no force or effect (at para 47) or (b) a prima facie infringement of a treaty right that the Crown would have to justify [this latter is my interpolation].

The Court held that the argument did not get to first base. Neither the treaty text nor the oral terms supported an interpretation that the treaty had created a trust. The treaty text authorized the Crown to sell or otherwise dispose of reserve lands "for the use and benefit" of the Indians entitled thereto and with their consent. The oral promise was that where reserve lands were sold the proceeds of the sale that were not then required by the First Nation would be "*put away to*

increase for them." This italicized language (taken from Morris', *Treaties with the Indians*) did not import a trust duty to invest. The Court suggested that what the Crown committed to above all else was to guarantee that these monies would be available (without loss - at para. 63) to the First Nation when required. Investment always creates the risk of loss (at para. 58) and a trustee is not a guarantor (at para. 57). According to Justice Rothstein:

> In my opinion, it is likely that the Indian signatories to Treaty No. 6 interpreted and understood Lieut.-Gov. Morris' statement as amounting to a guarantee that the proceeds of the sale of any part of a reserve would be kept for them by the Crown and that it would be safe and secure and over time would increase. In effect, the Crown guaranteed that there would be a return of and a return on the bands' capital funds <u>with no associated risk of loss</u>. (at para. 56, my emphasis)

In summary, the Court's position seems to have been that: (1) the Crown promised to preserve the proceeds of sale protecting them at most against inflation (not that the Court mentions inflation until para.133), (2) since "investment" involves risk of loss of capital, investment is inconsistent with the treaty promise.

The surrender argument

The second and alternative argument of the First Nations was that the terms of the 1946 surrenders obliged the Crown as a common law trustee to invest their royalties. The Court accepted at least part of this argument. Apparently still constrained by Justice Dickson's judgement in *Guerin v. The Queen* [1984] 2 SCR 335 to the effect that a surrender creates a fiduciary relationship rather than an express trust (and notwithstanding use of the term "trust" in the surrender document), Justice Rothstein was prepared to say that the Crown was a fiduciary but that in some circumstances a fiduciary would have essentially the same responsibilities as a common law trustee. And that was the case here (at para. 73):

> If a situation is such that a fiduciary is in a position similar to that of a trustee, even though the situation cannot necessarily be categorized as a "common law trust", I do not see why the common law duties of a trustee cannot be applied to that fiduciary if that is what the particular situation warrants. In this case, the bands have placed particular emphasis on a trustee's duty to invest their royalties - the trust corpus. In my opinion, if the situation is such that the Crown is in the position of a fiduciary, although not strictly speaking a trustee at common law, and holds funds on behalf of the bands, it is not improper to ascribe to the Crown a duty to invest those funds in the manner of a common law trustee, <u>subject to any legislation limiting its ability to do so</u> (my emphasis)

The kicker of course lies in the underlined words since they invite an inquiry as to whether there was any such legislation, the assumption being that, if there was no *treaty* right to have royalty proceeds invested, then any obligation to invest based upon common law and equitable rules

might be modified by legislation. That led the court to examine in turn: (1) the *Indian Oil and Gas Act*, R.S.C. 1985, c. I-7, (2) the *Financial Administration Act*, and (3) the Indian Act.

The *Indian Oil and Gas Act*

The *Indian Oil and Gas Act*, assented to in 1974, provides, *inter alia*, that all oil and gas produced from Indian lands is subject to the payment of a royalty to the Crown as prescribed from time to time by the regulations (s. 4). The same section makes it plain that while the royalty is payable to the Crown, the royalty payment is in fact and in law "in trust for the Indian bands concerned". The section also makes it clear that the royalty is payable in the manner prescribed notwithstanding the terms of any existing lease, permit etc.

The Court held that the *IOGA* was "*not* a legislative restriction that would preclude investment by the Crown of the royalties" (at para. 83) (i.e. it could not be read as modifying the common law and equitable obligations that the Court had already decided applied to the Crown here). However, the *IOGA* was also *not* a complete code (at para 84 - this was an argument raised by some interveners) meaning that it was necessary to look beyond the *IOGA* to see if there were other possible statutory modifications. This point was crucial, for if it was not a complete code then it was necessary to look at the *FAA*.

The *FAA*

The *FAA* (s.17(1)) requires that all public monies shall be deposited to the credit of the Receiver General and all money so deposited constitute the Consolidated Revenue Fund (s.2(1)). Once in the CRF, monies received "for a special purpose" can only be paid out for that purpose and "subject to any statute applicable thereto" (s.21).

One might have thought that royalties payable in trust were not "public monies" but rather were something else (such as First Nation monies), but s. 2 of the *FAA* defines "public monies" rather broadly and as including:

> (d) all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract, and is to be disbursed for a purpose specified in or pursuant to that Act, trust, treaty, undertaking or contract;

In light of that, the Court readily concluded (at para. 91) that since the "royalties are money collected by Canada on behalf of the bands pursuant to the *IOGA*, they are "public money" within this definition and as such must be dealt with in accordance with the provisions of the *FAA*."

Once that conclusion was reached everything else fell into place. The Court held that the "applicable statute" to authorize payments out of the CRF was the *Indian Act* (para. 94) and, remarkably enough, the Court was not prepared to conclude that the *Indian Act* permitted the Minister to "expend" capital monies of a First Nation on investments. In particular, the Court

held that the First Nations could not rely on the apparently broad language of s.64(1)(k) of the *Indian Act*:

> 64. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band …..
> (*k*) for any other purpose that in the opinion of the Minister is for the benefit of the band.

The Court preferred an *eiusdem generis* interpretation of the section and noted that the other paragraphs in the sub-section referred to expenditures for assets on the reserve rather than investments, held, controlled and managed by the Crown (at paras 107 and 109). Thus, while the Court was of the view that the Act did permit the Crown to transfer monies to a First Nation to allow the First Nation to invest in diversified investment portfolio (on conditions discussed below), the *Act* did not permit the Crown itself to invest Indian monies (at para. 123).

In sum, together, the *FAA* and the *Indian Act* modified what might otherwise have been the duty of the Crown as a fiduciary to invest the royalty monies.

If the Crown had no power to invest then all that was left to argue about was the question of interest and interest rates.

The interest issue

I assume that the CRF is effectively a commingled account. Funds within the CRF may be marked or designated for specific purposes but they are all available to fund the business of government. Special purpose funds are not segregated. Commingling of trust monies, while unusual, is not completely inconsistent with a trust, but even where the terms of an agreement permit commingling trust monies with the trustee's own monies the trustee\fiduciary still owes a duty not to spend those monies for the trustee's own account: *Brookfield Bridge Lending Fund Inc. v. Vanquish Oil and Gas Corporation*, 2008 ABQB 444 and *Bank of Nova Scotia v Société Générale (Canada) et al* [1998] 4 WWR 232.

But the terms of the CRF and the *FAA* go far beyond this since they clearly authorize the Crown to make use of these monies while they are in the CRF subject only to the statutory duties prescribed by the *FAA* and other relevant statutes. The Court recognized that this, on the face of it, is utterly inconsistent with trust obligations:

> [126] At common law, a trustee is not permitted to borrow from the trust, as this would constitute a conflict of interest. The bands argued that the Crown was in a position of conflict of interest and therefore in breach of its fiduciary duty to them because their royalties were held in the CRF for use by the Crown. The bands have characterized the fact that the royalties are held in the CRF for use by the Crown as a "forced borrowing", and that without their consent it is improper or unlawful.

> [127] The Crown is in a unique position as a fiduciary with respect to the royalties and the payment of interest. The Crown is borrowing the bands' money held in the CRF. However, the borrowing is required by the legislation…..
>
> [128] A fiduciary that acts in accordance with legislation cannot be said to be breaching its fiduciary duty. The situation which the bands characterize as a conflict of interest is an inherent and inevitable consequence of the statutory scheme.

Parliament in s.61(2) of the *Indian Act* recognized that, in return for this "forced borrowing," "interest on Indian monies held in the [CFR] shall be allowed at a rate to be fixed from time to time by the Governor in Council."

How then should the Crown go about setting this interest rate given the Crown's manifest conflict of interest position, a position in which its loyalty to the First Nations was at odds with its own self-interest?

Following earlier authority (the Court cites *Wewaykum Indian Band v Canada*, [2002] 4 SCR 245 but not *Osoyoos Indian Band v. Oliver*, [2001] 3 SCR 746 and the idea of minimal impairment) the Court emphasised that the Crown was no ordinary fiduciary since in some situations as here, legislation created a conflict of interest and (at para. 128) "A fiduciary that acts in accordance with legislation cannot be said to be breaching its fiduciary duty. The situation which the bands characterize as a conflict of interest is an inherent and inevitable consequence of the statutory scheme."

In the result, Justice Rothstein was of the view that this allowed the Crown to set aside the fiduciary's traditional undivided duty of loyalty and instead engage in a balancing of interests:

The Crown's position in the setting of the interest rate paid to the bands is also unique. On the one hand, it has fiduciary duties that are owed to the bands, including the duty of loyalty and the obligation to act in the bands' best interests. On the other hand, the Crown must pay the interest owed to the bands with funds from the public treasury financed by taxpayers. The Crown has responsibilities to all Canadians, and some balancing inevitably must be involved. ….. In the present case, the Crown must consider not only the interests of the bands but also the interests of other Canadians when it sets the interest rate paid to the bands (at paras. 129 - 130).

Justice Rothstein accepted that in setting the level of interest ("within its discretion as a fiduciary" (at para 132)) the Crown had a number of options: (1) a flat rate of interest that might be adjusted from time to time; (2) interest at the rate of return of short-term treasury bills; (3) interest equivalent to the return on a diversified portfolio; (4) interest at a rate tied to the yield on long-term government bonds but adjusted periodically; or (5) interest at the yield on long-term government bonds guaranteed for the term of the bonds, i.e. a laddered bond portfolio.

The Court seemed to reject option 1 (an adjusted flat rate) (even though the Crown actually used this system from 1859 - 1969) on the grounds that it was insufficiently responsive to changes in

the rate of inflation because of the need to procure an Order in Council every time it needed to change the rate of interest. Curiously (and I say curiously because of the complete absence of any discussion of consultation anywhere else in the judgement), Rothstein suggested that this in turn (at para. 133) could likely "have required consultation with the affected bands." It may go too far to suggest that the Court rejected option 1 notwithstanding the criticisms expressed (but see at para 147 where the Court notes that "it is apparent that short-term rates would not have been in the best interests of the bands when it was possible for the Crown to pay interest at a higher rate in view of the Crown's diversified borrowing patterns.") It is perhaps better to emphasise that the Court decided (at para. 133) that it was not necessary to consider the option further since "no one has suggested it as an *adequate* alternative" (emphasis mine). Similarly the Court did not further explore option 2 (a short term bill rate) since, while this provides liquidity, short term rates are generally lower and the bands would not need access to all of their royalty monies. The Crown, Rothstein concluded, "does not suggest that interest based on short-term treasury bills was an *appropriate* alternative" (at para. 134, emphasis mine).

The Court rejected option 3 (interest equivalent to what would have been paid in a diversified portfolio) for quite different reasons:

> [136] A fiduciary is not required to provide the beneficiary, out of the fiduciary's own resources, what could have been obtained had legislative or contractual limits on its discretion not existed. Requiring the Crown to pay a rate of interest equivalent to what would have been obtained through investment in a diversified portfolio would require the Crown, in its fiduciary capacity, to supplement, out of the public treasury, the return that it was statutorily prevented from obtaining. It was not required to do so.

That left options 4 and 5. Option 4 tied the interest rate to the yield on long term government bonds and provided for a quarterly adjustment. This approach provided both liquidity and (because of the quarterly adjustment) protection against inflation and was actually the option that the Crown had selected. While option 5 would (with hindsight) actually have provided better returns, it was not imprudent and therefore met the *Fales* test (at para. 140) (*Fales v. Canada Permanent Trust Co*, [1977] 2 SCR 302):

> …. it cannot be said that the floating rate approach adopted by the Crown was not a prudent course of action having regard to the options available. Nor can it be said that it was selected without regard to the best interests of the bands. It provided liquidity and some protection against inflation, without the risks associated with locking in the funds. It cannot be said that a prudent person managing his or her own affairs under the same legislative constraints as the Crown would not have chosen this option.

> ….. [146] just because in hindsight it is apparent that the returns may have been greater [with a laddered approach] does not mean that the Crown breached its

fiduciary duties to the bands by adopting an equally prudent floating long-term rate approach.

In conclusion both an adjusted long term rate and the laddered bond approach "could have been selected by a prudent person managing his or her own affairs but modified by the constraints applicable to the Crown" (at para. 148) and therefore the Crown did not breach its fiduciary duty owed to the bands.

The transfer of funds to the First Nations

As noted above, the Court ruled that the *Indian Act* did authorize the Crown to transfer funds to a First Nation so that the First Nation itself could invest those funds. The Crown had transferred some funds to the Samson First Nation in 1980 but it refused to transfer more funds until Justice Teitelbaum so ordered in 2005 as part of this action and subject to certain terms and conditions, including a detailed financial plan and a release exonerating the Crown from liabilities associated with the management of these monies (at paras. 153 - 170).

Was the refusal of the Crown to transfer further monies to the two First Nations a breach of (a fiduciary) duty? Justice Rothstein elected to consider this issue even though as he concedes (at para. 150): "This position was not specifically argued as a breach of trust or fiduciary duty by the Crown. The bands simply argued that the Crown not only refused to invest the royalties, but also refused to allow the bands to invest them."

In effect, he ruled that the Crown was not in breach (without really considering the source of such a duty) on the grounds that the Crown could not simply transfer the funds. In order to fulfill both its statutory duty under s.64(1)(k) of the *Indian Act* (quoted above) and its fiduciary obligations "it must be satisfied that any transfer is in the best interests of the bands" (at para. 152). In this case, and based upon Rothstein's assessment of the evidence, any further transfer to the Samson First Nation (prior to Teitelbaum's order) "would have been imprudent" while the Crown's refusal to transfer monies to Ermineskin was amply justified on the basis that Ermineskin was reluctant to provide a release for any monies so transferred (at para. 181).

The constitutional validity of the legislative scheme

In a legal system in which a statute will trump an inconsistent common law or equitable duty, the only avenue left to the plaintiffs was to attack the constitutionality of the legislative scheme that precluded the Crown from investing Indian monies. This lead the First Nations to contend that the provisions of the *Indian Act* were discriminatory and of no force or effect under s. 15 of the *Charter*. The lower courts had dealt with this argument by denying the First Nations standing to bring the argument on the basis that the First Nations "were asserting a claim in relation to the management of band property and not a claim relating to personal rights of band members" (at para. 187). Justice Rothstein however preferred to by-pass this "procedural" (at para. 187) objection and deal with the substantive merits of the argument.

On the substantive merits Justice Rothstein quickly reached the conclusion that the impugned legislation created a distinction (at para. 189) (presumably on the basis of race, national or ethnic origin, as argued by counsel for the First Nations) but that this differential treatment did not constitute discrimination because the "money management provisions, which preclude investment of Indian moneys by the Crown, [do not] perpetuate prejudice or stereotyping (at para. 190)."

My colleagues (Jennifer Koshan and Jonnette Watson Hamilton) plan to say more on this topic (see "The End of Law: A New Framework for Analyzing Section 15(1) *Charter* Challenges") so I shall limit myself to a few observations.

Justice Rothstein chose to focus on whether the money management provisions that preclude investment of Indian moneys by the Crown amounted to a disadvantage. But I wonder if this was the most appropriate focus for the analysis, particularly in light of Rothstein's consideration of the question of whether the Crown was in breach of a duty to transfer capital monies to the band for them to invest.

In this context, the questions might have been the following: (1) under what circumstances may the beneficiaries of a trust require the trustee to transfer the subject matter of the trust to the beneficiaries and are those conditions different from those required of First Nation beneficiaries with respect to the Crown's trust responsibilities for Indian monies (I assume that this might revolve around the conditions precedent for application of the *Rule in Saunders v. Vautier* and any possible statutory limitation on the application of that rule (see *Buschau v Rogers Communication Inc.*, [2006] 1 SCR 973), and (2) do these (different) conditions (e.g. satisfaction that the First Nation has a financial management plan) perpetuate prejudice or stereotyping. If the question were so framed (and with a statement of an appropriate comparator such as that described above) I am not sure that Justice Rothstein would have been able to reach the conclusion that he does (at paras 200 - 201) that the provisions of the *Indian Act* and the Crown's practice pursuant to those provisions did not in fact perpetuate prejudice and stereotyping.

Analysis and comment

I comment on three aspects of the decision: (1) the treaty analysis and the failure to consider the procedural implication of a treaty relationship, (2) the vulnerability of indigenous peoples to the categorizations of the legal system of the settler society, and (3) the "balancing" discussion.

The treaty analysis

At first reading I was almost persuaded by Justice Rothstein's treaty analysis. After all it does seem reasonable to think that the tribes would, above all else, have expected that the Crown would preserve the corpus. The risk of loss as a result of investing in a merchant enterprise would perhaps be too difficult to explain and if it could not be readily explained in 1876 then it could not be a reasonable interpretation of the treaty. But the more I thought about it the more I thought that this is such a fossilized and technical approach and an approach that seems to be

premised on the idea that the parties could not talk to each other (or perhaps premised on the stereotype that one party to the treaty was so primitive that it could never understand the pros and cons of investing - whether in 1876 or 2009). The fossilized and technical approach is facilitated by fastening on particular "oral" treaty terms as reproduced in Morris' account. But why privilege that account and that particular choice of words?

It is not clear to me, for example, why the interpretive question is framed in terms of trust law. Why is the question not framed more generally? If we frame the question more generally it is possible that we will re-state the Crown's duty in less precise but more evolutive terms. For example, it seems reasonable to think that what the Crown was really committing to was to take care of the proceeds of sale in the best interests of the First Nation. What those interests were might evolve and change over time and the Crown would need to engage in a conversation (perhaps even consultation - see para 133) with the First Nation to assess those interests and needs. For example, does the First Nation need cash now, or is it better to save for the long term and for the benefit of future generations? Such a conversation might include a discussion about risk. Even if it is reasonable to think that there could be no engagement between the parties on the concept of risk in 1876 why pick an interpretation of the treaty that freezes the interpretation at a particular historical moment? The point about a conversation is important. After all, the Court recognized in *Mikisew Cree*, [2005] 3 SCR 388 (not mentioned in the judgement) that the Crown's power to take up lands triggered a duty to consult because it resulted in moving lands from a category of lands to which First Nations had access for hunting purposes to a category of lands from which they could be denied access. What seems to be missing from this case is any sense of a relationship in which the parties might talk about the best interests of the First Nation and how to protect them. And this ignores reality.

Modern international treaty law is fully committed to the evolutive interpretation of historical treaties (especially but not exclusively in the context of human rights treaties - see the Iron Rhine Arbitration, 2005) and it is not clear why the Supreme Court of Canada seems to prefer a more fossilized approach.

Vulnerability to the categorizations of the legal system of the settler society

The treaty issue was crucial to the outcome here. Once the Court had decided that there was no treaty right to have the royalty monies invested it was then able to conclude that parliament could change the terms of the trust relationship at will. This observation triggers two reactions. The first comment is that this reveals (once again) the vulnerability of indigenous peoples to the legal categories and ineffable power of the settler society. The settler gets to construct legal categories such as: the Crown in its executive capacity; the Crown in parliament; the sovereignty of parliament; trust; fiduciary; property etc. These categories or concepts, once created, have no fixed meaning or content and in particular their content can be modified by parliament and indeed by the courts of the settler legal system. The only response to this risk of unilateral re-definition is to seek some form of "autonomy of meaning". This necessarily carries us from the national legal system to the international legal system where the state is more constrained in its unilateral ability to define and redefine such contested concepts as culture (Article 27 of the

International Covenant on Civil and Political Rights) or property (Article 23 of the *Inter-American Declaration of the Rights and Duties of Man*).

A second reaction is to question whether the treaty offered the only means of constitutionalizing the content of the Crown's fiduciary duty. I don't have a complete answer to this question but there is dicta in *R. v. Sparrow*, [1990] 1 SCR 1075 (not mentioned in the judgement) which some have read as constitutionalizing the Crown's fiduciary duty. And in addition, *Haida Nation*, [2004] 3 SCR 511 (also not referred to by Rothstein) and Mikisew Cree (supra) clearly locate the constitutional duty to consult outside s.35 of the *Constitution Act 1982* and as a more general constitutional duty based on the honour of the Crown and as a necessary implication of the Crown's assertion of sovereignty (a common law or unwritten principle of the Constitution). Furthermore, the Court in *Haida* suggests that both the duty to consult and accommodate and the Crown's fiduciary duty share this common legal root (*Haida*, paras 16 - 18). *Haida* tells us that the Crown may put in place a process for structuring consultation and accommodation (at paras 60 *et seq*) but *Haida* does not suggest that the Crown can unilaterally re-define the nature and meaning of the duty to consult and accommodate. And if the Crown and the legislature do not get to redefine the duty to consult, why do they get to redefine the concepts of trust and fiduciary? One of the silences of this case is that the Court barely even mentions "honour of the Crown" (see paras 33 & 84)

The "balancing" discussion

As noted above, Justice Rothstein suggests that the Crown is an unusual fiduciary since the Crown may owe duties not only to the First Nation but to Canadians more generally (at para. 129). I agree with this: the Crown's fiduciary duty is truly *sui generis*. However, we need to be careful about when it is necessary to invoke the need to balance and when it is unnecessary. I think that we also need to discipline any balancing by test such as the minimal impairment test.

I think that the need to invoke balancing is also tied to the particular duty that we are concerned with. Fiduciaries owe their beneficiaries a range of duties. Some of those duties are more strict than others. In particular, the duty of loyalty is strict whereas the duty to manage the trust assets is something like a negligence based duty (reasonable and prudent investor etc: *Fales*, *supra*). I can see that balancing may be necessary when the duty we are concerned with is the undivided duty of loyalty since that is a duty to completely avoid the possibility that self-interest and duty will conflict. But it is hard to see why balancing is required when the applicable duty is already negligence-based. And that is what is distinctly odd about the balancing discussion in this judgement; it is located in a part of the judgement where the issue was the prudent investor standard rather than a loyalty standard.

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