PARALLEL PATHS: FIDUCIARY DOCTRINE AND THE CROWN-NATIVE RELATIONSHIP IN CANADA. By Leonard Ian Rotman. Toronto: University of Toronto Press, 1996, Pp. 484 (paperback $24.95, hardcover $60.00).

In *Parallel Paths*, Leonard Rotman has set himself a formidable task—addressing the "unanswered questions that plague the development of the Crown-Native fiduciary relationship."[1] As he points out in his preface, such an undertaking involves grappling with "a complex topic" in "an even more complicated area of law."[2]

The book is divided into three parts. The first, "The Juridical Understanding of the Crown-Native Fiduciary Relationship", traces the political and historical contexts of the relationship, and its recognition as fiduciary in *Guerin* v. *R.*[3] and subsequent cases. Part Two, "General Principles of Fiduciary Doctrine", is Rotman's attempt to elucidate and, perhaps, to re-formulate, the fiduciary idea. In Part Three, he applies this re-formulated doctrine to the Crown-Native relationship, exploring implications that, in his view, the courts have not adequately or consistently addressed. As I have already intimated, this is a large enterprise, engaging a subject that surely merits the extensive attention which the author accords it.

The core of this review will be a critical analysis of Rotman's elaboration of a key element in his argument—fiduciary doctrine, especially as it is presented in Chapter 7, "The Status of the Crown's Fiduciary Duty", and Part Two, mentioned above. He himself says that "[t]he only way to rectify the inherent deficiencies in existing Crown-Native fiduciary jurisprudence is to return to the general characteristics and principles of fiduciary doctrine, as outlined in Part Two".[4] Moreover, he implies that his account of fiduciary doctrine constitutes "[a] workable general theory",[5] that, indeed, his account permits fiduciary law to be "truly understood".[6] In short, he claims to be fashioning a complete and accurate theory, upon which the appropriate development of Crown-Native fiduciary law depends.[7]

As Rotman observes, the fiduciary principle is notoriously intractable. Any sustained effort to advance our understanding of it is to be welcomed—indeed, applauded. However, while acknowledging the value of the undertaking, I question whether Rotman has been wholly successful in capturing this elusive concept and its implications.

My concerns about his approach arise in the following areas: (1) his characterization of the problem; (2) his treatment of some underlying premises; (3) his elaboration of his own theory *per se*, and (4) his application of it.

As I have already intimated, and as Rotman notes, there have been many attempts—both judicial[8] and academic[9]—to pin down the fiduciary principle. Rotman may very well be right in

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

[2] *Ibid.* at ix.

[3] [1984] 2 S.C.R. 335, 59 B.C.L.R. 301 [hereinafter *Guerin* cited to S.C.R.].

[4] *Supra* note 1 at 204.

[5] *Ibid.* at 176.

[6] *Ibid.*at 199.

[7] Indeed, some of Rotman's criticisms of the current judicial approach are quite damning. He says, for example, that in the post-*Guerin* cases, "the judiciary has been entirely inconsistent" (p. 138), that these cases leave a legacy that "is short on substance and abundant in confusion" (p. 138), and seems to imply that judicial efforts heretofore have not been *bona fide* (p. 204).

[8] Here, one could point to the line of Supreme Court of Canada cases including *Canadian Aero Services Ltd.* v. *O'Malley*, [1974] S.C.R. 592, *Guerin* itself, *Frame* v. *Smith*, [1987] 2 S.C.R. 99, *International Corona Resources Ltd.* v. *LAC Minerals Ltd.*, [1989] 2 S.C.R. 574, *Canson Enterprises Ltd.* v. *Boughton &*

saying that none of these has been completely satisfactory.[10] But one puzzling thing about his identifying the issue as problematic is his foregrounding of accounts that few, if any, contemporary commentators would regard as central to the difficulty.

Thus, he repeatedly dissociates himself from the "categories" approach to fiduciary relationships by stating: "The use of categories...runs counter to the very basis of fiduciary doctrine";[11] and "fiduciary relationships ought not to be confined to already established categories".[12] This emphasis tends to imply that the category approach is contemporary orthodoxy. I doubt that it is. For example, at least as long ago as *Guerin*, Supreme Court justices were rejecting that approach: "It is the nature of the relationship," writes Dickson J., "not the specific category of the actor involved that gives rise to the fiduciary duty."[13]

Another indication of a somewhat skewed characterization of the problem is the focus, in Chapter 8, on cases such as *Chase Manhattan Bank* v. *Israel-British Bank (London) Ltd.*,[14] *Goodbody* v. *Bank of Montreal*,[15] and *Reading* v. *R.*[16] as revealing courts' misunderstanding of the fiduciary principle. Again, I doubt that many current writers think the first two of these cases raise the fiduciary conundrum in any critical way. Indeed, LaForest J. in *LAC Minerals*[17] explicitly rejected the kind of invocation of the fiduciary notion that we find in *Chase Manhattan* and *Goodbody*[18]—both cases about "tracing". As for *Reading*, a case of quite a different kind, it does raise the central fiduciary issue—a point which Rotman acknowledges without analyzing. He devotes approximately three pages to debunking the "approach" taken in these three rather peripheral cases. By contrast, earlier in the Chapter, he mentions in one sentence the series of cases to which I have already referred[19] in which the Supreme Court has grappled, perhaps inconclusively, with fiduciary doctrine. Surely it is with these cases, and what they actually say about fiduciary doctrine, that any critique should begin. The "categories" approach, and the *post facto* finding of fiduciary relationships to justify the tracing remedy, are simply too easy targets.

My second area of concern involves some of Rotman's underlying premises, which form the context of his more specific development of the fiduciary concept.

One of these premises he expresses in these terms:

Co., [1991] 3 S.C.R. 534, *Norberg* v. *Wynrib*, [1992] 2 S.C.R. 226, *McInerney* v. *MacDonald*, [1992] 2 S.C.R. 138, *M.(K.)* v. *M.(H.)*, [1992] 3 S.C.R. 6, and *Hodgkinson* v. *Simms*, [1994] 3 S.C.R. 377.

[9] I would simply draw attention to Rotman's extensive bibliography *supra* note 1 at 455-475.

[10] Rotman goes further: he refers, for example, to the "failure of the judiciary to engage in serious analysis of fiduciary theory". *Ibid.* at 160.

[11] *Ibid.* at 152.

[12] *Ibid.* at 155.

[13] *Guerin*, *supra* note 3 at 384. Compare, for example, La Forest J.'s words in *M.(K.)* v. *M.(H.)*, *supra*, note 8 at 65-66: "In *Lac Minerals* I stressed the point, which also emerges from *Frame* v. *Smith*, that the substance of the fiduciary obligation in any given case is not derived from some immutable list of duties attached to a category of relationships ... Rather, the nature of the obligation will vary depending on the factual context of the relationship in which it arises."

[14] [1980] 2 W.L.R. 202, [1979] 3 All E.R. 1025 [hereinafter *Chase Manhattan*].

[15] (1974), 4 O.R. (2d) 147, 47 D.L.R. (3d) 335 (Ont. H.C.) [hereinafter *Goodbody*].

[16] [1949] 2 K.B. 232 (C.A.), aff'd [1951] A.C. 507 (H.L.), (sub nom. *Reading* v. *Attorney-General*) 1 All E.R. 617 (H.L.) [hereinafter *Reading*].

[17] See note 13, *supra*.

[18] *Lac Minerals*, *supra* note 8 at 649-650. Rotman himself calls *Chase Manhattan*, *supra* note 14, [o]ne of the most "notorious example of the misapplication of fiduciary doctrine" (p. 160). If it is "notorious", I am not sure why he has to tell us about it.

[19] *Supra* note 8.

> Fiduciary relationships exist on two independent, but interconnected planes—the legal and the extralegal. The legal plane...includes all relationships which are recognized by law as fiduciary. The extralegal plane is comprised of relationships that may be designated as 'pure' fiduciary relationships in the scientific or mathematical sense.[20]

Leaving aside the intriguing question of what a fiduciary relationship in the "scientific"—not to mention "mathematical"—sense might be, I find this position problematic. Arguably, "fiduciary relationship", as a *legal* concept, must be a creature of law; it is what the law says it is. Rotman appears to be saying that the fiduciary concept "just is", existing independently of courts' recognition and application of it.[21] This may be the case, but, if it is, it demands more adequate justification than Rotman's mere assertion of it affords. He talks about "pre-existing" rights and duties, but, again, are not rights and duties *creatures* of the law, or of *some* law?[22] What law? Rotman's position raises large jurisprudential issues that he does not resolve—and that may have to be reconciled with the social pragmatism seemingly underlying other aspects of his discussion.

Another of Rotman's operating premises engages the *purpose* of fiduciary doctrine. He tells us, several times, that "[t]he policy underlying the law of fiduciaries is focused on a desire to preserve and protect the integrity of socially valuable or necessary relationships which arise from human interdependency".[23] Indeed. But this seems, at this point, rather vague. Presumably, much of the law performs this function. Later, Rotman himself, while discussing "Utility Theory" as one account of the fiduciary principle, rejects this formulation as too broad and notes the need to distinguish "socially valuable relationships"[24] which are fiduciary from those that are not. However, I find no sustained reconciliation of the earlier and the later assertions—apart from what can be inferred from Rotman's more detailed description of his theory.

The last of Rotman's broad premises warranting mention is the "situation-specific" nature of the fiduciary concept. He emphasizes that this point is crucial to his theory.[25] The problem that arises, however, is the old one of the general versus the particular. Rotman insists that individual situations and contexts are critical; at the same time, he cannot abandon the notion that there is some governing or unifying principle: "[i]n spite", he says, "of fiduciary doctrine's need for contextual analysis, common core principles of fiduciary doctrine are capable of being isolated...in the absence of context".[26]

However, his treatment of the relationship between *ad hoc* particularity and the limiting principles lacks clarity. He says that "[a]lthough a relationship is fiduciary if it possesses certain characteristics, the limits of fiduciary relations ought not to be absolutely defined by those characteristics".[27] Does this mean that even relationships lacking the characteristics of fiduciary relationships might be fiduciary? The problem is aggravated by Rotman's apparent identification of "characteristics" with "categories", one of his favourite targets, as we have seen. Thus, in the

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[20] *Supra* note 1 at 141.

[21] Perhaps this is why he says, later, that determining whether a relationship is fiduciary is a "matter of fact" (p. 177)—although determining what "fiduciary principles" apply to the relationship is "a question of law" (p. 177). Rotman does not always clearly distinguish between "factual" and "normative" matters.

[22] Indeed, in his exemplification of this point, Rotman seems to envisage that at least some "pre-existing rights" are simply the creatures of some other law, for example, "customary laws" or a "separate [Aboriginal] legal system" (p. 143).

[23] *Ibid.* at 152.

[24] *Ibid.* at 173.

[25] *Ibid.* at 155-157.

[26] *Ibid.* at 156.

[27] *Ibid.* at 157.

same paragraph, he castigates "the creation of exhaustive lists or categories". But "characteristics" are not "categories"; they are features or criteria. On the same page, Rotman says that not only the "categories," but also the "limits," of fiduciary relations are never closed. Again, this is ambiguous: what is the "limit" of a fiduciary relation that should not be closed? Elsewhere, Rotman certainly does argue for "some boundaries for the application of fiduciary doctrine";[28] but then says that "determination of the types of relationships that come under the protective sheath of fiduciary law ought to be made according to the facts...and not be limited by general rules...".[29] Finally, he tells us that, "[a]lthough the variety of relationships that are capable of being described as fiduciary are not circumscribed, they are, in fact, limited by the purpose and intent of fiduciary doctrine";[30] and, indeed, such cases as *Chase Manhattan* and *Reading* show the judiciary straying beyond "the boundaries within which fiduciary law was intended to operate".[31] Intended by whom? This is all rather unclear.

Thus, I am left with questions about some of Rotman's fundamental assumptions. What is the jurisprudential basis for the "pure" fiduciary relationship? Is it socially determined? Does it have a definitive essence? Does saying that fiduciary doctrine is designed to protect socially desirable interactions advance our understanding of it? Does or does not the fiduciary doctrine have limits?

The third area upon which I wish to comment is Rotman's own re-formulation of fiduciary theory. As a background to this re-formulation, he, in Chapter 9, summarizes a number of postulated explanations for fiduciary doctrine: "Property Theory", "Reliance Theory", "Inequality Theory", "Contract Theory", "Unjust Enrichment Theory", "Utility Theory", and "Power and Discretion Theory". These summaries tend to be cursory, but Rotman says that he is not aspiring to exhaustiveness. The overview is useful, but I again have some reservations about it.

For one thing—perhaps because of the brevity of the summary—Rotman sometimes overstates the claims of proponents of some of the theories. He says, for example, that "[p]roperty theory is the starting point of most economic analyses of fiduciary doctrine";[32] he cites a number of such economic analyses, but does not show clearly that they propound a property theory. Further, is it true, as he claims, that proponents of "inequality theories" do not distinguish between antecedent inequality and inequality brought about by the creation of the relationship? In this connection, Rotman alludes to the Supreme Court's ongoing debate about "vulnerability as [a] necessary characteristic of fiduciary relations".[33] But he does not specify the nature of the debate, or whether it reflects the antecedent inequality versus relationship-created inequality distinction. Earlier, he seems himself to have assumed that vulnerability is a feature of fiduciary relationships. And, discussing "unjust enrichment" theory, Rotman offers a quotation from *Re West of England and South Wales District Bank, Ex parte Dale & Co.* which does not, on its face, refer to unjust enrichment.[34]

More troubling, however, is the terminological (and perhaps conceptual) imprecision that once more emerges in this context. "Reliance," Rotman says, is "...a determinant, rather than determinative, of the fiduciary character of a relationship".[35] Does this mean that it is a necessary, but not a sufficient condition? Later, he uses the word "determinant" in connection with "unjust

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[28] *Ibid.* at 158.

[29] *Ibid.* at 158-159.

[30] *Ibid.* at 160.

[31] *Ibid.* at 176.

[32] *Ibid.* at 165.

[33] *Ibid.* at 168.

[34] (1879) 11 Ch.D. 772 at 778, 48 L.J.Ch. 600. All that the quotation says is that a fiduciary in breach is subject to the same liability as a trustee in breach.

[35] *Supra* note 1 at 167.

enrichment"—but here, clearly, "determinant" cannot mean necessary condition. He then says that "...unjust enrichment *theory* like reliance *theory*, is illustrative rather than indicative of the existence of fiduciary relations" [emphasis added].[36] Reliance seems to me much more integral to fiduciary relationships than unjust enrichment—which, as Rotman points out, is one kind of consequence of a relationship or situation.[37] Indeed, in his own theory, Rotman identifies "reliance" as one of the four basic elements.[38] I am not sure why a "determinant" should be less compelling than an "indication"—or how it can be said that reliance merely "illustrates" the fiduciary character of a relationship.

Finally, Rotman's summation of this overview of various theories strikes me as too eclectic and inconclusive—essentially, none of these theories adequately accounts for fiduciary relationships, but each of them offers something that may be useful or suggestive. Indeed, in fashioning his new theory, "not...subject to exceptions",[39] Rotman finds his "ingredients" in these other theories, although we are told only in the most abbreviated way how.[40]

I turn now to Rotman's account itself—which he describes as a "back to basics" approach. A first comment on his "theory" relates to its overall structure, which is rather convoluted. Rotman begins by telling us that the application of fiduciary doctrine involves a "three-step" process: (1) determining whether the relationship is fiduciary; (2) applying only those fiduciary principles appropriate to the particular relationship to determine whether there is a breach; and (3) furnishing an appropriate remedy. Regarding (1), Rotman identifies four "basic elements," derived from the fiduciary theories described in Chapter 9. He refers to these "basic elements" also as "criteria" and as "general propositions".[41] Then, when he reaches (2), he divides it into two parts: (a) consequences of finding a fiduciary relationship; and (b) determining whether a breach has occurred. Perhaps the process really involves *four* steps? In any event, under (2)(a), he observes that the fiduciary relationship gives rise to *three* duties for fiduciaries and *three* benefits for beneficiaries—but these duties and benefits do not correspond to each other, the former being substantive and the latter being essentially procedural. After discussing (2)(b)—"breach"—Rotman goes on to list *four* "general principles governing fiduciary relationships".[42]

The theory suffers from excess complexity, and, I think, inconsistency. The various three and four-part classifications are hard to follow. Further, the lack of congruence between ostensibly parallel categories (fiduciaries' duties, beneficiaries' benefits) is puzzling. Moreover, how the four "general principles" relate to the three-part process that Rotman identifies as his starting point is unclear. And finally, these "general principles" *sound* like fiduciary duties (for example, "the requirement of full disclosure"). Indeed, three of these "general principles" are exactly the same as the (2)(a) fiduciary "essential subduties" ("fiduciaries must not benefit from their positions"; "must provide full disclosure"; "may not compromise their beneficiaries' interests"). Moreover, one of the "basic elements" allowing one to identify a relationship as fiduciary ("X has an obligation to act in Y's best interests"[43]), is also, apparently, one of the consequential duties and one of the "general principles." Again, this is rather awkward, and, indeed, tautologous.

Apart from this structural opacity, certain substantive aspects of Rotman's account leave me

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[36] *Ibid.* at 173.

[37] *Chase Manhattan*, which Rotman criticizes, appears to have involved arguing to a fiduciary relationship from a situation of unjust enrichment.

[38] *Ibid.* at 178.

[39] *Ibid.* at 176.

[40] *Ibid.*

[41] *Ibid.* at 179.

[42] *Ibid.* at 184ff.

[43] *Ibid.* at 179.

with questions. I wonder, for example, whether his "four basic elements", which presumably show us how to recognize fiduciary relationships in the first place, really are an adequate basis of distinction. These "elements" are: "(1) One or more person (X) possess [sic] the ability to affect—positively or negatively—the interests of one or more others"; "(2) Y's interests *within the confines of the particular relationship* may only be served—directly or indirectly—through the actions of X"; "(3) X has an obligation to act in Y's best interests"; and "(4) Y relies upon the honesty, integrity, and fidelity of X towards Y's best interests as a result of their relationship".[44] An application of these "elements" to, say, the facts of *Reading* would have been useful: why, in terms of these criteria, does Rotman say that the courts in that case "strayed" beyond the bounds of the fiduciary principle? For that matter, how do these "basic elements" allow us to distinguish fiduciary from ordinary contractual relationships? And incidentally, what, again, is the ontological status of these "four basic elements"? Rotman calls them "criteria",[45] but says that they "*illustrate* what aspects of individual relationships render them fiduciary" [emphasis added].[46] Elsewhere, as we have seen, he seems to treat an "illustration" as rather less than an "indication"; now he seems to equate it with a criterion.

I also have difficulties with his (2)(b) "benefits to beneficiaries". Two of these strike me as self-evident: "Beneficiaries may commence legal action for any breach of fiduciary duty ..." and "... may obtain remedial aid upon a finding of breach of duty by their fiduciaries."[47] Do we really have to be told that a person can sue and obtain a remedy for the breach of a legal obligation? Does this help us distinguish the fiduciary relationship? The other benefit— "beneficiaries need not prove a breach of fiduciary duty, but only allege it ..."[48]—is on its face a little startling; it at least requires qualification.

Rotman proffers an explanation under the subheading "The Reverse Onus", but what he says is, I believe, insufficiently nuanced. For example, he says "fiduciary doctrine presumes the existence of the fiduciary's breach of duty upon its allegation by a *cestui que trust*"[49] and "beneficiaries need only demonstrate, *prima facie*, the existence of a fiduciary relationship...".[50] These statements are ambiguous, at least. To take a case that Rotman refers to in this context, *Regal (Hastings) Ltd.* v. *Gulliver*,[51] one might inquire what would have to be proved to make out the cause of action. That there was a fiduciary relationship, to be sure. And then, simply an allegation of breach? What, exactly, does this mean? Would the principal not have to establish any further facts? It seems to me that the answer must be "Yes"—in this case, that a profit was made, and that the profit arose from the fiduciary position. But that is more than an allegation; it establishes the breach, as, for example, Lord Wright says: "The fact itself is a fundamental breach of the fiduciary relationship."[52] There is no inquiry into the good or bad faith of the fiduciary, or whether the principal was in fact injured, because these are not relevant to the definition of the breach. But this is not the same as saying that the principal's case is made by establishing a fiduciary relationship and alleging a breach, giving rise to a rebuttable presumption. Rotman says that the reverse onus can be satisfied by proof that the fiduciary acted only in the best interests of the principal. But in *Regal*, the House of Lords said explicitly that the making of the secret profit

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[44] *Ibid.* at 178-179.
[45] *Ibid.* at 177.
[46] *Ibid.* at 179.
[47] *Ibid.* at 181.
[48] *Ibid.*
[49] *Ibid.* at 183.
[50] *Ibid.*
[51] [1942] 1 All E.R. 378 (H.L.), [1967] A.C. 134 (H.L.) [cited to All E.R.]
[52] *Ibid.* at 392.

irrebuttably established the breach. So Rotman both understates the nature of the principal's burden, and overstates the possibility (in some cases) of the fiduciary's being relieved.

A similar missing of nuances occurs in his discussion, under the rubric of the four "general principles", of "exculpatory provisions" purporting to insulate fiduciaries from liability. Rotman says that "they should be struck down ... as contrary to public policy".[53] In terms of Rotman's devotion to "situation-specificity", I should have thought that such a provision would constitute an element defining the extent of the particular fiduciary obligation. If the provision went so far as to say explicitly that the essential fiduciary obligations were not binding, the relationship would simply not be fiduciary. Further, in support of his position, Rotman invokes the Alberta Surrogate Court decision in *Re Poche*.[54] That case does not stand for as broad a proposition as Rotman uses it for: indeed it, and the cases it cites, do recognize that exculpatory clauses may be effective, say, to protect a *negligent* fiduciary, albeit not a grossly negligent one. Moreover, those cases involve *trusts*, and the argument is that, given the existence of the categorical relationship, there are limits to how much the trustee's duties can be circumscribed. But Rotman claims to have rejected the "category" approach, as we have seen. Again, Rotman rather summarily dismisses the several Supreme Court cases in which such exculpatory provisions have been recognized, and, paradoxically, though he cites the article, does not pick up on Robert Flannigan's critique[55] of these same cases—a critique which is much more consistent with Rotman's situation-specific approach than what Rotman himself says.

Hence I find Rotman's fiduciary theory neither as coherent nor as compelling as he would like it to be, and it sometimes displays a troubling imprecision. Moreover, what emerges from it—essentially, the "general principles", namely, "Fiduciaries Must Not Benefit from Their Positions", "The Requirement of Full Disclosure", "Fiduciaries Must Not Compromise Their Beneficiaries' Interests", and "[Limits on] Fiduciaries' Delegation of Authority"—while unexceptionable, is also unexceptional. Given, then, that the Crown-Native fiduciary relationship *has* been recognized by the courts and that there is broad agreement about the general obligations of fiduciaries, the question might be asked what Rotman's approach adds. This brings me to the fourth area on which I wish to comment.

Generally, Rotman seems to advocate a more aggressive and expansive following through of the implications of the "general principles." His pressing of these implications can be thought-provoking, and his criticism of judicial hesitancy and inconsistency is often just. At the same time, I do again have some reservations about his enterprise.

For one thing, his positions sometimes seem rather too uncompromising. For example, he argues that a fiduciary's raising of "a defence of a lapse of a statutory limitation period, laches, or acquiescence in order to escape personal liability..." itself "...offends the rule against conflict of interest"[56]. Does this mean that the fiduciary is effectively precluded from defending a claim by the principal, because such defence implies the preferring of the fiduciary's interests? Elsewhere, he suggests that not only Britain, but also France (in respect of its former sovereignty over Canada) "could conceivably have an award made against it which required monetary compensation to be made to an aboriginal Nation for its breach of duty".[57] He suggests, too, that the fiduciary obligation of, say, the British Crown may be ongoing because a transfer of sovereignty is a kind

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[53] *Supra* note 1 at 188.

[54] (1984), 6 D.L.R. (4th) 40, (sub nom. *Poche* v. *Poche*) 50 A.R. 264 (Surr. Ct.).

[55] R. Flannigan, "Fiduciary Obligation in the Supreme Court" (1990) Saskatchewan L. Rev. 45 at 68-69.

[56] *Supra* note 1 at 195.

[57] *Ibid.* at 218-219.

of improper delegation of authority, and thus a violation of "general principle" four. Such suggestions seem to me at least unrealistic, and may involve the equation of incommensurables.

Moreover, in some places where Rotman advocates the extension of the fiduciary principle, I wonder whether he adequately relates his argument back to his own basic approach. An example is his discussion of provincial Crowns' fiduciary obligations to aboriginal peoples—undoubtedly an important question. But Rotman addresses the question in certain contexts which seem, to me, not necessarily to raise the issue of specifically *fiduciary* obligation. Thus, he discusses the "trilogy" of the *Robinson Treaties Annuities* case,[58] *Ontario Mining Company Ltd.* v. *Seybold*,[59] and the *Treaty No. 3 Annuities* case,[60] which followed *St. Catherine's Milling and Lumber Co.* v. *R.*,[61] concluding that they illustrate the existence of provincial responsibilities for the payment of annuities under pre-Confederation treaties as well as joint federal-provincial obligations regarding the setting aside of reserves from lands surrendered under treaty. He then goes on to suggest that "...these cases demonstrate one basis for the existence of provincial fiduciary duties to Native peoples."[62] I think that the inference of fiduciary duties from, say, the obligation to pay an annuity may be too quick.

For one thing, is a specific, defined obligation in an agreement (such as a treaty) a fiduciary obligation—or is it simply contractual? Specifically, is a particular obligation to pay an amount of money (say, an annuity) "fiduciary"? Is a debtor-creditor relationship then fiduciary? This takes me back to my earlier query about if and how Rotman would distinguish contractual and fiduciary obligations. The fact that the provinces may be held responsible for the payment of an annuity, agreed to by the federal Crown, may not make them fiduciaries; it may make them only debtors. Even the fact that surrendered land is *charged* with the payment of an annuity would not necessarily make the provinces fiduciaries. At one point, in discussing *Robinson Treaties*, Rotman gives prominence to Sedgewick J.'s quotation of the maxim *qui sentit commodum sentire debit et onus* as recognizing "the equities of the case."[63] But not every "equity" entails fiduciary obligation; here, all that the province may be undertaking is a debt associated with the benefit it has received, and no broader duty than that.

We should again recall Rotman's emphasis on "situation-specificity" in identifying fiduciary obligations: here, he seems to be saying something like: the federal Crown is in a fiduciary relationship with native peoples; if a provincial Crown assumes *any* obligation that the federal Crown has agreed to, it must become a fiduciary too. Steps are missing from the argument—steps that Rotman's own basic premises dictate have to be filled in. Near the end of this discussion, again referring to *St. Catherine's Milling* and the "trilogy", Rotman opines that "the equitable basis of a finding of provincial fiduciary duty is concerned primarily with whether the province reaped benefits under the treaty."[64] My question—and again, I would go back to Rotman's "four basic elements" which permit the recognition of fiduciary relationships—is: What is the status of "benefit" to the putative "fiduciary" as a criterion? Is it a fifth, or alternative, "basic element"? It may very well be that the provinces owe a general fiduciary obligation to aboriginal peoples within their boundaries[65], but, in this part of his argument, I am not convinced that Rotman meets

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[58] *Canada (Attorney-General)* v. *Ontario (Attorney General), Quebec (Attorney General)*, [1897] A.C. 199, 66 L.J.P.C. 11 (P.C.) [hereinafter *Robinson Treaties*].

[59] [1903] A.C. 73. 72 L.J.P.C. 5 (P.C.).

[60] *Canada* v. *Ontario*, [1910] A.C. 637 (P.C.) [hereinafter *Treaty No. 3 Annuities*].

[61] (1888) 14 A.C., [1890] 2 Ex.C.R. 202 (P.C.) [hereinafter *St. Catherine's Milling*].

[62] *Supra* note 1 at 237.

[63] *Ibid.* at 230.

[64] *Ibid.* at 242.

[65] *Ibid.* at 243.

the standard of rigorous analysis that he himself propounds.

The foregoing will, I believe, illustrate what strike me as elements of imprecision and incompleteness in the author's elaboration of a fiduciary theory, and will explain why the expectations created at the outset of his work remain, for me, partly unsatisfied.

I would not want to conclude this review without acknowledging once again that more could be said about *Parallel Paths*: as I noted earlier, it is a substantial undertaking which attempts a fairly comprehensive treatment of a challenging topic. My review has focused on one—albeit pivotal—aspect of the book. This focus has permitted me to make the kind of close and detailed criticisms that the author's complex discussion calls for. What my critique suggests is that the book could have benefited from further reflection and refinement, and that the processes of argumentation do not always sustain careful scrutiny. That said, because of the timeliness and importance of its subject and the extensiveness of the material it contains, *Parallel Paths* is a book that will be, and indeed, probably should be read. This review is intended as a reminder that it should be read cautiously, and with a critical eye.

Dennis R. Klinck*

*Professor, Faculty of Law, McGill University.