The Stolen Generation: Canadian and Australian Approaches to Fiduciary Duties

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The key purpose of this article is to critically evaluate the recent Australian decisions in Cubillo & Gunner v. The Commonwealth *that considered the fiduciary duties owed by the Commonwealth to the aboriginal claimants. The broader factual basis of the plaintiffs' causes of action was their removal from their families and subsequent detention as part of what is known as the "stolen generation." It is contended that it was arbitrary and illogical for the courts to deny equity's applicability to the subject case simply because there was an absence of an economic loss and the facts also gave rise to a tort relationship. It is suggested that the contrary line of authority in Canada is to be preferred. It is also contended that the relevant duties stemming from the Crown's general fiduciary relationship with the aboriginal peoples that arose out of settlement are not confined to protecting aboriginal interests in the extinguishment of aboriginal title. Rather it includes a general duty to act with care in the best interests of the aboriginal peoples. In turn, it is suggested that this duty may also have been breached through the removal and detention of part-aboriginal children.*

L'objet premier de cet article est de faire une évaluation critique des décisions australiennes récentes dans l'affaire Cubillo & Gunner c. Le Commonwealth *relativement aux devoirs fiduciaires du Commonwealth envers les requérants aborigènes. Les faits qui ont donné lieu à cette poursuite sont les enlèvements des demandeurs de leurs familles et leur détention subséquente dans le contexte de ce qu'on a appelée « la génération volée ». L'on prétend qu'il était arbitraire et illogique pour les tribunaux de nier l'application des règles d'équité en l'espèce simplement parce qu'il n'y avait pas eu de perte économique et que les faits donnaient aussi lieu à une relation délictuelle. L'on suggère que la tendance jurisprudentielle canadienne contraire est préférable. L'on soutient en outre que les devoirs qui reviennent en propre à la Couronne en vertu de sa relation fiduciaire avec les peuples autochtones en conséquence de la colonisation ne sont pas confinés à la protection des intérêts autochtones dans l'extinction du titre aborigène. Ce devoir inclut plutôt une obligation générale d'agir de façon diligente dans les meilleurs intérêts des peuples autochtones. Il est suggéré, par ailleurs, qu'une violation de ce droit est possible également du fait de l'enlèvement et de la détention d'enfants en partie d'origine autochtone.*

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I. Introduction

IN THE RECENT AUSTRALIAN DECISION in *Cubillo v. The Commonwealth*,[1] the Full Court of the Federal Court dismissed an appeal by aboriginal claimants against the Federal Court's rejection[2] of their claims for equitable damages. The broader factual basis of the plaintiffs' causes of action was their removal from their families and subsequent detention as part of what is known as the "stolen generation."[3] The term has become well known in, *inter alia*, Australia as referring to those aboriginal children who were removed from their families and placed in homes and institutions[4] as part of a policy of assimilation.[5] In addition to such removal and detention one of the plaintiffs, Mrs Cubillo, had been severely physically assaulted by one of the male missionaries at the institution in which she was placed[6] and the other plaintiff, Mr Gunner, and other children had been sexually assaulted by another male missionary.[7] The key purpose of this article is to critically evaluate the courts' conclusions in this case regarding the fiduciary duties owed by the Commonwealth to the aboriginal claimants. It is contended that the courts' denial of equity's applicability to the subject case was arbitrary and illogical and that the contrary line of authority in Canada is to be preferred. The article also notes that

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1. [2001] F.C.A. 1213, 183 A.L.R. 249 at summary para. 3 [*Cubillo 3*].
2. *Cubillo v. The Commonwealth*, [2000] F.C.A. 1084, 174 A.L.R. 97 [*Cubillo 2*].
3. Apparently, Peter Read coined this term in "The Stolen Generation: The Removal of Aboriginal Children in New South Wales 1883-1969" (New South Wales: Ministry of Aboriginal Affairs Occasional Paper No.1, 1982). It will be seen, however, that the courts in this case were at pains to assert that the subject facts did not fall into the category of the "stolen generation." See *Cubillo 2*, *ibid.* at paras. 3 and 65. See also *Cubillo 3*, *supra* note 1 at para. 10.
4. Compare *Cubillo v. The Commonwealth*, [1999] F.C.A. 518, 163 A.L.R. 395 at para. 2 [*Cubillo 1*]; *Cubillo 2*, *ibid.* at para. 1.
5. Ultimately, O'Loughlin J. accepted this was one of the aims of the policy. See especially *Cubillo 2*, *ibid.* at para. 1146. See also *Cubillo 2*, *ibid.* at paras. 158, 160, 162, 226, 233, 235, 251 and 257; *Williams v. The Minister, Aboriginal Land Rights Act 1983*, [1999] 25 Fam. L.R. 86, N.S.W.S.C. 843 at para. 88 [*Williams No. 2*]. Note the distinction between, (i) the policy of assimilation by removal of part-aboriginal children and (ii) the more general policy of gradual assimilation that extended to all aboriginal persons, not just part-aboriginal persons, that was implemented by Sir Paul Hasluck, then Federal Minister of State for the Territories (see especially *Cubillo 2*, *ibid.* at paras. 273–275). The plaintiffs asserted they had been 'victims' of the former policy.
6. See *Cubillo 2*, *ibid.* at paras. 11, 30, 677, 678, 682, 705 and 729.
7. See *ibid.* at paras. 14, 348, 899–905, 907–908, 946, 955, 960, 965, 974, 985, 989–990 and 992–994.

these courts failed to consider whether the Crown's general fiduciary relationship with the aboriginal peoples that arose out of settlement was applicable to the subject facts. To this end, it is contended that the duties stemming from this fiduciary relationship are not confined to protecting aboriginal interests in the extinguishment of aboriginal title. Rather they include a general duty to act with care in the best interests of the aboriginal peoples and, in turn, these duties may have been breached through the removal and detention of part-aboriginal children.

This is a very sad case. No one who has read the judgments can help but be moved by the disturbing evidence given in the course of the trial.[8] O'Loughlin J. at first instance showed sympathy to the plight of the plaintiffs and on key points found them and their supporting witnesses to be truthful witnesses.[9] He was also sympathetic to those who were involved in the plaintiffs' removal and detention[10] and most concerned that the case did not involve a reevaluation of past events "by reference to contemporary standards, attitudes, opinions and beliefs."[11] Ultimately, however, in a complex and sometimes inconsistent judgment,[12] O'Loughlin J. held against the plaintiffs on the basis of factual findings that at times appear harsh and rather insensitive to the plight of the plaintiffs[13] and at other times for reasons of law which, it will be submitted, were ill-founded. These findings, detailed more fully below, included that there was no policy of indiscriminate removal of part-aboriginal children from their families.[14] The removal and detention of the plaintiffs was said to be lawful because it was, *inter alia*, believed to be in the child's best interests and, as the plaintiffs bore the onus of proof, they had failed to show that they were taken without the consent of their parents/guardians.[15] Moreover, the Court held that the plaintiffs could not claim a breach of fiduciary duties in addition to their tortious claim[16] and equitable damages could not be sought as the plaintiffs had suffered no economic loss, only physical and psychological damage.[17] In any case, O'Loughlin J. held that their claims were barred under the statute of limitations and the equitable doctrine of laches

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8. For example, the evidence regarding the actual removal of Mrs Cubillo and Mr Gunner from their respective families and the assaults upon them whilst in care.
9. O'Loughlin J. thought, though, they may have at times engaged in reconstruction based upon what they thought must have happened. See *e.g. Cubillo 2*, *supra* note 2 at paras. 125 and 1482. See also *Cubillo 3*, *supra* note 1 at para. 165.
10. See *e.g. Cubillo 2*, *ibid.* at para. 28.
11. *Ibid.* at para. 84. See also *ibid.* at paras. 85, 102 and 109.
12. See *e.g.* the discussion regarding O'Loughlin J.'s findings as to whether parental consent was given in regard to the removal of Mrs Cubillo from Phillip Creek, below.
13. For example, the findings that the injuries the plaintiffs suffered stemmed from their non-actionable removal and detention, not from being physically/sexually assaulted whilst detained (see *Cubillo 2*, *supra* note 2 at paras. 1247, 1536 and 1563) and the plaintiffs' failure to mitigate their losses by seeking medical assistance and/or taking steps to regain their aboriginality (see *ibid.* at paras. 656, 1540 and 1541).
14. *Ibid.* at para. 300. See also *Cubillo 3*, *supra* note 1 at summary para. 2.
15. See *e.g. Cubillo 2*, *ibid.* at paras. 503, 511, 1146, 1167, 1264, 1305 and 1538–1539.
16. *Ibid.* at para. 1299, following *Paramasivam v. Flynn* (1998), 90 F.C.R. 489, 160 A.L.R. 203 at 218–220 (F.C.A) [*Paramasivam* cited to A.L.R.]; *Breen v. Williams* (1996), 138 A.L.R. 259, 186 C.L.R. 71 at 95, 112 and 113 [*Breen No. 2* cited to C.L.R.]; *Williams No. 2*, *supra* note 5; *Lovejoy v. Carp*, [1999] V.S.C. 223, [1998] V.S.C.A. 167 [*Lovejoy*]; *Prince v. Attorney-General*, [1996] 3 N.Z.L.R. 733 (H.C.) [*Prince*].
17. *Cubillo 2*, *ibid.* at para. 1307.

as the Commonwealth had been grossly prejudiced in the delay in bringing the subject claims.[18]

In essence, on appeal the Full Court accepted O'Loughlin J.'s findings of fact and asserted that he had not erred in law.[19] In addition, a number of the appellants' submissions on appeal were rejected as new claims that had not previously been pleaded or argued at trial.[20] The Full Court held that these new claims could not be brought on appeal as there were insufficient findings of fact made by O'Loughlin J. for them to be determined and the Commonwealth would be prejudiced as it had not had the opportunity to present evidence in defence of such claims.[21]

Whilst both O'Loughlin J. and the Full Court of the Federal Court tried to distance their findings from the broader issue of the legal rights of members of the stolen generation, emphasizing that they were only concerned with the particular circumstances of the two plaintiffs/appellants,[22] the significance of the case was not lost on O'Loughlin J. In *Cubillo I*,[23] O'Loughlin J. commented that "these cases are of such importance—not only to the individual applicants and to the larger aboriginal community, but also to the Nation as a whole."[24] It is submitted that these sentiments more accurately reflect the scope and importance of this case. Thus, despite the Full Court's attempt to confine the impact of the case, the reality is that the decision deals an incredible blow to all members of the stolen generation. For the reasons detailed below, all such persons effectively cannot bring any action against the Commonwealth. In the absence of the High Court overruling the determination, the finding that the Commonwealth was not involved in the removal of such children and, perhaps more importantly, that such persons were barred from bringing an action by the statute of limitations and doctrine of laches effectively bars future claims in this area.

As noted above, it will be submitted that it was arbitrary and illogical for the courts to deny the application of equity to the subject case simply because there was an absence of an economic loss and/or the facts also gave rise to a contractual or tort relationship. It will equally be contended that contrary to the courts' assertion, a wealth of authority provides that equity does not merely impose proscriptive duties, but also imposes positive duties on fiduciaries. In this

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18. *Ibid.* at paras. 1168, 1420, 1423 and 1425 and 1433–1434.
19. *Cubillo 3, supra* note 1 at paras. 249, 250, 252, 256, 287, 294, 299-303, 323, 324, 327–336, 378, 399, 436, 445, 465–466 and 471.
20. The new claims were: (i) breach of duty in the manner of removal (*ibid.* at paras. 351 and 363-368); (ii) failure to ensure the children maintained contact with their families (*ibid.* at paras. 370 and 374); (iii) failure to protect them from physical and sexual assault (*ibid.* at paras. 379 and 383); (iv) the unsuitability of St. Mary's Hostel (*ibid.* at paras. 387 and 388); and (v) the failure to inform Mr Gunner's mother as to the conditions at St. Mary's (*ibid.* at paras. 391 and 392).
21. See generally *ibid.* at paras. 368, 369, 374, 376, 378, 383-385, 388-390, 394, 396, 397, 398, 442 and 443.
22. See *Cubillo 2, supra* note 2 at para. 3. See also *Cubillo 3, ibid.* at para. 10.
23. This case involved a preliminary application by the Commonwealth for summary dismissal of the plaintiffs' case on the basis that the plaintiffs had no causes of action against the Commonwealth and that their actions were statute barred and barred under the equitable doctrine of laches. Subject to certain comments on deficiencies in the plaintiffs' pleadings, O'Loughlin J. rejected the Commonwealth application.
24. *Cubillo 1, supra* note 4 at para. 203.

regard, for the reasons detailed below, it is submitted that the contrary line of authority in Canada is to be preferred. In particular, the Australian courts' approach does not give effect to the remedial nature of equitable principles and hopefully will be more closely scrutinized by subsequent courts. In this regard it should also be noted that Canadian judicial authority is accorded persuasive authority in Australia and has been of particular relevance in the few cases considering aboriginal legal issues in Australia.[25] Thus the rejection of the relevant Canadian authorities in *Cubillo* was an unusual phenomenon and a matter that should be reviewed by subsequent courts.

The discussion that follows is also highly instructive for Canadian practitioners and researchers in the area of Canadian native residential schools. To date there has been limited Canadian case law in this area. The leading cases in this area have been divided on whether the conduct of the schools involved a breach of fiduciary duties. In *Blackwater v. Plint (No. 2)*[26] the Court relied on a line of authority reminiscent of that used in *Cubillo* to deny the claims based on a breach of fiduciary duties. By contrast, in *M. (F.S.) v. Clarke*[27] the Court followed the contrary line of authority supported in this article and upheld the plaintiff's claims in equity. Thus the discussion of the *Cubillo* case on the issue of fiduciary duties will hopefully prove instructive to the current debate in Canada on this issue.

It is also noted that in both *Cubillo* and these Canadian cases, the courts failed to consider the Crown's general fiduciary relationship with aboriginal peoples that arose out of the settlement of these Nations. As noted above, it is contended that the relevant duties stemming from this relationship are not confined to protecting aboriginal interests in the extinguishment of aboriginal title, but rather include a general duty to act with care in the best interests of aboriginal peoples. Thus this duty may also have been breached through the removal and detention of part-aboriginal children. That this general fiduciary duty extends beyond the extinguishment of aboriginal title is currently a key point of contention in Canada. The Canadian Federal Government denies that it extends beyond this scenario, while aboriginal claimants are relying upon it as a further source of rights in current native residential school litigation. Thus the following discussion of this issue will hopefully prove invaluable to those interested in this issue in both Australia and Canada.

Before the *Cubillo* judgments are evaluated in this regard, an outline of the relevant facts and causes of action is provided. While this article is only concerned with one of the relevant causes of action, namely, whether the Commonwealth had breached its fiduciary duties, this summary of the broader issues and proceedings assists in putting this aspect of the case in its broader context.[28]

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25. See *Milirrpum v. Nabalco Pty. Ltd.*, [1972] A.L.R. 65, (1971) 17 F.L.R. 141 (N.T.S.C.). See also *Mabo v. Queensland* (1992), 175 C.L.R. 1, F.C. 92/014 [*Mabo No. 2* cited to C.L.R.].
26. (2001), 93 B.C.L.R. (3d) 228 (S.C.) [*Blackwater*].
27. (1999), 11 W.W.R. 301 (S.C.) [*Mowatt*].
28. For a fuller discussion of O'Loughlin J.'s determinations in regard to these other causes of action see Jennifer Clarke, "Case Note: *Cubillo v. Commonwealth*" (2001) 25 M.U.L.R. 218.

II. Facts[29]

O'LOUGHLIN J.'S JUDGMENT IN *CUBILLO 1* is over 200 pages long and the *Cubillo 2* judgment runs to 674 pages with more than half of these pages involving detailed findings of fact. The *Cubillo 3* judgment is also over 100 pages long. It would be impossible to provide anything more than a summary of some of the key findings of fact. All of the graphic and disturbing detail provided by the plaintiffs is not repeated and in a sense this means that the truly sad picture underlying these cases may not be entirely or appropriately painted. It is, however, necessary to provide some detail as to the factual background so that the legal issues can be understood in their context.

Mrs Cubillo and Mr Gunner are part-aboriginal persons who were removed from their families as children and each detained in institutions against their will until they attained, in the case of Mrs Cubillo, eighteen years and, in the case of Mr Gunner, sixteen years.

In 1947, Mrs Cubillo, then aged eight, was living in the Phillip Creek Native Settlement in Northern Territory, with her Aunt Maisie.[30] Mrs Cubillo and fifteen or sixteen other children "were loaded onto a truck" and taken to the Retta Dixon Home located on an aboriginal reserve in Darwin. The Retta Dixon Home was established in 1946 by the Aborigines Inland Mission of Australia [AIMA], a Protestant interdenominational faith mission. In time, it was recognized by the Northern Territory Administrator as an official "Aboriginal Institution."[31]

Mrs Cubillo said that the removal of the children caused great distress to those who were taken, as well as to those who were left behind:

> As the truck left Philip Creek everyone was crying and screaming. I remember mothers beating their heads with sticks and rocks. They were bleeding. They threw dirt over themselves. We were all crying on the truck. I remember that day. Mothers chased the truck from Philip Creek screaming and crying. They disappeared in the dust of the truck.[32]

Initially O'Loughlin J. rejected the Commonwealth's submission that some or all of the parents, many of whom did not speak English, initiated the children's removal by asking the AIMA, that administered the depot, or the Native Affairs Branch to assist them in getting a better education for their children.[33] Ultimately,

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29. For a fuller discussion of the facts see generally Clarke, *ibid.*
30. See *Cubillo 2*, *supra* note 2 at para. 421. Mrs Cubillo's mother died when Mrs Cubillo was a very young child. She was largely cared for, and lived with, her mother's sister, Maisie. In fact, she believed until her teenage years that Maisie was her natural mother (*Cubillo 1*, *supra* note 4 at para. 23).
31. *Cubillo 1*, *ibid.* at paras. 25 and 26; *Cubillo 2*, *ibid.* at paras. 1, 10 and 514.
32. *Cubillo 1*, *ibid.* at para. 25.
33. See *Cubillo 2*, *supra* note 2 at para. 503. This is supported by the fact that Miss Shankelton, superintendent of the Retta Dixon Home who had been in charge of the children's removal, would have had very little time to explain to the families of 16 or 17 children what was happening and to obtain their informed consent to the proposed removal: "[o]btaining the consent of the families of 16 or 17 children in a period of no more than 24 hours seems highly unlikely" (*ibid.* at para. 442). To this end O'Loughlin J. seemed to accept Mrs Cubillo's evidence that there was a "tussle" between Miss Shankelton and one of Mrs Cubillo's aunts who was resisting handing over a baby (*ibid.* at para. 423).

and somewhat inconsistently, O'Loughlin J. concluded that on the evidence he was unable to conclude one way or the other regarding the issue of parental/guardian consent to the removal of the children. As Mrs Cubillo bore the burden of proof, O'Loughlin J. held she had "failed to establish that she was, at that time, in the care of an adult aboriginal person (such as Maisie) whose consent to her removal was not obtained."[34]

In 1953 a committal order was made by the Director of Native Affairs under section 16 of the *Aboriginals Ordinance*[35] committing her to the custody of the Retta Dixon Home until she was eighteen. Mrs Cubillo gave evidence as to the harsh treatment she suffered at the hands of Miss Shankelton and her co-missionaries. The Court accepted that one of the male missionaries, Mr Des Walter, had acted improperly by placing his hand on the upper part of her leg when they were alone in a car, causing her to cry, and viciously beating her on another occasion with the buckle of his trouser belt. In consequence of this beating, Mrs Cubillo sustained lacerations to her hands, face and one breast, partially severing one nipple.[36]

In May 1956, Mr Gunner, then aged seven, was taken from the station where he lived with his family and was ultimately admitted to St. Mary's hostel, near Alice Springs. The hostel was run by the Australian Board of Missions, but again it was an official Aboriginal Institution.[37] The removal was made on the recommendation of Mr Kitching, a Patrol Officer in the employ of the Native Affairs Branch of the Northern Territory Administration. As with Mrs Cubillo's removal, Mr Gunner's recollection of his removal was distressing. Mr Gunner said that there had been two earlier attempts to remove him. Mr Gunner said that on the day when he was ultimately taken, "a white fella" dressed in a khaki uniform "just grabbed me and put me back the truck [sic]." Mr Gunner said that he was "crying and screaming" and a lot of the families were "crying and yelling in Aboriginal language."[38] He said that his mother was among those who were present at the time when he was put on the truck.

The evidence of a witness, Mr Skinner, was to the effect that Mr Gunner was forcibly taken against his will. There were, however, reports written by Mr Harry Kitching that indicated that Topsy, Mr Gunner's mother, agreed to Mr Gunner being removed. Among the court documents was a 'Form of consent by a Parent' containing a thumbprint that was said to be that of Mr Gunner's mother. While there was no way of knowing if Topsy understood this document, the Court accepted that Mr Gunner's mother had in fact consented to his removal.[39]

In 1956, a committal order was made by the Director of Native Affairs under section 16 of the *Aboriginals Ordinance* committing Mr Gunner to the cus-

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34. *Cubillo 2*, *ibid.* at para. 511.
35. *Aboriginals Ordinance 1918* (N.T.), s. 16.
36. See *Cubillo 2*, *supra* note 2 at paras. 10, 11, 30, 677, 678, 682, 687, 705, 729 and 1156.
37. See *Cubillo 1*, *supra* note 4 at paras. 27 and 28. See also *Cubillo 2*, *ibid.* at paras. 12, 744 and 1156.
38. *Cubillo 2*, *ibid.* at para. 816.
39. See Cubillo 1, *supra* note 4 at para. 28. See also *Cubillo 2*, *ibid.* at paras. 13, 787, 782, 788, 790, 806, 807, 838 and 1133. The Court asserted, "I have no mandate to assume that Topsy did not apply her thumb or that she, having applied her thumb, did not understand the meaning and effect of the document" (*Cubillo 2*, *ibid.* at para. 788).

tody of St. Mary's until his eighteenth birthday in 1966. A further committal order in the same terms was made in February 1957, and in May 1957 the Administrator declared Mr Gunner to be a ward pursuant to section 14 of the *Welfare Ordinance*.[40]

By the end of 1956, the Director of Welfare and the Administrator were expressing grave concerns about the staff and management at St. Mary's. The hostel was inadequately staffed and the facilities were inadequate and unhygienic. In this regard, it should be noted that Mr Gunner also alleged that he was ill-treated whilst at St. Mary's. In particular, Mr Gunner and four other witnesses gave evidence that they had been sexually assaulted by one of the missionaries, Mr Kevin Constable, and that he had suffered cruel beatings. The Court accepted that Mr Constable had engaged in sexual misconduct in regard to Mr Gunner.[41]

Mr Gunner remained at the hostel until February 1963. At this point, when he was about fourteen, "he was taken from St. Mary's to Angas Downs ... a cattle station, about 250 kilometres to the south of Alice Springs."[42] Mr Gunner stayed at Angas Downs doing stock work until 1965 when the owner, Mr Liddle, told him that he could leave. Mr Gunner said "he was taken by Mr Liddle to Alice Springs and left there to fend for himself."[43] O'Loughlin J. held that "there was nothing in the evidence to suggest that the Director was 'detaining' Mr Gunner whilst he was at Angas Downs."[44]

III. Summary of Issues and Findings[45]

BOTH PLAINTIFFS RELIED on four causes of action:

· wrongful imprisonment and deprivation of liberty by the Director of Native Affairs as their removal and detention was beyond the powers conferred under sections 6, 7 and 16 of the *Aboriginals Ordinance*;

· breach of statutory duty by the Director of Native Affairs in failing to provide for their custody, maintenance and education as required under section 5 of the *Aboriginals Ordinance*;

· breach of the Commonwealth's duty of care as a consequence of the Commonwealth and Director of Native Affairs failing to take into account the plaintiffs' relationship with his or her family and community when they were removed and detained; and,

· breach of the Commonwealth's fiduciary duties.[46]

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40. *Welfare Ordinance 1953*, (N.T.), s. 14. The *Welfare Ordinance* repealed the *Aboriginals Ordinance*. See *Cubillo 2*, *ibid.* at paras. 155, 789 and 839.
41. See *Cubillo 1*, *supra* note 4 at para. 30. See also *Cubillo 2*, *ibid.* at paras. 14, 60, 348, 899–905, 907–908, 946, 955, 960, 965, 974, 985, 989–990, 992–994, 1028, 1034, 1050, 1063, 1066 and 1073.
42. *Cubillo 1*, *ibid.* at para. 32.
43. *Ibid.*
44. *Cubillo 2*, *supra* note 2 at para. 1150.
45. For a fuller discussion of O'Loughlin J.'s determinations in regard to the causes of action other than the breach of fiduciary duty see Clarke, *supra* note 28.
46. Compare *Cubillo 3*, *supra* note 1 at summary para. 1.

The Commonwealth pleaded that these actions were statute barred under the *Limitation Act 1981*[47] or by the doctrine of laches. In response, the plaintiffs sought an extension of time to bring their common law claims pursuant to section 44 of the *Limitation Act 1981* and asserted that their claims in equity were not barred by the doctrine of laches. The Commonwealth opposed the application on the basis of prejudice arising from the difficulty in identifying and locating witnesses.[48]

O'Loughlin J. accepted that the plaintiffs suffered the psychiatric illnesses that they pleaded as a consequence of their removal and detention but also held that the plaintiffs had failed to mitigate their losses by attempting to return to their aboriginal lifestyle and/or obtaining earlier medical assistance. More importantly, in a sad twist, O'Loughlin J. held that the injuries the plaintiffs suffered stemmed from their removal, detention and deprivation from their family, rather than the conditions at the institutions or being assaulted whilst detained. Thus it was necessary for him to find the plaintiffs' removal, rather than the assaults, to be a breach, for any damages to be awarded. Ultimately O'Loughlin J. rejected the plaintiffs' claims in this regard. In fact, in *Cubillo 2* O'Loughlin J. rejected the plaintiffs' claims with respect to all causes of action.[49]

The Court found that "at the relevant times, there was no general policy in force in the Northern Territory supporting the indiscriminate removal and detention of part-aboriginal children, irrespective of the personal circumstances of each child."[50] Rather, the removal and detention of the part-aboriginal children could be lawfully effected under the terms of the relevant legislation when it was believed to be in the child's best interests. Thus, O'Loughlin J. effectively asserted that part-aboriginal children were only removed when it was necessary or desirable in the best interests of the child.[51]

O'Loughlin J. added that "if, contrary to that finding, there was such a policy,"[52] the evidence did not support a finding that it was implemented in respect of Mrs Cubillo and Mr Gunner. The plaintiffs bore the onus of proof and neither Mrs Cubillo, nor Mr Gunner, could show that the Director had not appropriately exercised his discretion in removing them. Equally, Mrs Cubillo could not show that she was removed without the consent of a family member. In the case of Mr Gunner, the Court concluded he was taken to St. Mary's hostel at his mother's request.[53]

The Court held that neither the Director nor the Commonwealth owed Mrs Cubillo or Mr Gunner a duty of care. In essence, O'Loughlin J. asserted that no duty of care arose from the role of carer of the aboriginal children that had been removed and detained. In support, the Court relied on case law stating that no duty of care arises from the parent/child relationship.[54] In regard to the

47. *Limitation Act 1981* (N.T.).
48. See *Cubillo 3*, *supra* note 1 at paras. 14–16.
49. See *Cubillo 2*, *supra* note 2 at paras. 656, 1244, 1247, 1481–1485, 1488, 1536, 1540, 1541 and 1563.
50. *Cubillo 3*, *supra* note 1 at summary para. 9.
51. *Cubillo 2*, *supra* note 2 at paras. 300, 1146, 1160 and 1305.
52. *Ibid.* at para. 1160.
53. See *ibid.* at paras. 503, 511, 787, 790, 838, 1133, 1167, 1264, and 1538–1539.
54. See *e.g. Hahn v. Conley*, [1972] A.L.R. 247, (1971) 126 C.L.R. 276 (H.C.A.) [*Hahn*].

Directors' statutory duties to care for aboriginal children,[55] O'Loughlin J. held that these duties were not mandatory and thus gave rise to no duty of care.[56]

Moreover, had the Commonwealth owed the plaintiffs a duty of care, there had been no breach of that duty. While in regard to Mr Gunner, O'Loughlin J. concluded that "the Director had failed to exercise his supervisory and regulatory powers over St. Mary's Hostel"[57] and in regard to Mrs Cubillo, he noted that written reports to the Native Affairs Branch referred to incidents when Mr Walter had beaten inmates,[58] as the plaintiffs had never told anyone in authority about what had occurred, O'Loughlin J. held that there was no evidence that either the Directors or the Commonwealth knew, or ought to have known, of the assaults or the assailants' propensities to such conduct.[59] Note that this was one of the few aspects of O'Loughlin J.'s findings that the Full Court questioned. The Full Court asserted that in light of these reports, "there may be some difficulty with his finding that there was no evidence that the Commonwealth knew, or ought to have known, that Mr Walter was prone to violence towards children."[60]

As discussed in more detail below, O'Loughlin J. held that no fiduciary relationship existed between the plaintiffs and the Commonwealth. He held that a fiduciary duty could not exist where a claim was also made in tort.[61] Moreover, as there had been no economic loss by the plaintiffs, only physical and psychological damage, no equitable damages could be claimed.[62]

O'Loughlin J. also refused to grant the plaintiffs an extension of time to bring both their common law claims (wrongful imprisonment and breach of duty of care) and equitable claim (breach of fiduciary duty) on the basis that the Commonwealth had suffered "irremediable prejudice" in defending the proceedings because with the lapse of time, potential witnesses had died or were unavailable due to poor health.[63]

The issues on appeal were narrower. The claim for breach of statutory duty by the Director of Native Affairs was, for example, no longer pursued. In regard to these narrower claims, the Full Court upheld O'Loughlin J.'s findings.

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55. Specified under ss. 5(1)(d) and 16 of the *Aboriginals Ordinance* and s. 8 of the *Welfare Ordinance*.
56. See *Cubillo 2*, *supra* note 2 at paras. 1256 and 1261.
57. *Cubillo 3*, *supra* note 1 at para. 150.
58. For example, reports in the Native Affairs Branch's files expressing concerns as to Mr Walter's propensity for violence. There was the report of Mr Dentith, the Superintendent of the Bagot Reserve, to Mr McCaffrey the Acting Director of Native Affairs, dated 27 July 1954, that concerned young boys who had been flogged by Mr Matthews and Mr Walter several days earlier. There was the report of Mr McCaffrey to the Administrator under cover of a memorandum, dated 28 July 1954, concerning the conduct of Mr Matthews and Mr Walter (with a handwritten notation of the Administrator on that memorandum). There was also the report of Mr Dentith to the District Superintendent, Native Affairs Branch, dated 27 October 1954, concerning an attack by Mr Walter upon another young boy. See *Cubillo 2*, *supra* note 2 at paras. 664, 668, 669, 671, 672 and 674. See also *Cubillo 3*, *supra* note 1 at paras. 126–129, 333 and 382.
59. See *Cubillo 2*, *ibid.* at paras. 1141, 1241, 1255, 1262, 1263 and 1268.
60. *Cubillo 3*, *supra* note 1 at para. 331.
61. *Cubillo 2*, *supra* note 2 at para. 1299, following *Paramasivam*, *supra* note 16 at 218–220; *Williams No 2*, *supra* note 5; *Lovejoy*, *supra* note 16; *Prince*, *supra* note 16.
62. See *Cubillo 2*, *ibid.* at para. 1307.
63. *Cubillo 3*, *supra* note 1 at summary para. 10.

Specifically, the Full Court held that:

· O'Loughlin J. had not erred in rejecting the plaintiffs/appellants' claims of false imprisonment;

· there was no basis for the plaintiffs/appellants' claims of breach of fiduciary duty; and,

· it was open to O'Loughlin J. to find that both the plaintiffs/appellants' common law claims and equitable claims were barred because of the lapse of time.[64]

IV. Fiduciary Duties

A. PLAINTIFFS' AND DEFENDANT'S SUBMISSIONS

As noted above, the plaintiffs argued that the Commonwealth and/or the Directors owed them a fiduciary duty at and following their removal and detention. The fiduciary relationship was said to arise because of the "vast powers" the Commonwealth had in relation to aboriginal people under, *inter alia*, the *Aboriginals Ordinance* and the *Welfare Ordinance*, which could be unilaterally exercised in a manner that brought about a total inequality of position in relation to the Commonwealth and each of the applicants. The "legislation restricted the rights of aboriginal people in many fundamental areas such as their freedom of movement and association, their right to marry, to work and to deal with property."[65] It was said that this relationship "conjured up terms such as 'vulnerability', 'oppression', 'guardianship' and the expectations of people in relation to what they could expect of someone who purportedly acts in their interests."[66] More specifically, the duty was said to arise "because of the role and functions of the Commonwealth's servants and agents [the Directors and/or the Administrator of the Northern Territory] in the removal and detention of the applicants and because of the Commonwealth's powers over, and its assumption of responsibility for, aboriginal people in the Northern Territory."[67]

The fiduciary relationship with the Directors also arose from their role as the legal guardians of the plaintiffs under section 7 of the *Aboriginals Ordinance* and section 24 of the *Welfare Ordinance*. Thus, both Mrs Cubillo and Mr Gunner pleaded that a "relationship of guardian and ward existed between the Directors and each of them, that it was a fiduciary relationship and that the personal injuries and losses that they have each suffered resulted from breaches of the duties that existed as a consequence of these fiduciary relationships."[68] The Commonwealth was said to have "knowingly participated in the breaches of fiduciary duty" that were allegedly committed by the Directors.[69]

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64. See *ibid.* at summary para. 3. See also *ibid.* at paras. 249, 250, 252, 256, 287, 294, 299–303, 323, 324, 327–336, 378, 399, 436, 445, 465–466 and 471.
65. *Cubillo 2*, *supra* note 2 at para. 1298.
66. *Ibid.* at para. 1287.
67. *Ibid.* at para. 1276.
68. *Ibid.* at para. 1299.
69. *Ibid.* at para. 1282.

The Commonwealth denied that any fiduciary relationship arose between the plaintiffs and the Directors. It asserted that no fiduciary duty arose as there was no "undertaking or the agreement to act for, or on behalf of, or in the interests of, another person in a legal or practical sense, rendering the other person vulnerable to abuse by the fiduciary."[70] If, to the contrary, such a relationship existed, then the Commonwealth denied that the Directors were involved in any conduct that could have amounted to a breach of any fiduciary duty.[71]

B. O'LOUGHLIN J.'S JUDGMENT

As noted above, O'Loughlin J. held that as both Mrs Cubillo and Mr Gunner had not proved that the Directors had failed to comply with the relevant legislation, they had not proved that "the 'purpose' of their removals and detentions was, (or included) the purpose of destroying their associations and connections with their mothers, families and cultures." In this regard O'Loughlin J. said it was necessary to distinguish between "purpose" and "consequence." He noted that the destruction of their associations and connections with their mothers, families and cultures "did occur in each case, but it was as a 'consequence'" not the purpose underlying their removal.[72] There was no appeal from this finding.[73]

O'Loughlin J. held that his findings of fact meant that the plaintiffs had also failed to prove that any of their rights were infringed.[74] In essence, O'Loughlin J. asserted that as he had rejected the plaintiffs' claims of breach of duty and false imprisonment, the plaintiffs had suffered no loss that could be the subject of a claim for equitable compensation.[75] It will be seen that this point is linked to a broader notion advocated by O'Loughlin J., discussed below, that claims factually based in tort or contract law cannot also be based in equity.[76]

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70. *Ibid.* at para. 1285, citing *Hospital Products Ltd. v. United States Surgical Corporation* (1984), 55 A.L.R. 417, 156 C.L.R. 41 at 96–97 (H.C.A.), Mason J. [*Hospital Products* cited to C.L.R.]. Note that this point was not addressed in the courts' judgments in *Cubillo 2* and *Cubillo 3*. It is submitted that the definition of a fiduciary relationship does not necessarily require an "undertaking or the agreement to act for, or on behalf of, or in the interests of, another person in a legal or practical sense, rendering the other person vulnerable to abuse by the fiduciary." Again a person can be vulnerable even though another person has not accepted to act on their behalf. While the cases often refer to the need for a mutual understanding that one party will act in the interests of the other, it is submitted that the understanding does not need to arise from a formal undertaking or agreement. Moreover, it is submitted that a fiduciary duty can arise in the absence of such an undertaking. As La Forest J. has recognized, the "imposition of fiduciary obligations is not limited to those relationships in which a presumption of such an obligation arises. Rather, a fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship" (*LAC Minerals v. International Corona Resources*, [1989] 2 S.C.R. 574 at 649, 61 D.L.R. (4th) 14 [*LAC Minerals* cited to S.C.R.]). *Cf.* Gillian K. Hadfield, "An Incomplete Contracting Perspective on Fiduciary Duty" (1997) 28 Can. Bus. L.J. 141. Note also in this regard that an "undertaking" is not included in the classic identification of "common features" of a fiduciary relationship in Wilson J.'s judgment in *Frame v. Smith*, [1987] 2 S.C.R. 99 at 136, 42 D.L.R. (4th) 81 [*Frame* cited to S.C.R.]. This issue was not addressed in *Cubillo 2* and *Cubillo 3*. For a further discussion of this issue see Hadfield, *ibid.* and John D. McCamus, "Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada" (1997) 28 Can. Bus. L.J. 107.

71. See *Cubillo 2*, *ibid.* at para. 1283.

72. *Ibid.* at para. 1305.

73. See *Cubillo 3*, *supra* note 1 at para. 453.

74. *Cubillo 2*, *supra* note 2 at para. 1289. See also *Cubillo 3*, *ibid.* at para. 454.

75. *Cubillo 3*, *ibid.* at para. 468.

76. See *Cubillo 2*, *supra* note 2 at para. 1299, following *Paramasivam*, *supra* note 16 at 218–220; *Williams No 2*, *supra* note 5; *Lovejoy*, *supra* note 16; *Prince*, *supra* note 16.

As to the existence of a fiduciary duty, O'Loughlin J. recognized that in a number of cases the courts have held that the relationship of guardian and ward is a fiduciary relationship.[77] While the Full Court states that O'Loughlin J. consequently held that the Director owed "fiduciary obligations to the appellants by virtue of his statutory role as their legal guardian,"[78] this is erroneous. O'Loughlin J. stated that a guardian/ward relationship "may," not "will," create a fiduciary relationship.[79] As a consequence he was able to ultimately conclude that there was no fiduciary relationship in the subject case.

O'Loughlin J. refused to extend the notion of a fiduciary relationship to the subject facts because the plaintiffs did not claim any loss of, or damage to, an economic interest. Their claims were limited to "losses and damages flowing from the psychiatric injuries and cultural losses that they have allegedly suffered."[80] O'Loughlin J. held that such non-economic claims could not be maintained in equity. In support, O'Loughlin J. quoted the Court in *Paramasivam v. Flynn*:

> In Anglo-Australian law, the interests which the equitable doctrines invoked by the appellant, and related doctrines, have hitherto protected are economic interests. ... [I]n cases usually classified as involving fiduciary obligations not to allow interest to conflict with duty, the interests protected have been economic.[81]

O'Loughlin J. asserted that it "would appear to be inappropriate for a judge at first instance, to expand the range of the fiduciary relationship so that it extends, as would be the case here, to a claimed conflict of interests where the conflict did not include an economic aspect."[82]

Moreover, where, as in this case, the claim in equity arises out of the same factual basis as the claim in tort, O'Loughlin J. followed a line of case law that provides that the subject claim should be in tort, not equity.[83] In support, O'Loughlin J. quoted, *inter alia*, *Paramasivam v. Flynn*:

> Here, the conduct complained of is within the purview of the law of tort, which has worked out and elaborated principles according to which various kinds of loss and damage, resulting from intentional or negligent wrongful conduct, is to be compensated. That is not a field on which there is any obvious need for equity to enter and there is no obvious advantage to be gained from equity's entry upon it. And such an extension would, in our view, involve a leap not easily to be justified in terms of conventional legal reasoning.[84]

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77. *Cubillo 2*, *ibid.* at para. 1290. See also *Cubillo 3*, *supra* note 1 at para. 455.
78. *Cubillo 3*, *ibid.* at para. 460.
79. *Cubillo 2*, *supra* note 2 at para. 1290, referring to *Paramasivam*, *supra* note 16 at 218.
80. *Ibid.* at para. 1299.
81. *Supra* note 16 at 218. See also *Williams No. 2*, *supra* note 5.
82. *Cubillo 2*, *supra* note 2 at para. 1307.
83. *Ibid.* at paras. 1291, 1299 and 1307, following *Breen No. 2*, *supra* note 16; *Paramasivam*, *supra* note 16; *Williams No 2*, *supra* note 5; *Lovejoy*, *supra* note 16; *Prince*, *supra* note 16.
84. *Supra* note 16 at 219.

C. FULL COURT'S JUDGMENT

The Full Court's summation of O'Loughlin J.'s findings in this regard is, with respect, difficult to comprehend. In essence, as noted above, the Court states that O'Loughlin J. did accept that the Directors owed fiduciary duties to the plaintiffs as their legal guardian, but the Full Court asserts that he failed to make any determination as to whether there was a fiduciary relationship between the Commonwealth and the plaintiffs.[85] As the detail set out immediately above makes clear, this is not an accurate summation of O'Loughlin J.'s findings on this issue. O'Loughlin J. denied the existence of any fiduciary relationship as a matter of law.

The Full Court's judgment continues by asserting that even if there is a fiduciary relationship, this does not mean that all aspects of the relationship are governed by equitable principles.[86] Moreover, the Full Court agreed with O'Loughlin J.'s assertion that where there is a factual overlap between an alleged fiduciary relationship and common law tort, the latter should be the source of any legal liability.[87] The Full Court quoted with approval *Breen v. Williams* where Dawson and Toohey JJ. asserted in response to a claim of a fiduciary relationship between a doctor and patient:

> [T]he duty of the doctor is established both in contract and in tort and it is appropriately described in terms of the observance of a standard of care and skill rather than, inappropriately, in terms of the avoidance of a conflict of interest ... The concern of the law in a fiduciary relationship is not negligence, or breach of contract. Yet it is the law of negligence and contract which governs the duty of a doctor towards a patient. This leaves no need, or even room, for the imposition of fiduciary obligations. [88]

The Court also quoted the above passage from *Paramasivam v. Flynn*, where *Breen v. Williams* was applied. In the former case, the Full Court rejected the plaintiff/appellant's claim of a breach of a fiduciary relationship arising out of sexual assaults upon himself by his former guardian. The Court asserted that the fiduciary claim was "most unlikely to be upheld by Australian courts" because the plaintiff/appellant's claim was encompassed by tortious principles.[89]

Following these cases[90] the Full Court in *Cubillo 3* concluded that "Australian law has set its face firmly against the notion that fiduciary duties can be imposed on relationships in a manner that conflicts with established tortious and contractual principles."[91] As the plaintiffs/appellants' claims were within the "purview of the law of torts" there was "no occasion to invoke fiduciary principles."[92]

Finally, the Full Court asserted that as Mr Gunner had been removed at the

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85. See *Cubillo 3, supra* note 1 at paras. 460 and 461.
86. *Ibid.* at para. 462, referring to *Pilmer v. Duke Group Ltd. (in liq)* (2001), 38 A.C.S.R. 122, 180 A.L.R. 249 especially at 271 (H.C.A.) [*Pilmer* cited to A.L.R.].
87. *Cubillo 3, ibid.* at paras. 463 and 464, referring to *Breen No. 2, supra* note 16.
88. *Breen No. 2, ibid.* at 93.
89. *Paramasivam, supra* note 16 at 221.
90. The Full Court also quoted a passage from *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at 312, 6 W.W.R. 673 [*Norberg* cited to S.C.R.] that "[f]iduciary duties should not be superimposed on these common law duties simply to improve the nature or extent of the remedy", cited in *Cubillo 3, supra* note 1 at para. 464.
91. *Cubillo 3, ibid.* at para. 463.
92. *Ibid.* at para. 466, citing *Paramasivam, supra* note 16.

request, and with the informed consent, of his mother and "the Director had not participated in the removal," there was "no room for Mr Gunner's claim that his removal was in breach of fiduciary duties owed to him by the Commonwealth."[93] In regard to Mrs Cubillo, the Full Court asserted that as O'Loughlin J. had not found that her removal and detention had been in breach of the relevant statutory regimes, there could be no breach of fiduciary duties. The Full Court asserted that "[a]ny fiduciary obligation must accommodate itself to the terms of statute. In particular, a fiduciary obligation cannot modify the operation or effect of statute: to hold otherwise, would be to give equity supremacy over the sovereignty of Parliament. ... [N]o fiduciary obligation could forbid what the legislation permitted."[94]

v. Evaluation

A. ECONOMIC LOSS AS A PREREQUISITE FOR FIDUCIARY DUTIES

In regard to the courts' rejection of the plaintiffs/appellants' claim of breach of fiduciary duty there are a number of sub-issues that are raised by the courts' reasoning in *Cubillo 2* and *Cubillo 3*. Three of these issues, namely whether: (i) an economic loss is necessary for a breach of a fiduciary duty; (ii) a fiduciary duty can exist when the same facts are governed by contract law or tort; and, (iii) equity merely imposes proscriptive duties; are highly controversial in the general area of equity. While it is not the purpose of this article to provide a comprehensive examination of the issues and thus engage in this broader debate,[95] as these points

93. *Ibid.* at para. 465.

94. *Ibid.*, citing *Tito v. Waddell No. 2*, [1977] Ch. 106 at 139, 3 All ER. 129 [*Tito* cited to Ch.].

95. For example, this article does not discuss the issues arising from the development of the remedy of equitable compensation such as the methods of quantification, causation and remoteness issues. For a discussion of these issues and a further discussion of issues raised in this article see Ian E. Davidson, "The Equitable Remedy of Compensation" (1982) 13 M.U.L.R. 349; Dennis R. Klinck, "The Rise of the 'Remedial' Fiduciary Relationship: A Comment on *International Corona Resources Ltd v. Lac Minerals Ltd*" (1988) 33 McGill L.J. 600; P.D. Finn, "The Fiduciary Principle" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 1; Justice Gummow, "Compensation for Breach of Fiduciary Duty" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 57; R.E. Hawkins, "LAC and the Emerging Obligation to Bargain in Good Faith" (1990) 15 Queen's L.J. 65; Horace Krever & Marion Randall Lewis, "Fiduciary Obligations and the Professions" in *Special Lectures of the Law Society of Upper Canada 1990: Fiduciary Duties* (Scarborough: Richard DeBoo, 1991) 279; Robert Cooter & Bradley J. Freedman, "The Fiduciary Relationship: Its Economic Character and Legal Consequences" (1991) 66 N.Y.U. L. Rev. 1045; Deborah A. De Mott, "Fiduciary Obligation under Intellectual Siege: Contemporary Challenges to the Duty to be Loyal" (1992) 30 Osgoode Hall L.J. 470; Paul M. Perell, "The Aftermath of Fusion: Canson Enterprises Ltd v. Boughton & Co" (1993) 14 Adv. Q. 488; L. Aitken, "Developments in Equitable Compensation: Opportunity or Danger?" (1993) 67 A.L.J. 596; Sir Anthony Mason, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: An Australian Perspective" in Maryla A. Waters & Mark Bridge, eds., *Equity, Fiduciaries and Trusts 1993* (Scarborough: Carswell, 1993) at 3 [*Equity, Fiduciaries and Trusts 1993*]; Sir Robin Cooke, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A New Zealand Perspective" in *Equity, Fiduciaries and Trusts 1993* at 25; Beverley M. McLachlin, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A Canadian Perspective" in *Equity, Fiduciaries and Trusts 1993* at 37; J. Derek Davies, "Equitable Compensation: 'Causation Foreseeability and Remoteness'" in *Equity, Fiduciaries and Trusts 1993* at 297; Charles Rickett and Tim Gardner, "Compensating for Loss in Equity: The Evolution of a Remedy" (1994) 24 V.U.W.L.R. 19; Jeff Berryman, "Some Observations on the Application of Equitable Compensation in Western Australia: *Dempster v. Mallina Holdings Ltd*" (1995) 25 U.W.A.L. Rev. 317; Patrick Parkinson, "Fiduciary Law and Access to Medical Records: *Breen v. Williams*" (1995) 17 Syd. L. Rev. 433; Leonard I. Rotman, "The Vulnerable Position of Fiduciary Doctrine in the Supreme Court of Canada" (1996) 24 Man. L.J. 60; McCamus, *supra* note 70; Hadfield, *supra* note 70.

are central to the courts' rejection of a fiduciary relationship between the Directors/Commonwealth and the aboriginal plaintiffs/appellants, it is necessary to evaluate these aspects of the courts' decisions in *Cubillo 2* and *Cubillo 3*. To this end, it is convenient to first consider these three issues, plus the further issue, raised by the Full Court in *Cubillo 3*, namely, (iv) whether a fiduciary duty can be breached by statute, before considering, (v) the sources of a fiduciary relationship between the Commonwealth/Directors and the plaintiffs/appellants.

As to the first point, in regard to the need for an economic loss for a breach of a fiduciary duty, while this view has been previously expressed in cases such *Paramasivam v. Flynn*,[96] it is submitted that such a principle is inappropriate for two related reasons. First, the approach in these cases and in *Cubillo 2* involves the 'tail wagging the dog.' The consequences of a breach are somehow being used to determine whether there was an equitable breach in the first place. Logically, the nature of a person's loss cannot determine whether the underlying fiduciary relationship exists or not. Whether an economic, as opposed to physical or psychological, loss stemmed from a breach of a fiduciary duty cannot determine that that fiduciary duty existed. Fiduciary relationships exist in the absence of a breach. Thus, the fiduciary relationship may exist in the absence of harm to the person to whom the duty is owed,[97] much less an economic loss.

Secondly, and flowing on from this point, the courts' approach in *Paramasivam v. Flynn* and *Cubillo 2* has the effect of denying the very 'definition' of a fiduciary relationship.[98] Equity imposes a fiduciary relationship when a person stands in such a position of trust and power over another that equity believes that the former should be held to act in the latter's best interests. As Mason J. stated in *Hospital Products Ltd v. United States Surgical Corporation*, "[t]he relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position."[99] Persons are

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96. *Supra* note 16 at 218. See also *Williams No. 2, supra* note 5 especially at paras. 731 and 733.
97. The duty may be breached without any harm being inflicted on the beneficiary and even if the beneficiary benefits from the breach: see generally *Keech v. Sandford* (1726), Sel. Cas. T. King 61, 25 ER. 223 (H.L.) [*Keech*]; *Regal (Hastings) Ltd. v. Gulliver*, [1967] 2 A.C. 134 (H.L.) [*Regal*]; La Forest J. in *LAC Minerals, supra* note 70 at 657.
98. It is acknowledged that there is no definitive definition of a fiduciary relationship: see *Hospital Products, supra* note 70 at 68; *Breen No. 2, supra* note 16 at 106; *Frame, supra* note 70, per Wilson J. See also J.C. Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1981) at 4–8; Mason, *supra* note 95; Klinck, *supra* note 95 at 603. Nevertheless the essence of a fiduciary relationship can be so identified.
99. *Hospital Products, ibid.* at 97. See also *Hospital Products, ibid.* at 142; *Johnson v. Buttress* (1936), 56 C.L.R. 113 at 134-135, CB 14.1.4 (H.C.) [*Johnson* cited to C.L.R.]; *Daly v. Sydney Stock Exchange Ltd.* (1986), 160 C.L.R. 371 at 377, 65 A.L.R. 193 [*Daly* cited to C.L.R.]; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 384, 13 D.L.R. (4th) 321 [*Guerin* cited to S.C.R.]; *Frame, supra* note 70 at 139; *LAC Minerals, supra* note 70 at 606 and 656; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 409 and 467, 117 D.L.R. (4th) 161 [*Hodgkinson* cited to D.L.R.]; *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344, 130 D.L.R. (4th) 193 [*Blueberry River* cited to S.C.R.]; *Mabo No. 2, supra* note 25 at paras. 78–79. See also D.S.K. Ong, "Fiduciaries: Identification and Remedies" (1986) 8 U. Tasm. L. Rev. 311. Note, it is beyond the scope of this article to discuss the differing degrees of importance members of the courts in *Frame, LAC Minerals* and *Hodgkinson* placed on the element of vulnerability and the degree of reliance in the definition of a fiduciary relationship. While there are differences in La Forest and Sopinka JJ.'s approaches, there are also broad areas of conformity and ultimately it is submitted that the Justices simply disagreed on the facts. See generally M.H. Ogilvie, "Fiduciary Obligations in Canada: from Concept to Principle" (1995) J. Bus. L. 638; Rotman, *supra* note 95; McCamus, *supra* note 70; Hadfield, *supra* note 70; Mark R. Gillen & Faye Woodman, *The Law of Trusts: A Contextual Approach* (Toronto: Emond Montgomery, 2000) at 479, 747 and 789–791.

not only vulnerable when they suffer an economic loss. Thus, the unifying concept underlying the imposition of fiduciary obligations is equally applicable where the weaker party is especially liable to sustain harm to his or her fundamental human interests, rather than his/her financial interests.[100]

Again, while it is beyond the scope of this article to provide an exhaustive treatment of this issue,[101] for these reasons it is submitted the preferable view is that adopted, for the most part, in the Canadian cases[102] where the ability to award equitable damages compensating a plaintiff for non-pecuniary losses is recognized.[103] As Wilson J. stated in her judgment in *Frame v. Smith*, fiduciary duties should not be confined to the protection of "legal interests," but should extend to "vital non-legal or 'practical' interests."[104] To "deny relief because of the nature of the interest involved, to afford protection to material interests, but not to human or personal interests would, it seems to me, be arbitrary in the extreme."[105] Using this reasoning Wilson J. would have applied equity's fiduciary responsibilities to the protection of a parent's 'human' interest in ensuring access to his/her child.[106]

Similarly, in *Norberg v. Wynrib* a majority of the Court held there had been a breach of a fiduciary relationship when the defendant doctor extorted sexual favours from the plaintiff/patient in return for supplying her with prescriptions for a drug, a painkiller called Fiorinal, to which the patient had previously developed an addiction. McLachlin J. held that fiduciary duties were capable of pro-

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100. Samantha Hepburn, "*Breen v. Williams*" (1996) 20 M.U.L.R. 1201 at 1206. *Cf. Hodgkinson, ibid.* at para. 25 where La Forest J. refers to "vulnerability" as being "the 'golden thread' that unites such related causes of action as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation."

101. See generally Finn, *supra* note 95; Cooter & Freedman, *supra* note 95; De Mott, *supra* note 95; Perell, *supra* note 95; Mason, *supra* note 95; McLachlin, *supra* note 95; Parkinson, *supra* note 95; Hepburn, *ibid.*; McCamus, *supra* note 70.

102. Cases such as *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289 [*M.(K.)* cited to S.C.R.] and *Norberg, supra* note 90, do not provide the only examples where persons have been held to stand in a fiduciary relationship despite an absence of protection of property interests. Directors stand in a fiduciary relationship with their company (see generally *Regal, supra* note 97) and it has been suggested that the "corporation's interest which is protected by the fiduciary duty is not confined to an interest in the property of the corporation but extends to non-legal, practical interests in the financial well-being of the corporation and perhaps to even more intangible practical interests such as the corporation's public image and reputation" (*Frame, supra* note 70 at 136-137, Wilson J.). Similarly, Wilson J. in this case referred to the earlier decision in *Reading v. Attorney-General*, [1951] A.C. 507, 1 All E.R. 617 (H.L.) as a further example where equitable compensation was awarded to the Crown for breach of fiduciary duties where the Crown's interest was "reputational or diplomatic", rather than economic. In this case Reading was a sergeant in the Royal Army Medical Corps, serving in Cairo. In return for money, Reading helped smugglers avoid detection by police during WWII by riding in their lorries in his military uniform. *Cf.* McCamus, *supra* note 70 at 130.

103. *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, 93 D.L.R. (4th) 415 [*McInerney* cited to S.C.R.]; *Norberg, supra* note 90; *Taylor v. McGillivray* (1993), 110 D.L.R. (4th) 64, 143 N.B.R. (2d) 241 (Q.B.).

104. *Supra* note 70 at 136.

105. *Ibid.* at 143.

106. *Ibid.* at 136. In this case the majority rejected the notion that a former wife owed her former husband a fiduciary duty to facilitate access to the children. The majority asserted that the statutory family law scheme provided an exhaustive statement of rights and thus could not be supplemented by equity. Whilst Wilson J. was in the minority, and thus agreed with the submission that a fiduciary duty did exist, it is her view that has proven to be influential in the elucidation of the fiduciary concept. See *e.g.* the reference to this judgment in the subsequent decisions in *LAC Minerals, supra* note 70 and *Hodgkinson, supra* note 99.

tecting not only narrow legal and economic interests, but also fundamental human and personal interests.[107] Again, in *M.(K.) v. M.(H.)* the Court held that the parent/child relationship was fiduciary in nature and in the subject case had been breached through the incestuous relationship between the appellant and her father.[108] The breach was actionable even though the interest that had been affected was personal, not economic. The Court held that while the parental duty to protect the child's economic interests had previously been recognized, there was no principle that confined the interests protected by a fiduciary relationship to economic interests. "Indeed, the essence of the parental obligation in the present case is simply to refrain from inflicting personal injuries upon one's child."[109]

M.(K.) v. M.(H.) was adopted by the Court of Appeal of the Supreme Court of New South Wales in *Williams v. Minister [No. 1]*.[110] In that case, the plaintiff was of aboriginal descent. Following her birth she was placed, at her mother's request, under the control of the Aboriginal Welfare Board under section 7(2) of the *Aborigines Protection Act 1909*.[111] The plaintiff was placed by the Board with the United Aborigines Mission at an Aboriginal Children's Home. At the age of 4 years, she was transferred to another home conducted by the Plymouth Brethren faith. The plaintiff claimed the Board had breached its fiduciary duties to provide for her custody, maintenance and education and, she alleged, that in consequence of these childhood experiences she suffered a personality disorder.[112] In regard to *M.(K.) v. M.(H.)*, Kirby P. asserted that he saw "no reason to conclude that the principles expressed by the Supreme Court of Canada would not be applicable in this jurisdiction."[113] Consequently, he suggested that equitable duties could be used to protect non-economic interests. Thus, while in this case there was no economic loss, only a human, personal loss, the breach of fiduciary duties was nevertheless arguable. Kirby P. asserted that it was "distinctly arguable that a person who suffers as a result of want of proper care on the part of the fiduciary may recover equitable compensation for losses occasioned by want of care."[114] While Abadee

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107. *Norberg, supra* note 90 at 277.
108. See also *Mowatt, supra* note 27, discussed in more detail below, where despite the absence of any economic loss, the plaintiff successfully sued the Anglican Church of Canada for breach of their fiduciary duties, in particular by failing to report properly and investigate the sexual abuse of the plaintiff during his stay at an Indian Residential School and to care for him after the abuse was disclosed.
109. *M.(K.), supra* note 102 at 67.
110. (1994), 35 N.S.W.L.R. 497 (C.A.) [*Williams No. 1*].
111. *Aborigines Protection Act 1909* (N.S.W.).
112. Note that in *Williams v. Minister, Aboriginal Land Rights Act 1983 [No. 3]*, [2000] N.S.W.C.A. 255, Aust. Torts Rep. 64,136 at 64,175 (C.A.) [*Williams No. 3*] the Court found that the plaintiff's case suffered from an "insuperable causation problem". While she claimed that if the Board had taken her to a Child Guidance Clinic before 1960 she would not have suffered a psychiatric disorder, she did in fact go to a clinic in 1960 and no such disorder was diagnosed.
113. *Williams No. 1, supra* note 110 at 510.
114. *Ibid.* Note this hearing was an application for an extension of time in respect of claims statute barred under the *Limitation Act*, 1969 (N.S.W.). The plaintiff was granted an order under s. 60(G) extending the period in which to bring her proceedings against the Defendants.

J. expressed a contrary view when this case went to trial in *Williams No. 2*,[115] for the reasons already expressed, it is submitted the approach adopted in the Canadian case law is to be preferred.

B. MAY A FIDUCIARY RELATIONSHIP OVERLAP WITH CONTRACT OR TORT?

As to the second issue, it will be recalled that interrelated with O'Loughlin J.'s approach to the first issue was the proposition that where the claim in equity arises out of the same factual basis as a claim in tort, the subject claim should be determined under tort law, not equity.[116] The Full Court also favoured this view.[117] While again this view has been previously expressed in cases including *Paramasivam v. Flynn*[118] and *Breen v. Williams*,[119] four points can be made that suggest that the courts' application of these cases in *Cubillo 2* and *Cubillo 3* was erroneous.

First, even if it is accepted for the moment that it is necessary to limit the application of fiduciary principles to what has been described in *LAC Minerals v. International Corona Resources* as those "situations that are truly in need of the special protection that equity affords,"[120] it is submitted that the courts in *Cubillo 2* and *Cubillo 3* have applied this principle without regard to its underlying rationale(s). The rationale for limiting the scope of fiduciary relationships, thereby confining their application to outside existing tortious/contractual relationships, has been explained on the basis that the strict duties, and harsh consequences of breaches imposed by equity sometimes described as equity's "blunt tool for the control of [the fiduciary's] discretion,"[121] are rarely required in the context of an arm's

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115. In the subsequent trial, in *Williams No. 2*, *supra* note 5 at para. 704 the Court noted that the view in *Norberg* was "not supported by English or Australian authority" and noted that in *Brunninghausen v. Glavanics* (1999), 46 N.S.W.L.R. 538, 17 A.C.L.C. 1247 (C.A.) [*Brunninghausen* cited to N.S.W.L.R.] and *O'Halloran v. RT Thomas Family Pty. Ltd.* (1998), 45 N.S.W.L.R. 262, N.S.W.S.C. 596 (C.A.) dealing with directors' fiduciary duties, the interests being protected by equity were economic. Ultimately, however, Abadee J. asserted that that there is nothing "to be found in *Breen* to support the proposition that fiduciary principles may be invoked to protect other than economic interests. There was no suggestion that a fiduciary duty would or should protect personal interests of the type postulated in the instant case, as has been perhaps suggested in the Canadian cases. For these further reasons, in my view the Canadian cases have no application in the present case" (*Williams No. 2*, *ibid.* at para. 731). Abadee J. also agreed with the view in *Paramasivam*, *supra* note 16 at 218–219 that "in Anglo-Australian law the interests which the equitable doctrines ... have hitherto protected are economic interests" and refused to extend these equitable principles to the subject case (*Williams No. 2*, *ibid.* at para. 733). Abadee J. concluded that as there were "no economic interests at stake" a fiduciary duty should not be extended to the circumstances (*Williams No. 2*, *ibid.* at para. 745). Abadee J.'s judgment was upheld on appeal (*Williams No. 3*, *supra* note 112).

116. Following *Paramasivam*, *ibid.*; *Williams No. 2*, *ibid.*; *Lovejoy*, *supra* note 16; *Prince*, *supra* note 16.

117. *Cubillo 3*, *supra* note 1 at paras. 462–464, citing *Pilmer*, *supra* note 86; *Breen No. 2*, *supra* note 16 at 93.

118. *Supra* note 16 at 219.

119. *Supra* note 16 at 93–94. See also *Williams No. 2*, *supra* note 5 at paras. 732, 735 and 743.

120. *Supra* note 70 at 596, Sopinka J. See also *Barnes v. Addy* (1874), 9 Ch. App. 244 at 251, L.J. Ch. 513; *Hospital Products*, *supra* note 70 at 493–494.

121. Ernest J. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1 at 4, cited with approval in, *inter alia*, *Guerin*, *supra* note 99 at 384.

length commercial transaction.[122] The parties to "an arm's length commercial transaction ... have an adequate opportunity to prescribe their own mutual obligations, and ... the contractual remedies available to them to obtain compensation should be sufficient."[123] It is difficult to see how the doctor/patient relationship in *Breen v. Williams* could be described as "an arm's length commercial transaction." Even more so, the guardian/ward relationship in *Paramasivam v. Flynn* and *Cubillo* and the Crown/aboriginal person relationship in *Cubillo* hardly falls within this rationale, particularly given that it is based upon the premise of equal bargaining power.[124]

A further interrelated basis for confining the scope of fiduciary relationships was suggested in *LAC Minerals v. International Corona Resources*. La Forest J. suggested that there should be a difference in approach depending on whether the court is dealing with one of the traditional fiduciary relationships or whether the plaintiff is trying to extend the notion of a fiduciary relationship to a relationship that is not traditionally fiduciary in nature:

> When the court is dealing with one of the traditional relationships, the characteristics or criteria for a fiduciary relationship are assumed to exist. ... Conversely, when confronted with a relationship that does not fall within one of the traditional categories, it is essential that the court consider: what are the essential ingredients of a fiduciary relationship and are they present?[125]

Thus, commercial relationships, for example, are not traditionally fiduciary in nature and consequently require closer scrutiny in determining whether the requisite elements of a fiduciary relationship exist.[126]

This aspect of the rationale was echoed in both *Paramasivam v. Flynn*[127] and *Breen v. Williams*. In the latter case, Gaudron and McHugh JJ., in rejecting the con-

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122. See *Frame*, *supra* note 70, per Wilson J.; *Hodgkinson*, *supra* note 99, per La Forest J.; *Hospital Products*, *supra* note 70 at 493–494, adopted in *LAC Minerals*, *supra* note 70. The latter case involved two companies engaging in negotiations regarding the joint venture development of a gold field owned one of the companies, International Corona Resources. In the course of such negotiations, Corona revealed confidential information to the other company, LAC Minerals, in regard to an adjacent property that LAC in turn exploited. The majority of the Court held that the relationship was not fiduciary. The majority Justices asserted that when Corona disclosed the confidential information it was in a position that it could have exacted from LAC an undertaking that it would not acquire the subject property unilaterally. Given there was a well-established practice in the mining industry regarding the treatment of confidential information between parties negotiating towards a joint venture, the minority Justices believed that Corona was not at fault by failing to negotiate a confidentiality agreement. See generally Hawkins, *supra* note 95; McCamus, *supra* note 70. It will be seen below that the majority/minority views were, in essence, reversed in the subsequent decision in *Hodgkinson*, *supra* note 99. However, it is submitted that while there are differences in La Forest and Sopinka JJ.'s approaches, there are also broad areas of conformity. See McCamus, *supra* note 70 at 112 and 124–128.

123. Hon. Justice G.A. Kennedy, "Equity in a Commercial Context" in Paul D. Finn, ed., *Equity and Commercial Relationships* (Sydney, Austl.: The Law Book Co., 1987) at 15. See also McCamus, *ibid.* at 118–119.

124. See Kennedy, *ibid.* See also *Burns v. Kelly Peters & Associates* (1987), 41 D.L.R. (4th) 577 at 600, 6 W.W.R. 1 (B.C.C.A.) [*Burns* cited to D.L.R.]; *LAC Minerals*, *supra* note 70.

125. *LAC Minerals*, *ibid.* at 598.

126. *Hospital Products*, *supra* note 70 at 456–457, adopted in *LAC Minerals*, *ibid.* at 667, per La Forest J.

127. The Full Court asserted that the appellant's fiduciary claims were "a novelty. ... [A]n advance must be justifiable in principle. Here, the conduct complained of is within the purview of the law of tort .... That is not a field on which there is any obvious need for equity to enter and there is no obvious advantage to be gained from equity's entry upon it. And such an extension would, in our view, involve a leap not easily to be justified in terms of conventional legal reasoning" (*supra* note 16 at 219).

tention that the doctor owed the patient a fiduciary duty to give her access to the patient's medical records, asserted:

> She seeks to impose fiduciary obligations on a class of relationship which has not traditionally been recognised as fiduciary in nature and which would significantly alter the already existing complex of legal doctrines governing the doctor-patient relationship, particularly in the areas of contract and tort. As Sopinka J. remarked in *Norberg*, "Fiduciary duties should not be superimposed on these common law duties simply to improve the nature or extent of the remedy."[128]

Later in their judgment, Gaudron and McHugh JJ. again reinforced the 'novelty' of the claim before them.[129]

Surprisingly, the doctor/patient relationship has not traditionally been accepted as a fiduciary relationship;[130] hence the Court's reference to the case as one involving a relationship not traditionally perceived as fiduciary in nature. While it is submitted that the better view is that the doctor/patient relationship is fiduciary in nature,[131] more importantly there can be no suggestion that in *Cubillo* there was an attempt to extend a fiduciary characterization to a relationship that had not previously been seen as fiduciary in nature; much less that such an attempt was simply to obtain a better remedy within the above sentiments. It will be seen that the relationship between the Crown and aboriginal peoples is an established fiduciary relationship.[132] The relationship of ward and guardian is also well estab-

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128. *Norberg*, *supra* note 90 at 312.

129. *Ibid.* at 115. Note, however, that Gummow J. asserted that the relationship between a medical practitioner and patient was fiduciary in nature (*ibid.* at 134–135). Ultimately, however, he held that there was no positive duty attached to this fiduciary relationship.

130. *Hospital Products*, *supra* note 70 at 68, 96 and 141. See also *Sidaway v. Governors of Bethlem Royal Hospital*, [1985] A.C. 871 at 884, 1 All ER. 634 (H.L.).

131. Note, however, that Dixon J. in *Johnson*, *supra* note 99 at 135–136 asserted that the doctor/patient relationship exhibited fiduciary characteristics. Gummow J. in *Breen No. 2*, *supra* note 16 at 134–135 asserted that the relationship between a medical practitioner and patient is fiduciary in nature. Ultimately, however, he held that there was no positive duty attached to this fiduciary relationship. Kirby P. also noted in his dissent in *Breen v. Williams* (1994), 35 N.S.W.L.R. 522 at 542–543 (C.A.) [*Breen No. 1*] that a doctor owes a patient a fiduciary duty which entitles the patient to inspect or obtain copies of his/her medical records. In the course of his judgment he noted there is no legal or policy reason why the doctor/patient relationship is not seen as a fiduciary relationship (*Breen No. 1*, *ibid.* at 549). Perhaps the contrary view has been based on the notion that has been rejected above, that fiduciary duties only protect economic interests. *Cf.* Hepburn, *supra* note 100. The better view is that taken by the Canadian courts, where it has been acknowledged that this relationship is fiduciary in nature (see *e.g. McInerney*, *supra* note 103; *Norberg*, *supra* note 90). In *McInerney* the Supreme Court of Canada held that the doctor/patient relationship is fiduciary in nature and requires the doctor to act with "utmost good faith and loyalty" (*ibid.* at 149). This fiduciary relationship was held to cast upon the doctor a duty to provide the patient reasonable access to examine and copy his/her medical records (*ibid.* at 150). Non-disclosure of such records would only be warranted if there was a real potential for harm either to the patient or to a third party.

132. See *Mabo No. 2*, *supra* note 25 at 203. In Canada see especially *Guerin*, *supra* note 99; *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 at 406 and 408 [*Sparrow* cited to D.L.R.]; *Blueberry River*, *supra* note 99; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at 301–302, 304, 338, 340, 368-369, 380, 395-397 [*Van der Peet* cited to D.L.R.]; *R. v. Badger*, [1996] 1 S.C.R. 771, 133 D.L.R. (4th) 324 at 331 and 354–355 [*Badger* cited to D.L.R.]; *R. v. Côté*, [1996] 3 S.C.R. 139, 138 D.L.R. (4th) 385 at 417 (S.C.C.) [*Côté* cited to D.L.R.]; *R. v. Adams*, [1996] 3 S.C.R. 101, 138 D.L.R. (4th) 657 at 677 [*Adams* cited to D.L.R.]; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 at 322–324, 337-338 and 340–342, 367–368 and 377–379 [*Delgamuukw* cited to D.L.R.]; *Nunavik Inuit v. Canada*, [1998] 1 F.C. 38, 4 C.N.L.R. 68 at 86 and 87 (F.C.) [*Nunavik Inuit* cited to C.N.L.R.]. In the United States see *Worcester v. The State of Georgia*, 31 U.S. 515 at 544, 8 L.Ed. 483 (1932) (U.S.S.C.) [*Worcester*]; *Cherokee Nation v. Georgia* 30 U.S. 1, 8 L.Ed. 25 (1831) (U.S.S.C.) [*Cherokee Nation*].

lished as a fiduciary relationship.[133] In regard to the latter point, the Full Court in *Paramasivam v. Flynn* suggested that such a relationship is fiduciary in nature, but made assertions similar to those quoted above from *Breen v. Williams*.[134] Thus, the Full Court refers to the "novelty" of the claim before it even though the relationship under consideration was that of ward/guardian.[135] Perhaps the "novelty" of the claim pertained to the non-economic interests sought to be protected, and discussed above.

Second, even if a case did concern a relationship that has not previously been considered fiduciary in nature, it is submitted that this principle, as described above, does not negate the possibility that the subject facts might nevertheless have the ingredients of a fiduciary relationship. As stated above, the approach taken in *LAC Minerals v. International Corona Resources* and *Hospital Products Ltd v. United States Surgical Corporation* merely requires the court to consider whether, rather than simply assume, "the essential ingredients of a fiduciary relationship ... are ... present."[136] Thus as Mason J. added in *Hospital Products Ltd v. United States Surgical Corporation*:

> There has been an understandable reluctance to subject commercial transactions to the equitable doctrine of constructive trust and constructive notice. But it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime as though in some way commercial transactions do not lend themselves to the creation of a relationship in which one person comes under an obligation to act in the interests of another. The fact that in the great majority of commercial transactions the parties stand at arm's length does not enable us to make a generalization that is universally true in relation to every commercial transaction. In truth, every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship.[137]

What the courts in *Cubillo 2* and *Cubillo 3* fail to add in their application of *Paramasivam v. Flynn* and *Breen v. Williams* is that even in these cases the courts did not assert an absolute rule whereby the law of negligence or contract could not overlap with fiduciary duties. Hence Dawson and Toohey JJ. asserted in *Breen v. Williams* that "[o]f course, fiduciary duties may be superimposed upon contractual obligations...."[138] Gummow J. stated in stronger language that he was:

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133. See generally *Countess of Bective v. FCT* (1932), 38 A.L.R. 362, 47 C.L.R. 417 at 420-421 [*Countess of Bective* cited to C.L.R.]; *Hospital Products*, *supra* note 70 at 141; *Bennett v. Minister for Community Welfare* (1992), 176 C.L.R. 408 at 411 [*Bennett*]; *Williams No. 1*, *supra* note 110 at 511; *Paramasivam*, *supra* note 16 at 218; *Clay v. Clay* (1999), 20 W.A.R. 427, (2001), 178 A.L.R. 193 at 205 (H.C.A.) [*Clay* cited to A.L.R.]; *Brunninghausen*, *supra* note 115 at 555. *Cf. Williams No. 2*, *supra* note 5 at paras. 721–722. See the criticism of this statement below.
134. *Paramasivam*, *ibid.* at 218. *Cf. Breen No. 2*, *supra* note 16 at 110.
135. *Paramasivam*, *ibid.* at 219.
136. *LAC Minerals*, *supra* note 70 at 598.
137. *Supra* note 70 at 99–100, adopted by La Forest J. in *LAC Minerals*, *ibid.* at 667.
138. *Breen No. 2*, *supra* note 16 at 93.

> ...not to be understood as supporting the existence of any necessary antipathy between concurrent contractual and fiduciary obligations. The law of partnership is an obvious example of such a concurrence. The mere presence of a contract does not exclude the co-existence of concurrent fiduciary duties and the contract may, in particular circumstances, provide the occasion for their existence.[139]

In considering *Breen v. Williams*, the Court in *Paramasivam v. Flynn* noted there was in "*Breen*, significant observations about the interrelationship between common law obligations and the fiduciary principle." The Court continued by adding the "truth of that is not at all undermined by the undoubted fact that fiduciary duties may arise within a relationship governed by contract or that liability in equity may coexist with liability in tort."[140]

Thus, the courts' approach in *Cubillo 2* and *Cubillo 3* takes the principles expressed in, *inter alia*, *Breen v. Williams* too far. The courts failed to appreciate that the category of fiduciary relationships is not closed[141] and that the above-discussed principle merely requires greater scrutiny in commercial transactions to determine if it is truly fiduciary in nature.[142] Thus even if the subject relationship had not traditionally been recognized as fiduciary in nature,[143] it was clearly open to the plaintiffs/appellants in *Cubillo* to argue that the Commonwealth and/or the Directors owed them a fiduciary duty.

Flowing on from this point, the approach taken to this principle in *Cubillo 2* and *Cubillo 3* again effectively denies the very definition of a fiduciary relationship.[144] This is because the suggestion that a fiduciary relationship cannot arise out of the same factual scenario as a contract or duty of care denies the possible co-existence of the factual elements of a fiduciary duty. Yet, clearly, a person may be in a position of vulnerability within the notion of a fiduciary relationship even though they have a contractual or tortious relationship with the person who has power over them.[145] The vulnerability of a person does not disappear just because

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139. *Ibid.* at 132.

140. *Supra* note 16 at 221.

141. See generally *Guerin*, *supra* note 99 at 341; *Hospital Products*, *supra* note 70 at 68 and 96; *LAC Minerals*, *supra* note 70; *Breen No. 2*, *supra* note 16 at 107; *Frame*, *supra* note 70, Wilson, J. in *Hodgkinson*, *supra* note 99; *Nunavik Inuit*, *supra* note 132 at 86.

142. See *LAC Minerals*, *ibid.*; *Hospital Products*, *ibid.* at 99–100.

143. *Breen No. 2*, *supra* note 16 at 110.

144. Note that the approach to the principle described above in reference to the Canadian case *LAC Minerals*, *supra* note 70, does not warrant the same criticism because it in fact reinforces the definition of a fiduciary relationship, but merely requires the court to scrutinize on the particular facts if the essential ingredients of that relationship exist. On the facts in *LAC Minerals*, *supra* note 70, the majority (Sopinka, Lamer and McIntyre JJ.) held there was no fiduciary relationship. Sopinka J., for example, believed the element of vulnerability to be absent on the facts. By contrast, La Forest and Wilson JJ. believed the requisite elements of a fiduciary duty did exist.

145. See *e.g. Johnson*, *supra* note 99 at 134–135; *Hospital Products*, *supra* note 70 at 142; *Daly*, *supra* note 99 at 377; *Guerin*, *supra* note 99 at 340; *Frame*, *supra* note 70 at 139; *LAC Minerals*, *ibid.* at 606 and 656; *Hodgkinson*, *supra* note 99; *Blueberry River*, *supra* note 99; *Mabo No. 2*, *supra* note 25 at 200–201. See also Ong, *supra* note 99. Note, it is beyond the scope of this article to discuss the differing degrees of importance that members of the courts in *Frame*, *ibid.*; *LAC Minerals*, *ibid.*; and, *Hodgkinson*, *supra* note 99 placed on the element of vulnerability and the degree of reliance in the definition of a fiduciary relationship. While there are differences in La Forest and Sopinka JJ.'s approaches, there are also broad areas of conformity and ultimately it is submitted the Justices simply disagreed on the facts. See generally Ogilvie, *supra* note 99; Rotman, *supra* note 95; McCamus, *supra* note 70; Hadfield, *supra* note 70; Gillen & Woodman, *supra* note 99 at 479, 747 and 789–791.

that person is also owed, for example, a duty of care in tort or contractual obligations. While it may be accepted that the element of vulnerability is "seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm's length ... *i.e.*, any 'vulnerability' could have been prevented through the more prudent exercise of their bargaining power," this is hardly true of all contractual or tortious arrangements, particularly non-commercial arrangements.[146] Yet, the approach in *Cubillo 2* and *Cubillo 3* denies that such transactions are even capable of being classified as fiduciary in nature. In essence, it is submitted that the courts in *Cubillo 2* and *Cubillo 3* are ultimately saying that the definition of a fiduciary relationship is confined to cases of vulnerability outside contractual and tortious relationships. It is submitted that this is erroneous. Equity is concerned with protecting the vulnerable, not just the vulnerable who are not otherwise protected by the common law.

Finally, while it has been stated above that an exhaustive discussion of this broader issue is beyond the scope of this article,[147] it is submitted that the better view is that a fiduciary relationship can arise out of the same facts as a contractual or tortious arrangement. In a number of cases, the Canadian courts[148] have held that a fiduciary relationship can arise out of the same facts as a contractual or tortious arrangement, even in a commercial context.[149] In *Hodgkinson v. Simms*, the plaintiff's salary had increased and he sought advice as to how to shelter such money from tax.[150] His accountant had advised the plaintiff to invest in certain property development schemes, known as "MURBS" (multi-unit residential buildings), without disclosing that he would receive "extra billings" from the developer for any investors he referred to the scheme. A decline in the residential property market led to the plaintiff losing most of his money, namely, $350,507.62. The plaintiff sued on the basis that he would not have entered into

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146. *Frame*, *ibid.* at 137–138, Wilson J. See also *Hospital Products*, *ibid.* at 99–100, adopted by La Forest J. in *LAC Minerals*, *ibid.* Note, however, that as discussed below, the element of vulnerability can be found in particular commercial contexts. See *e.g.* the majority view in *Hodgkinson*, *supra* note 99, discussed below, and the dissenting views of La Forest and Wilson JJ. in *LAC Minerals*, *ibid.*

147. See generally Finn, *supra* note 95; Donovan W.M. Waters, "*LAC Minerals Ltd. v. International Corona Resources Ltd.*" (1990) 69 Can. Bar Rev. 455; Hawkins, *supra* note 95; Krever & Lewis, *supra* note 95; Mason, *supra* note 95; Cook, *supra* note 95; McLachlin, *supra* note 95; Aitkin, *supra* note 95; Parkinson, *supra* note 95; Hepburn, *supra* note 100; McCamus, *supra* note 70; Hadfield, *supra* note 70.

148. In the Australian context, see *Hospital Products*, *supra* note 70 at 99–100, Mason, J.

149. See *Hodgkinson*, *supra* note 99. See also *Burns*, *supra* note 124, where an investment consultant was held to have breached a fiduciary duty to disclose a conflict of interest and the profit that was made through the advice given. See also *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, 85 D.L.R. (4th) 129 [*Canson* cited to S.C.R], discussed below, where the Court held that a solicitor had breached his fiduciary duties when he failed to warn his client that an undisclosed third party was obtaining a secret profit from the vendor in the subject real estate transaction. See also the dissenting view of La Forest and Wilson JJ. in *LAC Minerals*, *supra* note 70, who believed that a fiduciary relationship existed on the facts.

150. *Supra* note 99. Note that La Forest J. asserted in this case that the subject factual scenario of a professional adviser was very different from the arm's length commercial transaction relationship in cases such as *LAC Minerals*, *supra* note 70, discussed above, where the majority refused to find a fiduciary relationship existed between the parties. The essence of the former was said to be "trust, confidence and independence" while the latter was based upon "self-interest." While in the latter case one party might be expected to take steps to protect itself, in the former case such would be "surprising indeed" as the "very basis of the advisory contract is that the advisor will use his or her special skills on behalf of the advisee." (*Hodgkinson*, *ibid.* at 181).

the transaction had he known the connection between the defendant and the developer. The Court concluded, "the existence of a contract does not necessarily preclude the existence of fiduciary obligations between the parties. On the contrary, the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty."[151] In other cases, it will not be the contractual arrangement *per se*, but rather "the facts surrounding the relationship" that give rise to a fiduciary inference. The majority of the Court held that a fiduciary relationship existed between the plaintiff and his accountant.[152] The majority held there had been a breach of both the underlying contract and these fiduciary duties and awarded the plaintiff the full value of his investment, less the tax advantage that accrued from the scheme.

While, because of its commercial context, *Hodgkinson v. Simms* provides the strongest factual example of the ability to impose fiduciary obligations on an arrangement that is also contractual in nature, it would be remiss not to return to the non-commercial context and make brief reference to the application of this principle in this context. As noted above, in *M.(K.) v. M.(H.)* the Court held that the parent/child relationship was fiduciary and in the subject case had been breached through the incestuous relationship between the plaintiff and her father.[153] The breach was actionable even though the plaintiff's claims were in both tort (assault) and equity. The Court held "a breach of fiduciary duty cannot be automatically overlooked in favour of concurrent common law claims."[154] The Court adopted the comment of Cooke P. in *Mouat v. Boyce* that "now that common law and equity are mingled the Court has available the full range of remedies, including damages or compensation and restitutionary remedies such as an account of profits. What is appropriate to the particular facts may be granted."[155]

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151. *Hodgkinson*, *ibid.* at 174, per La Forest J. As the Court stated, an agency agreement is an example of a contractual relationship "in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations" (*ibid.*). Note, Brennan C.J. in *Breen No. 2*, *supra* note 16 at 82, recognized that fiduciary relationships may arise out of an agency relationship and Gummow J. recognized that a contract may provide the occasion for the concurrence of contractual and fiduciary obligations, the law of partnership providing an example of the concurrence of contractual and fiduciary obligations (*Breen No. 2*, *ibid.* at 132). See also *Birtchnell v. Equity Trustees, Executors and Agency Co. Ltd* (1929), 42 C.L.R. 384 at 408–409 (H.C.A.); *Hospital Products*, *supra* note 70 at 99–100; *Henderson v. Merrett Syndicates Ltd*, [1995] 2 A.C. 145 at 206, [1994] 3 All ER. 506 (H.L.).

152. La Forest J., with whom L'Heureux-Dubé and Gonthier JJ. concurred, and Iacobucci J. The minority, Sopinka and McLachlin JJ., with whom Major J. concurred, believed, *inter alia*, that no fiduciary relationship existed because the plaintiff had time to think about the proposal and thus there was an absence, in their view, of any vulnerability. Note, it has been suggested that the minority Justices' reluctance to find a fiduciary duty on the facts may in turn be tied to their view that the relief sought was not otherwise available in contract law. See also McCamus, *supra* note 70 at 127.

153. See also *Norberg*, *supra* note 90. As noted above, in this case a majority of the Court held there had been a breach of a fiduciary relationship when the defendant doctor extorted sexual favours from the plaintiff/patient in return for supplying her with prescriptions for a drug, a painkiller called Fiorinal, for which the patient had previously developed an addiction. The breach was actionable even though the plaintiff's claims were in both tort (battery) and equity. McLachlin J. did not find that "the doctrines of tort or contract capture the essential nature of the wrong done to the plaintiff. ... Only the principles applicable to fiduciary relationships and their breach encompass it in its totality" (*ibid.* at 268–269).

154. *M.(K.)*, *supra* note 102 at 10.

155. Unreported decision of the New Zealand Court of Appeal, 11 March 1992 at 11, cited in *M.(K.)*, *ibid.* at 61.

M.(K.) v. M.(H.) was recently followed in *Mowatt*,[156] discussed in more detail below. In *Mowatt*, the plaintiff was of Canadian Indian descent. He was a "Status Indian" under the *Indian Act*.[157] Attendance and residency at an Indian Residential School was mandatory under section 115 of the *Indian Act*.[158] The plaintiff entered the subject school in September 1969 when he was eight.[159] From the age of nine, and over a two-year period, their Dormitory Supervisor, Mr Clarke, sexually assaulted the plaintiff and other boys.[160] The Court considered a decision of the British Columbia Court of Appeal, *A.(C.) v. C.(J.W.)*[161] that, in essence, echoed the sentiments of *Paramasivam v. Flynn* and *Breen v. Williams* with respect to the exclusion of fiduciary duties from cases that can be resolved in tort or contract law.[162] The Court noted, however, that this was contrary to the Supreme Court decision in *M.(K.) v. M.(H.)* and chose to follow the latter case.[163] The Court consequently upheld the plaintiff's claims against the Anglican Church of Canada for breach of fiduciary duty in addition to his claims in tort.[164]

It should be noted that in the other leading Indian Residential School case, *Blackwater v. Plint (No. 2)*[165] the Court relied on, *inter alia*, *A.(C.) v. C.(J.W.)*[166] to deny the claims based on a breach of fiduciary duties. The plaintiffs alleged that Canada had breached its fiduciary duty by "removing the plaintiffs from their communities, homes and families and causing them to be transported and placed at AIRS (the subject Residential School), depriving them of family love and guidance, friendship and support of their community, and knowledge of the language, culture, customs and traditions of their nation."[167] A breach of fiduciary duty was also claimed against both Canada and the Church in the operation of the schools where they were "systematically subjected to abuse, mistreatment and racist ridicule and harassment."[168] The Court held that through the joint venture the "defendants could unilaterally affect the plaintiffs' interests and that the plaintiffs were peculiarly vulnerable" within the definition of a fiduciary relationship.[169] The Court went on, however, to apply *inter alia*, *A.(C.) v. C.(J.W.)* and held that a claim of breach of fiduciary duty is excluded from cases that can be resolved in tort or contract.[170] The cases relied upon were, however, only British Columbia Court of

156. *Supra* note 27 at 355–356.
157. R.S.C. 1952, c. 149, ss. 5–17.
158. *Mowatt*, *supra* note 27 at 305.
159. *Ibid.* at 306.
160. *Ibid.* at 307.
161. (1998), 166 D.L.R. (4th) 475, 60 B.C.L.R. (3d) 92 at para. 85 (C.A.) [*A.(C.)*].
162. *Mowatt*, *supra* note 27 at 356.
163. *Ibid.* at 355–356. Ultimately, the Court did not have to refuse to follow *A.(C.)*, *supra* note 161, as it noted that in that case McEachern C.J. had also found that "everyone charged with the responsibility for the care of children is under a fiduciary duty towards such children" (*Mowatt*, *ibid.* at 356).
164. *Ibid.* at 356–357.
165. *Blackwater*, *supra* note 26.
166. *Supra* note 161 at para 85. See also *H.(J.) v. British Columbia*, [1998] B.C.J. No 2926, CarswellBC 2786 (S.C.) [*H.(J.)*].
167. *Blackwater*, *supra* note 26 at 270.
168. *Ibid.*
169. *Ibid.* at 271.
170. *Supra* note 161 at para. 85. See also *H.(J.)*, *supra* note 166.

Appeal decisions. The Court makes no reference to contrary decisions, including the binding Supreme Court of Canada decisions discussed above. Importantly, it also makes no reference to the contrary finding in *Mowatt*. Thus, the decision was in this, and other aspects discussed below, at the very least *per incuriam*.

It should be noted that while the courts in *Breen v. Williams*,[171] *Paramasivam v. Flynn*[172] and *Williams v. Minister [No. 2]*[173] disagreed with the reasoning in the Canadian cases, *M.(K.) v. M.(H.)* was adopted by the Court of Appeal of the Supreme Court of New South Wales in the earlier decision in *Williams v. Minister [No. 1]*. The facts have been detailed above. The plaintiff claimed the Board had failed to provide for her custody, maintenance and education and, she alleged, that in consequence of these childhood experiences she suffered a personality disorder.[174] She further claimed that she had been denied bonding and attachment and had been a victim of maternal deprivation and as a consequence suffered a disorder of attachment. The plaintiff claimed damages for negligence, breach of fiduciary duty, breach of statutory duty and for trespass. Kirby P. referred to *M.(K.) v. M.(H.)* and asserted that he saw "no reason to conclude that the principles expressed by the Supreme Court of Canada would not be applicable in this jurisdiction" and thus concluded that just because her claims in tort were statute barred by reason of the *Limitation Act 1969*,[175] this did not prevent her pursuing her claim "based upon her allegation of the breach of fiduciary duty for which they are liable."[176] While Abadee J. also expressed a contrary view on this issue when this case went to trial in *Williams v. Minister No. 2*,[177] for

171. *Supra* note 16 at 83, 94, 95, 110–113 and 132. In *Breen No. 2*, the Court was particularly referring to *McInerney*, *supra* note 103.

172. In this case the reference was to *M.(K.)*, *supra* note 102.

173. *Supra* note 5 at para. 733. See also paras. 704, 729 and 731. In this case Abadee J. makes particular reference to *Norberg*, *supra* note 90 and *M.(K.)*, *ibid.*

174. Note, in *Williams No. 3*, *supra* note 112, the Court of Appeal noted that the plaintiff's case suffered from an "insuperable causation problem." While she claimed that if the Board had taken her to a Child Guidance Clinic before 1960 she would not have suffered a psychiatric disorder, she did in fact go to a clinic in 1960 and no such disorder was diagnosed.

175. *Limitation Act 1969* (N.S.W.).

176. *Supra* note 102 at 510. Note this hearing was an application for an extension of time in respect of claims statute barred under the *Limitation Act 1969*. The plaintiff was granted an order under s. 60(G) extending the period in which to bring her proceedings against the Defendants.

177. In the subsequent trial, in *Williams No. 2*, *supra* note 5, the Court adopted this principle from *Breen No. 2* as to the exclusion of fiduciary principles from the realm of contract and tort law (*ibid.* at para. 732). Abadee J. also agreed with *Paramasivam* and asserted that "where similar facts could possibly give rise to a claim in negligence and for breach of fiduciary duty, if there is in the circumstances an action available it should be according to the common law and not otherwise" (*ibid.* at para. 735). Abadee J. later stated that "[w]here an action ... is within the purview of the common law dealing with situations when wrongful conduct is to be compensated then there is no obvious advantage (quite the contrary) to be gained by equity providing a further action on the same facts even where the common law may in the result might [sic] deny the existence of a duty of care or liability for breach. The plaintiff's claim in the present, (if a good one) is within the purview of the common law dealing with situations when wrongful or intentional conduct is to be compensated if at all" (*ibid.* at para. 743). Abadee J.'s concern was as to the extension of fiduciary duties to facts otherwise covered by common law remedies merely to avoid or circumvent limitation periods or where a claim could not be established on its merits (*ibid.* at para. 735). "I further do not see why a fiduciary duty should be found to convert an unsustainable claim at common law, based on the same facts, into a sustainable one in equity" (*ibid.* at para. 745). To this end Abadee J. suggested that if a claim under the common law failed for say policy reasons, then automatically a claim in equity should also fail (*ibid.* at para. 744). Note the plaintiff's action in negligence also failed as the Court held there was no duty of care, breach of duty or relevant causation. It also held no action in trespass was established and there was no private action available for breach of statutory duty. Abadee J.'s judgment was upheld on appeal (see *Williams No. 3*, *supra* note 112).

the reasons already expressed it is submitted the approach adopted in the Canadian case law is to be preferred.

For the reasons delineated above, it is submitted the approaches adopted in these cases should be preferred to the views expressed in, *inter alia*, *Cubillo 2* and *Cubillo 3*.

C. DOES EQUITY MERELY IMPOSE PROSCRIPTIVE DUTIES?

In *Cubillo 3*, the Full Court quoted with approval the statement by Gaudron and McHugh JJ. in *Breen v. Williams* that equity merely imposes "proscriptive obligations—not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. ... But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed."[178] The sentiments expressed in this statement were repeated several times in the judgment in *Breen v. Williams*.[179] Thus Dawson and Toohey JJ. asserted that "[e]quity requires that a person under a fiduciary obligation should not put himself or herself in a position where interest and duty conflict. ... [W]hat the law exacts in a fiduciary relationship is loyalty, often of an uncompromising kind, but no more than that."[180] Gummow J. reiterated that:

> Equitable remedies are available where the fiduciary places interest in conflict with duty or derives an unauthorised profit from abuse of duty. It would be to stand established principle on its head to reason that because equity considers the defendant to be a fiduciary, therefore the defendant has a legal obligation to act in the interests of the plaintiff so that failure to fulfil that positive obligation represents a breach of fiduciary duty.[181]

All members of the Court[182] rejected the Canadian case law[183] that recognized the "positive" obligations stemming from equity's imposition of the duty to "act with the utmost good faith and loyalty" and to act in the best interests of the person to whom the fiduciary duty was owed. The Court affirmed, "Australian courts only recognize proscriptive fiduciary duties."[184]

The statement adopted by the Full Court in *Cubillo 3*[185] and these further statements in *Breen v. Williams* raise three interrelated issues: (i) does equity merely impose two duties, namely, not to profit from the relationship and not to be in a position of conflict; (ii) can the duty be breached negligently and/or honestly;

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178. *Breen No. 2*, *supra* note 16 at 113, affirmed in *Cubillo 3*, *supra* note 1 at para. 464; *Pilmer*, *supra* note 86. See *Williams No. 2*, *supra* note 5 at para. 729, where Abadee J. adopted *Breen No. 2* and *Paramasivam* and asserted, "a fiduciary relationship is not really concerned with negligence or the assertion of a fiduciary duty of the type here involved and asserted. On this basis in my view, the Canadian authorities dealing with fiduciary duties are not to be followed in Australia ...". See also *Williams No. 2*, *ibid.* at para. 745.

179. See *Breen No. 2*, *supra* note 16 at 109 and 110–111, Gaudron and McHugh JJ.

180. *Ibid.* at 93, citing Finn, *supra* note 95 at 28.

181. *Ibid.* at 137.

182. Dawson and Toohey JJ. (*ibid.* at 95); Dawson and Toohey JJ. and Gaudron and McHugh JJ. (*ibid.* at 110–113); and, Gummow J. (*ibid.* at 132).

183. Namely McInerney, *supra* note 103, discussed below.

184. *Breen No. 2*, *supra* note 16 at 113

185. *Supra* note 1 at para. 464.

and, (iii) does equity only impose proscriptive duties? Each of these matters is considered in turn. Ultimately it is submitted the comments in *Breen v. Williams*[186] are erroneous and fail to recognize that the content of the fiduciary duties imposed by equity is tailored to the specific relationship from which it arises.[187] These duties may include duties other than these two specified duties, and include a positive legal duty to act in the best interests of the person to whom the duty is owed.[188]

First, while many breaches will fall into either of these two categories of duties, known as the "profit" and "conflict" rules or proscriptions,[189] some types of breaches do not fit into either category.[190] The two rules are, in essence, only suited for situations where through the breach of duty, the fiduciary obtains property that should be passed on to the person to whom the duty is owed. Some cases, however, such as the sexual assaults in *Norberg v. Wynrib*, *M.(K.) v. M.(H.)* and *Mowatt*,[191] will involve a breach of fiduciary duty without a corresponding benefit obtained by the fiduciary that may be so disgorged.[192] In such cases, the breaches will not involve any 'equitable property' and thus cannot be classified within either of the two duties.[193] Limiting fiduciary duties in the manner suggested in *Breen v. Williams*[194] fails to appreciate that equity is not only concerned with compensating the beneficiary when the fiduciary financially benefits by acting for reasons of self interest, but rather is concerned with ensuring that the undertaking of the fiduciary is completed in good faith and with the utmost candour.[195]

Moreover, it is submitted that a fiduciary may breach its duties without acting for reasons of self-benefit or with *mala fides*.[196] In some cases, the fiduciary simply fails to act "in accordance with the undertaking the fiduciary has taken on."[197] A "breach of a fiduciary duty can take many forms. It might be tantamount to deceit and theft, while on the other hand it may be no more than an innocent and honest bit of bad advice, or a failure to give a timely warning."[198] Thus, the breach in *Canson Enterprises Ltd v. Boughton & Co.* was a failure on the part of a solic-

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186. *Supra* note 16 at 110.
187. *Mabo No. 2*, *supra* note 25.
188. See generally *Mabo No. 2*, *ibid.* See also *Hospital Products*, *supra* note 70 at 102; *Hodgkinson*, *supra* note 99, citing *National Westminster Bank plc v. Morgan*, [1985] 1 All ER. 821, 60 N.R. 384 (H.L.) [*National Westminster*]; *Williams No. 2*, *supra* note 5 at para. 707.
189. See McCamus, *supra* note 70 at 108; Gillen & Woodman, *supra* note 99 at 536.
190. *Cf.* Charles Huband, "Remedies and Restitution for Breach of Fiduciary Duties" in *The 1993 Isaac Pitblado Lectures* (Manitoba: The Law Society of Manitoba, 1993), cited in *Hodgkinson*, *supra* note 99; Gillen & Woodman, *ibid.* at 536.
191. *Supra* note 27 at 355–356.
192. *Cf. Canson Enterprises*, *supra* note 149, per La Forest J.; *Hodgkinson*, *supra* note 99, per La Forest J.
193. *Cf. Canson Enterprises*, *ibid.*, per La Forest and McLachlin JJ. See also Gillen & Woodman, *supra* note 99 at 536.
194. *Supra* note 16 at 83.
195. *Cf. Canson Enterprises*, *supra* note 149, per McLachlin J.
196. See *Regal*, *supra* note 97; *Harrison v. Harrison* (1868), 14 Gr 586 (Ch. D.) [*Harrison*].
197. *Canson Enterprises*, *supra* note 149 at 578, per La Forest J., citing L.S. Sealy, "Some Principles of Fiduciary Obligation" (1963) Cambridge L.J. 119; L.S. Sealy, "Fiduciary Relationships" (1962) Cambridge L.J. 69.
198. Huband, *supra* note 190 at II-9. See also *McInerney*, *supra* note 103, discussed above, for a further example of a breach of fiduciary duty that did not involve a breach of the profit or conflict rules. The breach in that case was the doctor's refusal to provide the patient with copies of medical reports from consultants and other doctors.

itor to warn his client that an undisclosed third party was obtaining a secret profit from the vendor in the subject real estate transaction. There was no breach of the profit or conflict proscriptions.[199] There was no self-benefit. The benefit was obtained by a third party. The breach was simply a failure to provide all the relevant information with respect to the proposed transaction. This included information that was so important that disclosure would have caused the client not to go through with the transaction. As the breach of fiduciary duty resulted in the acquisition of the relevant interest in the property, the plaintiff was held to be entitled to equitable damages being the difference between the contract price and the market value of the property, plus interest.[200]

Similarly, in *Guerin v. The Queen*, discussed in more detail below, the Court held that the Indian Affairs Branch of the Federal government breached its fiduciary duties owed to the plaintiff Indian band and ordered the Crown to pay $10 million in equitable compensation. The subject reserve lands were partly composed of the band's traditional territory and were highly valuable, being situated near Vancouver. Pursuant to sections 37 and 41 of the *Indian Act*[201] the band surrendered 162 acres of this land "in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our welfare and that of our people."[202] The Indian Affairs officials had negotiated on behalf of the band a lease of part of the band's reserve lands to a golf club. The officials had failed to follow the band's instructions and negotiated the lease on less favourable terms than those insisted upon by the band.[203] There had been no breach of the profit or conflict rules as the Indian Affairs Branch obtained no self-benefit from the transaction.[204] Nor was there any dishonesty or moral turpitude on the part of the officials. Wilson J. found that their unconscionable action stemmed from paternalism rather than intent to deceive or harm the band.[205] They had simply failed "to take proper care in carrying out the task that had been assigned to the fiduciary."[206]

This issue was also addressed in *Mowatt*.[207] The facts have been briefly detailed above. As noted above, in that case the Court considered a decision of the

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199. *Cf.* McCamus, *supra* note 70 at 113 and 129.
200. The further loss stemming from the fact that the warehouse that the plaintiff built on the land sank into the ground as a consequence of negligence by the plaintiff's soil engineers and contractor was not, however, caused by the breach of fiduciary duty. It was held to be caused by the third parties.
201. *Supra* note 157.
202. The terms of the surrender are set out in the case itself: *Guerin*, *supra* note 99 at 369.
203. In fact, the Crown's full proposal was never presented to the band and the Band Council did not receive a copy of the lease until 1970, twelve years after its execution. *Cf.* John Hurley, "The Crown's Fiduciary Duty and Indian Title: *Guerin v. The Queen* " (1985) 30 McGill L.J. 559 at 562.
204. *Cf.* McCamus, *supra* note 70 at 113.
205. *Guerin*, *supra* note 99 at 356.
206. Gillen & Woodman, *supra* note 99 at 537, citing in support John D. McCamus, "Equitable Compensation and Restitutionary Remedies: Recent Developments" in *Special Lectures of the Law Society of Upper Canada 1995: Law of Remedies* (Scarborough: Carswell, 1995) 295 where he refers to the alleged breach in this case as "a failure to follow [the principal's] instructions" in negotiating a deal (*ibid.* at 304) and *Canson Enterprises*, *supra* note 149 at 549-50, where the Court refers to this case as "the failure to adhere to the conditions of surrender and to consult with the band in accordance with the Crown's fiduciary duty". See also McCamus, *supra* note 70 at 129.
207. *Supra* note 27 at 355-356.

British Columbia Court of Appeal, *A.(C.) v. C.(J.W.)*,[208] that also echoed this aspect of *Breen v. Williams*. In *A.(C.) v. C.(J.W.)* the Court asserted that to find a breach of fiduciary duty the defendant must act dishonestly and take "advantage of a relationship of trust or confidence for his or her direct or indirect personal advantage."[209] According to the Court, carelessness or negligence did not suffice.[210] In this case, McEachern C.J. added that all the Supreme Court of Canada decisions addressed above, apart from *Guerin*,[211] satisfied this test.[212] *Guerin* is not, however, the only decision referred to that does not accord with this principle. The only so-called benefit/advantage in *Norberg v. Wynrib* and *M.(K.) v. M.(H.)* was not economic, but sexual gratification. Even if a sexual benefit suffices, as noted above, in *Canson Enterprises Ltd v. Boughton & Co*[213] the profit was not made by the fiduciary (solicitor), but rather a third party. Moreover, McEachern C.J. does not address the express statement in other cases referred to above, such as *LAC Minerals v. International Corona Resources* and *Hodgkinson v. Simms* that *mala fides* is not necessary for a breach of fiduciary duties.[214] Further, the Court in *Mowatt*, rejecting this aspect of *A.(C.) v. C.(J.W.)*,[215] added that this principle was also contrary to, *inter alia*, the finding in *B.(K.L.) v. British Columbia*[216] where the provincial Crown was found to be in breach of its fiduciary duties for abuses that occurred to the plaintiff in a foster home even though there was no specific finding of dishonesty made against the Crown. Thus, the better view is that fiduciary duties may be breached even if the fiduciary has no *mala fides*,[217] does not act in its own interests[218] and/or received no unauthorized benefit from the relationship as required in *Breen v. Williams*.[219] In fact, the duty may be breached if there is no harm to the beneficiary or even if the beneficiary benefits from the breach.[220]

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208. *Supra* note 161 at paras. 77–78 and 85. See also *G.(E.D.) v. Hammer* (2001), 197 D.L.R. (4th) 454, 86 B.C.L.R. (3d) 191 (C.A.) [*G.(E.D.)*]; *H.(J.)*, *supra* note 166.
209. *A.(C.)*, *ibid.* at para. 85.
210. *Ibid.* at paras. 77–78 and 85.
211. See *Canson Enterprises*, *supra* note 149 at note 206.
212. *Supra* note 161 at para. 85; *Canson Enterprises Ltd*, *ibid.*; *Norberg*, *supra* note 90; *M.(K.)*, *supra* note 102; *LAC Minerals*, *supra* note 70.
213. See also *Dodge v. Ford Motor Co*, (1919) 170 N.W. 668, 3 A.L.R. 413 (Mich. S.C.) [*Dodge*], where the directors breached their fiduciary duties by acting for the benefit of the public and *Parke v. Daily News Ltd*, [1962] Ch. 927, 3 All ER. 929 [*Parke*], where the directors breached their fiduciary duties by acting for the benefit of ex-employees.
214. See also *Boardman v. Phipps*, [1967] 2 A.C. 46, [1966] 3 All ER. 721 (H.L) [*Boardman*]; *Regal*, *supra* note 97.
215. *Supra* note 161 at para. 85.
216. [1999] 9 W.W.R. 298, 172 D.L.R.(4th) 1 (B.C.C.A). Ultimately, the Court in *Mowatt* (*ibid.* at para. 190) did not have to refuse to follow *A.(C.)* as it noted that in that case, McEachern C.J. had also noted that "everyone charged with the responsibility for the care of children is under a fiduciary duty towards such children"(*A.(C.)*, *ibid.* at para. 18).
217. See *e.g. Regal*, *supra* note 97; *Harrison*, *supra* note 196.
218. See *e.g. Dodge*, *supra* note 213 (acting for the benefit of the public); *Parke*, *supra* note 213 (acting for the benefit of ex-employees).
219. *Supra* note 16, affirmed in *Pilmer*, *supra* note 86.
220. See generally *Keech*, *supra* note 97. See also *Regal*, *supra* note 97.

Again it should be noted that despite these findings in *Mowatt*, in the later key Indian Residential School case, *Blackwater v. Plint No. 2*[221] Brenner C.J. adopted this aspect of *A.(C.) v. C.(J.W.)*[222] and concluded that as there was no evidence of dishonest or intentional disloyalty on the part of Canada or the United Church a claim for breach of fiduciary duty was precluded. This conclusion was said to be equally applicable to the plaintiffs' claims of "linguistic and cultural deprivation."[223] While many concluded that the Indian Residential School policy was "badly flawed," the Court held it did not amount to a breach of fiduciary duties as there was no "dishonesty or disloyalty."[224] This aspect of *A.(C.) v. C.(J.W.)*[225] was similarly applied in a Saskatchewan residential school case *D.W. v. Canada*[226] where the Court held that while the person who had sexually assaulted the plaintiff, Mr Starr, had abused his position of trust for personal advantage, the Crown had not. Again both cases are in this regard *per incuriam* as there was no reference to the above discussed binding Supreme Court of Canada decisions that were contrary to *A.(C.) v. C.(J.W.)*.[227]

Third, it is submitted that equity does not merely impose proscriptive duties. While the particular duties imposed on a fiduciary will vary from case to case, there are minimal positive duties that are applicable in all cases, such as the duty to act for the benefit of the person to whom the duty is owed.[228] In this regard, it is contended that the reasoning in *McInerney v. McDonald* is also preferable to the view expressed in *Breen v. Williams*[229] on this point. In this case, the Supreme Court of Canada held that the doctor/patient relationship is fiduciary in nature and this fiduciary relationship cast upon the doctor a duty to provide the patient reasonable access to examine and copy his/her medical records.[230] In the course of its judgment, the Court recognized that this fiduciary relationship obliged the doctor to act with "utmost good faith and loyalty."[231] Similarly in *Williams v. Minister [No. 1]* discussed above, Kirby P. said that the Aboriginal Welfare Board was, "arguably obliged to Ms Williams to act in her interest and in a way that truly provided, in a manner apt for a fiduciary, for her 'custody, main-

221. *Supra* note 26 at 271–274.
222. *Ibid.* at para. 85.
223. *Supra* note 26 at 273.
224. *Ibid.* at 274.
225. *Supra* note 161.
226. *Supra* note 221 at para. 19.
227. *Supra* note 161 at para. 85.
228. As opposed to the fiduciary's own benefit or that of a third party (see *Mabo No. 2, supra* note 25).
229. *Supra* note 16 at 286–289.
230. *McInerney, supra* note 103 at 150.
231. *Ibid.* at 149. See also Nourse J. in *R. v. Mid-Glamorgan Family Health Services Authority*, [1995] 1 W.L.R. 110, 1 All E.R. 356 at 363 (C.A.) where he asserted "the doctor's general duty ... is to act at all times in the best interests of the patient."

tenance and education'."[232] Kirby P. asserted that it was "distinctly arguable that a person who suffers as a result of want of proper care on the part of a fiduciary, may recover equitable compensation from the fiduciary for losses occasioned by the want of proper care."[233] Thus, Kirby P. was clearly contemplating that the relevant fiduciary duties included an obligation to act positively for the care of the person to whom the duty was owed. A further example of this positive fiduciary duty can be found in the fiduciary relationship between directors and companies.[234] Pursuant to this relationship, the director is under a duty to act positively,[235] not just proscriptively, in the best interests of the company.[236]

Most importantly, the duty to act positively in the other person's best interests is not confined to these particular factual scenarios, but rather extends to all fiduciaries.[237] Thus the better view is that equity imposes strict obligations on the fiduciary to always act in the best interest of the person to whom the duty is owed, not just to avoid making a personal profit out of the arrangement.

Again, while it is beyond the scope of this article to provide an exhaustive treatment of this issue,[238] it is ultimately submitted that the views expressed in the Canadian Supreme Court cases are to be preferred to the views stated in *Cubillo 3*[239] and *Breen v. Williams*.[240] Moreover, with respect to the above discussed three sub-issues, the latter cases are not only contrary to these Canadian cases, but also the leading English cases on fiduciary duties, such as *Boardman v. Phipps*,[241]

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232. *Williams No. 1*, *ibid.* at 511. Note, in *Williams No. 2*, *supra* note 5 at para. 729, Abadee J. disagreed. Abadee J. adopted *Breen No. 2*, *supra* note 16 and *Paramasivam*, *supra* note 16 and asserted "a fiduciary relationship is not really concerned with negligence or the assertion of a fiduciary duty of the type here involved and asserted. On this basis in my view, the Canadian authorities dealing with fiduciary duties are not to be followed in Australia ...".
233. *Williams No. 1*, *ibid.*
234. See generally *Regal*, *supra* note 97.
235. Thus if, as in *Scottish Co-operative Wholesale Society v. Meyer*, [1958] 3 All. E.R. 66, 120 Sol. Jo. 617 (H.L.) [*Scottish Co-operative*], directors fail to act in a positive manner to promote the company's interests, they will breach their fiduciary duties.
236. *Charterbridge Corp. Ltd. v. Lloyds Bank Ltd.*, [1970] 1 Ch. 62 at 74 [*Charterbridge*].
237. See generally *Boardman*, *supra* note 214; *Mabo No 2*, *supra* note 25 at 203-204; *LAC Minerals*, *supra* note 70.
238. See Gummow, *supra* note 95; Finn, *supra* note 95; Parkinson, *supra* note 95; McCamus, *supra* note 70.
239. *Supra* note 1 at para. 464.
240. *Supra* note 16 at 110, cited with approval in *Pilmer*, *supra* note 76. See also *Williams No 2*, *supra* note 5 at para. 729 where Abadee J. adopted *Breen No 2*, *supra* note 16 and *Paramasivam*, *supra* note 16 and asserted "a fiduciary relationship is not really concerned with negligence or the assertion of a fiduciary duty of the type here involved and asserted. On this basis in my view, the Canadian authorities dealing with fiduciary duties are not to be followed in Australia ...". See also *Williams No 2*, *ibid.* at para. 745.
241. *Supra* note 214. Boardman was the solicitor of a trust created by will. The trust property included shares in a private company. The Court held that Boardman was liable to account for profits made through the acquisition of these shares, even though there was no suggestion that there was anything dishonest or underhand in what Boardman did. Boardman had an honest, but mistaken belief that he had the full approval of the trustees and beneficiaries when they acquired the subject shares.

Keech v. Sandford[242] and *Regal (Hastings) Ltd v. Gulliver*.[243] In combination, these cases recognize that fiduciary duties may be breached in the absence of *mala fides*, self-interest, self-benefit or even damage to the "beneficiary" and that equity imposes on the fiduciary a strict duty to always act in the best interests of the person to whom the duty is owed.[244]

D. RELATIONSHIP BETWEEN STATUTE AND FIDUCIARY DUTIES

As to the fourth point, it will be recalled that the Full Court asserted that "any fiduciary obligation must accommodate itself to the terms of a statute. In particular, a fiduciary obligation cannot modify the operation or effect of a statute: to hold otherwise, would be to give equity supremacy over the sovereignty of Parliament.... [N]o fiduciary obligation could forbid what the legislation permitted."[245] The implications of this statement include that: (i) the legislature is not bound by the Crown's fiduciary duties; (ii) any duties owed by the Crown can be modified and confined by statute; and, (iii) a contrary finding would undermine parliamentary sovereignty. Each of these matters is considered in turn.

There is some basis for the first proposition that the legislature is not bound by the Crown's fiduciary duties. Thus, in regard to the Canadian Crown it has been asserted that before the constitutional recognition of aboriginal and treaty rights in the *Constitution Act, 1982*, section 35(1)[246] the Crown's fiduciary obligations were owed by the executive, but not the legislative, branch of government.[247] The

242. *Supra* note 97. In this case the Court held that there was a breach of the fiduciary duty when the trustee took advantage of an opportunity to renew a lease for himself. While this is a case of self-benefit, the Court so concluded even though there was no damage to the beneficiary in the sense that the beneficiary could not have taken up the opportunity because of lack of capacity (the beneficiary was a minor). Moreover, the trustee had sought the renewal for the infant beneficiary, but the lessor declined, indicating an absence of *mala fides* on the trustee's part.

243. *Supra* note 97. In this case the subject directors were requested to assist the appellant company acquiring leases over two cinemas by investing in a subsidiary company that was formed to purchase the leases. The directors made a profit on the subsequent sale of their shares in the subsidiary. The new board of directors of Regal (Hastings) Ltd. brought an action against the former directors for the profits they had made on the sale of the shares. Lord Russell of Killowen stressed that the equitable principle rendering directors liable to account for such profits "in no way depends on fraud, or absence of *bona fides*; or upon such questions or considerations as to whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account". Moreover, it was held to be irrelevant that the company's lack of funds made it impossible for the company to have adopted the opportunity and that the company actually benefited from the directors investing in the subsidiary.

244. See *Scottish Co-operative*, *supra* note 235; *Charterbridge*, *supra* note 236; *Dodge*, *supra* note 213; *Parke*, *supra* note 213; *Mabo No 2*, *supra* note 25 at 203–204.

245. *Cubillo 3*, *supra* note 1 at para. 465, citing *Tito*, *supra* note 94 at 139.

246. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 35(1) states that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

247. Gillen and Woodman, *supra* note 99 at 840. Note, however, that the cases cited for this proposition, (*R. v. Sikyea*, [1964] S.C.R. 642, 50 D.L.R. (2d) 80; *R. v. George*, [1966] S.C.R. 267, 55 D.L.R. (2d) 386; *Daniels v. White and the Queen*, [1968] S.C.R. 517, 2 D.L.R. (3d) 1; *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159, 16 N.R. 231) involved inconsistencies between treaties and statutes. The cases do not specifically address the issue in terms of a breach of fiduciary duties. In this regard it is relevant to note that these cases were determined prior to the landmark decision in *The Queen v. Guerin*, *supra* note 99, recognizing the Crown's fiduciary duties to the aboriginal peoples of Canada.

Constitution Act, 1982, however, had the effect of requiring the legislative branch to also have regard to the Crown's fiduciary obligations when determining if a legislative infringement of aboriginal rights was justified.[248] The Court in *R. v. Sparrow* asserted, "the honour of the Crown is at stake in dealings with aboriginal peoples, [and thus] ..., [t]he special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified."[249] Thus in the absence of an equivalent constitutional protection in Australia, it could be surmised that the Australian legislature is not bound by the Crown's fiduciary duties.

However, it is submitted that the sentiments expressed in *R. v. Sparrow*[250] are also applicable to the Australian position, even in the absence of such constitutional protection, for three reasons. First, in *R. v. Sparrow* the Court noted that section 35(1) "affords aboriginal peoples' constitutional protection against provincial legislative power," but added that the Court was "of course aware that this would, in any event, flow from the *Guerin* case ...."[251] *Guerin v. The Queen*, briefly discussed above, is perhaps the most important Canadian decision regarding the fiduciary duties owed by the Crown to aboriginal peoples. Whilst the Court in *R. v. Sparrow* noted that judgment in this case followed the 1982 constitutional amendment, section 35(1) of the *Constitution Act, 1982*, did not provide the basis of the Court's decision.[252] This is because the factual basis for the case arose before section 35(1) came into force and thus the Supreme Court determined the matter, as did the lower courts, on the basis of the law as at the time the case arose. It was not until the later case *R. v. Sparrow* that the Supreme Court considered the constitutionalization of aboriginal rights.[253] Thus, with the above comment, the Court in *R. v. Sparrow* appears to be acknowledging that even without the constitutional provisions of 1982, the legislative branch, while not in itself bound by the Crown's fiduciary duties should, when exercising its legislative powers, have regard to the executive's fiduciary duties.[254] To this end, while the Court in *Cubillo 3* is technically correct that the legislature is not bound by the Crown's fiduciary duties,[255] it is submitted that in enacting legislation it should consider if its actions will cause the executive to breach its duties.

Second, in *R. v. Sparrow*, the Court also acknowledged that there "is no explicit language in [s. 35] that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights.... Federal legislative powers continue, including, of course, the right to legislate

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248. *Sparrow, supra* note 132 at 1114. See also *Van der Peet, supra* note 132 at 538; *Adams, supra* note 132 at 119.

249. *Sparrow, supra* note 132 at 1078. Similarly in *Adams, supra* note 132 at 132 Lamer C.J. stated that in "light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance."

250. *Supra* note 132 at 1114.

251. *Ibid.* at 1105.

252. *Ibid.* at 1105.

253. *Cf.* Kent McNeil, "Aboriginal Rights in Transition: Reassessing Aboriginal Title and Governance" (2001) 31 Am. Rev of Can. Studies 317 at 318.

254. *Sparrow, supra* note 132 at 1114.

255. *Supra* note 1 at para. 465, citing *Tito, supra* note 94 at 139.

with respect to Indians ...."[256] As the Court in *R. v. Sparrow* held, section 35(1) does not provide absolute constitutional protection of aboriginal rights.[257] Legislation that infringes such rights will still be valid if it can be justified.[258] To this end, it must have a valid legislative objective.[259] That legislative objective must also "uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal people."[260] The Crown's fiduciary duties have to be respected and its responsibilities met[261] by ensuring that aboriginal rights are infringed as little "as possible in order to affect the desired result," paying fair compensation for any expropriation and consulting with the affected aboriginal peoples.[262] In a sense section 35(1) only indirectly impacts on legislative validity by requiring that the legislature have regard to the "Sparrow justification test"[263] and, in turn, the Crown's fiduciary duties.[264] Thus section 35(1) does not change the prima facie legislative validity of enactments. It simply clarifies and provides an impetus, which it has been submitted derives from existing common law, for ensuring that federal legislative powers are "reconciled with federal duty ...".[265] In this light, the Court's sentiments in *R. v. Sparrow*[266] are again equally applicable to the Australian context.

Third, the need for legislative regard to the Crown's fiduciary duties is logical because a contrary approach fails to accommodate the interaction of the legislature and the executive. When a bill is proposed it would be necessary for the Crown to show that it is respecting its fiduciary duties to the utmost degree. If the legislation seeks to limit its fiduciary obligations or impacts upon the rights of those to whom a fiduciary duty is owed, the Crown will need to show it has consulted with those affected and provided fair compensation for any abrogation. If the Crown fails to have regard to its duties and the legislation is nevertheless

256. *Supra* note 132 at 1109.
257. *Ibid.*
258. *Ibid.* at 1109, 1110 and 1113.
259. *Ibid.* at 1110 and 1113.
260. *Ibid.* at 1110.
261. *Ibid.* at 1110 and 1114.
262. *Ibid.* at 1119.
263. As this test has come to be known. *Cf. Adams, supra* note 132; *R. v. Marshall*, [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513 [*Marshall* cited to S.C.R.]; *R. v. Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 [*Gladstone*]; *Delgamuukw, supra* note 132; McNeil, *supra* note 253 at 318. For a further discussion of the *Sparrow* test see W.I.C. Binnie, "The *Sparrow* Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L.J. 217; Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta. L. Rev. 498; Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L. J. 95; Kent McNeil,"How Can Infringements of the Constitutional Rights of Aboriginal Peoples be Justified" (1997) 8 Constitutional Forum 33; Kent Wilkins, "Of Provinces and Section 35 Rights" (1999) 22 Dal. L.J. 185; Kent McNeil, "Aboriginal Title and Section 88 of the Indian Act" (2000) 34 U.B.C. L.Rev. 159.
264. Thus in *Adams, ibid.* at 132, Lamer C.J. stated that in "light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance." Without such guidance "the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test." See also *Marshall, supra* note 263 at 504-505.
265. *Sparrow, supra* note 132 at 1105.
266. *Ibid.* at 1114.

enacted, while the legislation may be valid, the Crown will have breached its duties and be liable to equitable remedies.[267] Similarly, whilst Parliament may enact legislation that is contrary to the Crown's fiduciary duties and despite the breach the legislation may be valid, it is the executive that carries out or administers such legislation. It would be irresponsible for Parliament to enact a law that it knows will effect a breach of fiduciary duties when subsequently administered by the executive. As Lamer C.J. stated in *R. v. Adams* in "light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance."[268] While the Court in *Cubillo 3* may correctly note the ability of the legislature to enact legislation contrary to the Crown's fiduciary duties,[269] when the executive proposes legislation and/or administers such legislation it will be breaching its fiduciary duties. Thus as the Court in *R. v. Sparrow* counsels, it is better for the legislature to have regard to the executive's fiduciary duties when enacting legislation to ensure that it is not facilitating a breach by the Crown.[270]

Flowing on from this last point, it is submitted that the second proposition stemming from the Court's statement in *Cubillo 3*,[271] namely that any duties owed by the Crown can be modified and confined by statute,[272] is erroneous. While legislation may be contrary to the Crown's fiduciary duties, that legislative enactment does not negate the Crown's duties. The Crown may still breach its duties in introducing legislation into Parliament and/or administering such an Act once enacted. Thus, equity does not, as the Court in *Cubillo 3* asserted, "accommodate itself to the terms of a statute."[273]

This has been recognized in Australia in *Mabo v. Queensland No 2*.[274] In this case Toohey J. asserted that, while the obligations flowing from the fiduciary relationship between the Crown and the traditional owners of Australia did not limit Parliament's legislative authority, it did make the government liable for any breach of its duties.[275] Thus while Parliament could, subject to any legislative or constitutional constraints,[276] enact legislation derogating from aboriginal rights, it would be breaching its duties and liable to pay compensation for the consequent impairment of aboriginal interests. For present purposes it suffices to note that Toohey J. asserted that the Crown was bound under its fiduciary duties to "ensure the traditional title is not impaired or destroyed without the consent of, or other-

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267. The author thanks Prof. Brad Morse, Professor of Law, Faculty of Common Law at the University of Ottawa, for this suggestion regarding the interplay between the Crown's fiduciary duties and legislative powers.
268. *Supra* note 132 at 132.
269. *Cubillo 3*, *supra* note 1 at para. 465.
270. *Supra* note 132 at 1114.
271. *Cubillo 3*, *supra* note 1 at para. 465.
272. *Ibid.*
273. *Ibid.*
274. *Supra* note 25.
275. *Ibid.* at 203.
276. Such as the *Racial Discrimination Act*, Cth. 1975, in Australia or the *Constitution Act, 1982*, in Canada.

wise contrary to, the interests of the titleholders."[277] This obligation prevented any alienation of the subject lands or termination of the relevant reserve in a manner contrary to the plaintiffs' aboriginal interests.[278]

This clearly implies that legislative enactments could not facilitate a breach of the Crown's fiduciary duties. To this end it is submitted that from these statements Toohey J. would have held the purported legislative extinguishment of the aboriginal title[279] in *Mabo v. Queensland No 1*,[280] to have breached the Crown's fiduciary duty. Ultimately, it was unnecessary for the Court to so conclude because the majority[281] of the Court found the relevant Act, *Queensland Coast Islands Declaratory Act*, was inconsistent with the *Racial Discrimination Act*[282] and consequently inoperative.[283] As this enactment provides an example of a blatant legislative breach of the Crown's fiduciary duties, the case is nevertheless briefly examined. Five members of the Meriam community[284] began proceedings to have their customary title to, and usufructuary rights in, their traditional lands recognized.

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277. *Mabo No 2, supra* note 25 at 204 and 214.
278. *Ibid.* at 204.
279. The *Queensland Coast Islands Declaratory Act*, Qld. 1985, s 3(a) declared that upon the annexation of Queensland, the subject islands vested in the Crown in right of Queensland "freed from all other rights, interests and claims of any kind whatsoever and became waste lands of the Crown." Section 3(c) provided further that "the islands could thereafter be dealt with as Crown lands for the purposes of Crown lands legislation ." Sections 4 and 5 purported to prospectively validate any disposal of such land by the Crown. Section 4 declared any such disposal "shall be taken to have been validly made and to have had effect in law according to its tenor." Section 5 confirmed that no compensation was payable for the extinguishment of "any right, interest or claim, [in the islands] alleged to have existed prior to the annexation."
280. (1988), 63 A.L.J.R. 84; (1988) 14 ALR. 83.
281. Brennan, Toohey, Gaudron and Deane JJ. Despite all parties to the dispute requesting the Court to assume the existence of the plaintiffs' traditional rights for the purposes of this hearing, the minority based their decision on a refusal to accept such. Dawson J., for example, declared that until it was proven the "land rights of the kind alleged by the plaintiffs are exclusively possessed" by persons of the plaintiffs' race, colour or origin, it could not be said the *Queensland Coast Islands Declaratory Act* destroys the plaintiffs' rights in a manner falling within s. 10(1) *Racial Discrimination Act* (*ibid.* at 107). Moreover, Dawson and Wilson JJ. said that even if this was proved, as the land rights alleged were not enjoyed generally by all persons in Queensland, a denial of such rights "would not necessarily be to deprive them of rights enjoyed by persons of another race, colour or national or ethnic origin"(*ibid.*) within the meaning of the *Racial Discrimination Act.* They seemed to believe the *Queensland Coast Islands Declaratory Act* removed a source of inequality. See also Julie Cassidy, "Observations on Mabo v. Queensland" (1994) 1 Deakin L. Rev. 37.
282. While Mason C.J., Dawson, Wilson, Brennan, Toohey and Gaudron JJ. found that the *Racial Discrimination Act*, s. 9 only prohibited "acts", not the enactment of legislation by a state parliament, Brennan, Toohey, Gaudron JJ. (*ibid.* at 95) and Deane J. (*ibid.* at 101) found the *Queensland Coast Islands Declaratory Act* to be contrary to the terms of *Racial Discrimination Act*, s. 10. Section 10 provides, *inter alia*, that if by reason of a law, or provision thereof, persons of a particular "race, colour or national or ethnic origin" do not enjoy, or only enjoy to a limited extent, a right enjoyed by persons of another race, colour or national or ethnic origin, notwithstanding that law, the first mentioned persons shall enjoy that right to the same extent as persons of that other race, colour or origin. As the rights protected by this provision included the right to own and inherit property, the *Queensland Coast Islands Declaratory Act*'s arbitrary deprivation of the Meriam people's traditional legal rights in and over the Murray Islands was contrary to the *Racial Discrimination Act*.
283. As a result of the *Commonwealth Constitution*, 1901, s. 109 which renders state acts that are inconsistent with Commonwealth acts inoperative.
284. Of the Torres Strait Island group of islands, off the coast of the State of Queensland. The plaintiffs were members of one of Australia's aboriginal peoples, namely, Torres Strait Islanders.

In response to these moves, the Queensland government, under the leadership of the then Premier, Sir Joh Bjelke-Peterson, enacted the *Queensland Coast Islands Declaratory Act*. The Act declared the subject islands to be vested in the Crown in right of Queensland and subject to the state's Crown land legislation. The Act deemed "those rights which might otherwise have survived annexation in 1879 ... not to have survived and ... never to have survived,"[285] thereby retrospectively extinguishing the Murray Islanders' traditional rights and title. Consequently, if effective, the *Queensland Coast Islands Declaratory Act* could be pleaded by the Queensland government as a complete defence to the plaintiffs' substantive claim for the recognition of their customary title. It is submitted that if this Act had not been held invalid for other reasons, it would provide an example of a legislative alienation of land that Toohey J. in *Mabo No 2* believed would be in breach of the Crown's fiduciary duty.[286]

In Canada, the legislative enactments that have been held to be in breach of the Crown's fiduciary duties have not been as blatant as the *Queensland Coast Islands Declaratory Act* and certainly have not been enactments that have had as their overt purpose overriding the Crown's fiduciary duty. The enactments have been implicitly, rather than explicitly, inconsistent with the Crown's duties. Thus in *R. v. Sparrow* the issue was whether the fish net restrictions provided for in regulations[287] made pursuant to the *Fisheries Act* infringed the right of the Musqueam Nation to fish for food, societal and ceremonial purposes.[288] Notably the legislative enactment in this and other relevant cases impacted on aboriginal rights other than aboriginal title[289] and thus provide examples of the Crown's fiduciary duties outside the context of the extinguishment of aboriginal title, a matter discussed in more detail below.

In regard to the third point, it will be recalled that the Full Court in *Cubillo 3*[290] asserted, in essence, that Parliamentary sovereignty overrode any fiduciary duty to protect aboriginal interests. It stated that a contrary conclusion "would be to give equity supremacy over the sovereignty of Parliament"[291] citing

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285. *Mabo No 1*, *supra* note 280 at 92.

286. *Supra* note 25 at 204.

287. Note, this case did not involve an executive act, rather the regulations were made by the Governor-in-Council acting legislatively under authority delegated under the *Fisheries Act*, R.S.C. 1970, c. F-14. See Gillen and Woodman, *supra* note 99 at 845. Similarly in *Gladstone*, *supra* note 263 the accused had been charged with violations of fishing regulations made by the Governor in Council under delegated legislation under the *Fisheries Act*.

288. As the evidence was insufficient to determine if the fish net restrictions infringed Sparrow's aboriginal rights and, if so, if it could be justified, the Court ordered a new trial to decide these issues (see *Sparrow*, *supra* note 132 at 417). See also *Adams*, *supra* note 132; *Côté*, *supra* note 132.

289. Note in this regard that in *Adams*, *ibid.* at 680–681 and *Côté*, *ibid.* the Court recognized that aboriginal rights, in those cases fishing rights, can exist independently of aboriginal title. *Cf. Van der Peet*, *supra* note 132 at 332–334; *Delgamuukw*, *supra* note 132 at 206, 309–312 and 367–368. See also Binnie, *supra* note 263; Douglas Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983) 61 Can. Bar Rev. 314. This has also been recognized in New Zealand. See *Te Weehi v. Regional Fisheries Officer*, [1986] 1 N.Z.L.R. 680 (N.Z.H.C.); *Royal Forest and Bird Protection Society v. Habgood* (1987), 12 N.Z.T.P.A. 76 (N.Z.H.C.).

290. *Supra* note 1 at para. 465.

291. *Cubillo 3*, *ibid.*

in support the decision in *Tito v. Waddell (No 2)*.[292] *Tito v. Waddell (No 2)* is one of what is known as the 'political trust cases.'[293] The rationale underlying these cases is that when the alleged trustee is the Crown it is necessary to carefully scrutinize the facts to determine if the Crown is acting out of an equitable trust, a "true trust," or merely an exercise of the Crown prerogative or discretion, a "trust in the higher sense" or a "political trust."[294] If the arrangement under scrutiny was intended to confer an administrative or government discretion, rather than an enforceable right, it will fall in the latter category and will be unenforceable by the courts.[295] This is because any obligations that may be owed under these 'trusts' are merely political and cannot be enforced by the courts.

The political trust cases have generally[296] been held to be inapplicable to any alleged fiduciary relationship between the Crown and aboriginal peoples.[297] Their applicability was, however, a key issue in the landmark Canadian case *Guerin v. The Queen*. The facts of this case have been detailed above. The first instance finding of Collier J.[298] that the Crown had breached its fiduciary duties

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292. *Supra* note 94 at 139. This case involved a claim by the Banabans Islanders that royalty payments made to the local government Commissioner as a result of mining operations on their lands were held on trust for them. The Court held that there was not a sufficient connection between the land-holding and the royalties to show that the royalties were truly intended to be held on trust for the indigenous owners (*supra* note 94 at 225–226). Thus the royalties were held to be the exclusive property of the Crown. The Court held that the "surrounding circumstances, as well as the terms of the documents, do very little to support the concept of any true trust" and thus concluded that the Crown was not bound by any fiduciary obligations (*supra* note 94 at 226). Rather, the Crown's obligations were "governmental" in nature, arising from a political trust or "trust in a higher sense" that were unenforceable even where "there have been grave breaches of those obligations" (*supra* note 94 at 227).

293. See also *Kinloch v. Secretary of State for India* (1882), 7 App Cas 619 (H.L.) [*Kinloch*]; *Civilian War Claimants v. The King*, [1932] A.C. 14 (H.L.) [*Civilian War Claimants*]; *Director of Aboriginal and Islander's Advancement (Queensland) v. Peinkinna* (1978), 52 A.L.J.R. 286 (P.C.) [*Peinkinna*]; *R. v. Vincent*, [1993] 2 C.N.L.R. 165, 12 O.R. (3d) 397 (C.A.) [*Vincent*]. In *Civilian War Claimants*, the plaintiffs had suffered losses through the war with the Germans in World War I. They claimed against the Crown for war reparations paid by Germany to the Crown on trust for civilian claimants pursuant to a treaty. The House of Lords rejected the claim.

294. *Tito No 2*, *supra* note 94, citing *Kinloch*, *ibid.* The latter case was one of the first to advance this notion of a political trust. The issue was whether a Royal Warrant that conferred the 'booty of war' upon the Secretary of State in India "in trust" for members of certain armed forces created an enforceable trust. The Court held it did not. The effect of the Warrant was said to be one of agency. The Secretary of State was said to be an agent of the Crown for the distribution of the booty, not a trustee.

295. See *Kinloch*, *ibid.*; *Tito No 2*, *ibid.*

296. There are some exceptional cases, such as *Peinkinna*, *supra* note 293 and *Vincent*, *supra* note 293, which, it should be noted, have not been free from criticism. See Richard H. Bartlett, "You Can't Trust the Crown: The Fiduciary Obligations of the Crown to the Indians: Guerin v. The Queen" (1984) 49 Sask. L.R. 367 at 371. In regard to the former, it was legislatively reversed by the Commonwealth Government through the enactment of the *Aborigines and Torres Strait Islanders, (Queensland Reserves) Self-Management Act*, Cth. 1978. It is significant, particularly given the manner in which the political trust cases were distinguished in *Guerin*, *supra* note 99 and *Mabo No 2*, *supra* note 25, that this decision pre-dated *Mabo No 2* (*ibid.* at 58) where the High Court of Australia recognized aboriginal title as the pre-existing tenure of aboriginal peoples that had its source in the "traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory." *R. v. Vincent* involved a Canadian aboriginal person seeking to enforce a customs exemption they were supposed to receive under the *Jay Treaty* 1794, between the British Crown and the United States. In accordance with the political trust cases the Court held that an international treaty between sovereign States cannot be a source of fiduciary obligations (*Vincent*, *supra* note 293 at 176).

297. See *Guerin*, *supra* note 99 at 352, 355, 379 and 385. See also *Mabo No 2*, *supra* note 25 at 202.

298. [1982] 2 F.C. 385, 2 C.N.L.R. 83.

owed to the Musqueam Indian Band was reversed on appeal, the appellate Court concluding that the only obligations upon the Crown were political obligations of an administrative nature. These obligations were said to be public, not private in nature, and thus not enforceable in law.[299]

This characterization of the Crown's obligations was rejected on further appeal by the Supreme Court of Canada. Both Dickson J. (as he then was)[300] and Wilson J.[301] rejected the applicability of the "political trust" cases and recognized the Crown to be subject to a legally enforceable equitable obligation to deal with the lands in a manner beneficial to the interests of the Indian band. Dickson J. stressed that the mere fact "that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle" and place it in the category of a political trust.[302] Dickson J. in turn believed that the "political trust" cases were easily distinguishable from the circumstances before him.[303] As Dickson J. explained, in each of the political trust cases the rights of the parties claiming to be 'beneficiaries' under the trust depended entirely on the terms of a statute, ordinance or treaty.[304] By contrast, the band's "interest in their lands is a pre-existing legal right not created by *Royal Proclamation*, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision."[305] The "Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty but rather, in the nature of a private law duty.[306] In this "*sui generis* relationship it is not improper to regard the Crown as a fiduciary."[307] Consequently, Dickson J. held that by obtaining a less valuable lease without consulting with the traditional owners, the Crown breached its fiduciary obligations and had to make good the loss suffered by the band.

Wilson J. also found this trust obligation to be more than just a purely public law administrative discretion.[308] In this regard she noted that the discretion conferred on the Governor-in-Council as to the use of reserve lands was not unfettered. Rather the requirement in *Indian Act*, section 18 that the land must be put "for the use and benefit of the band" made it clear that the Indian band's beneficial interest in the reserve was to be respected "and this is enough to make the so-

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299. [1983] 2 F.C. 656, 143 D.L.R. (3d) 416 (F.C.A.).
300. With whom Beetz, Chouinard and Lamer JJ. concurred.
301. With whom Ritchie and McIntyre JJ. concurred. Estey J., writing his own judgment, found the Crown liable on the basis of agency and thus did not consider this issue.
302. *Guerin*, *supra* note 99 at 385.
303. Note, it is peculiar that the Court only distinguished the political trust cases, and did not simply consider the inapplicability of the rationale of these cases to the facts before it. *Cf.* Bartlett, *supra* note 296 at 371.
304. *Guerin*, *supra* note 99 at 379.
305. *Ibid.*
306. *Ibid.* at 385, citing *Goldex Mines Ltd v. Revill* (1974), 7 O.R. (2d) 216 at 224, 54 D.L.R. (3d) 672 (C.A.).
307. Dickson J. believed that it did not make any difference to the outcome of the case that the interest under consideration was in a reserve, rather than the plaintiff's unrecognized aboriginal title. In both cases, the interest in the land was the same. This was particularly so in this case where the plaintiffs' traditional lands partly constituted the reserve. See *Guerin*, *ibid.* at 385, citing *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401 at 410-411 (P.C.).
308. *Ibid.* at 350.

called 'political trust' cases inapplicable."[309] Further, she asserted that the case before her was clearly distinguishable from the "political trust" cases. Echoing Dickson J., she asserted that in the "political trust" cases the "funds at issue were the property of the Crown ... and none of those laying claim to them as beneficiaries could show a right to share in the funds independent of the treaty, statute or other instrument alleged to give rise to an enforceable trust."[310] By contrast, as already noted, in this instance the government's obligations existed independently of the terms of the *Indian Act*, section 18. Moreover, it would "fly in the face of the clear wording of the section to treat that interest as terminable at will without recourse by the Band."[311] Wilson J. consequently concluded that when the Crown "barrelled ahead" with the lease, it breached an express, legally enforceable trust, not a mere political trust.

The applicability of the "political trust" doctrine to the Crown's fiduciary duties to aboriginal peoples was also rejected by Toohey J. in *Mabo No 2*.[312] The facts of this case have been briefly detailed above. The defendant state had submitted that the Crown had an absolute power to extinguish the aboriginal title, asserting that any trust obligations that may exist were political in nature and therefore unenforceable.[313] Toohey J. distinguished the "political trust" cases upon which the defendant relied on the basis that they involved the creation of express trusts by the Crown.[314] The subject fiduciary obligations, by contrast, arose out of the relationship between the Crown's legal authority and the aboriginal occupants' title.[315] They were not, therefore, political in nature, but rather arose out of a legal relationship and thus gave rise to legally enforceable rights.[316]

It is submitted that the "political trust" cases were also inapplicable to the facts in *Cubillo*. On the basis of the above authorities, the political trust cases are distinguishable, and thus inapplicable, to the general fiduciary duties owed by the Crown to the aboriginal peoples, discussed below. It will be seen that these fiduciary obligations exist independently of any executive or statutory provision,[317] ordinance or treaty, stemming from the Crown's "historic responsibility" to act

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309. *Ibid.* at 350–351.
310. *Ibid.* at 351.
311. *Ibid.* at 352.
312. *Supra* note 25 at 202.
313. The defendant was relying on *Kinloch*, *supra* note 293 and *Tito*, *supra* note 94.
314. Note, it is peculiar that Toohey J. simply distinguished the political trust cases, rather than: (i) apply the underlying rationale to the subject facts; and/or, (ii) in light of the criticism of the political trust cases, reject the doctrine.
315. *Mabo No 2*, *supra* note 25 at 202.
316. *Ibid.*
317. See *Guerin*, *supra* note 99 at 376-382. That the fiduciary duty is not sourced in statute law has been subsequently affirmed by the Supreme Court of Canada in decisions such as *Blueberry River*, *supra* note 99; *Kruger v. The Queen* (1985), 17 D.L.R. (4th) 591 at 597 (F.C.A.). Note, while in *Guerin* (*ibid.* at 355) Wilson J. believed there to be an express trust that arose on the surrender of the band's land in that case, this Justice also recognized the general fiduciary obligation of the Crown that coincided and pre-existed this express trust. Wilson J. asserted that even pre-surrender "the Crown does hold the lands subject to a fiduciary obligation to protect and preserve the band's interests from invasion or destruction."

on behalf of the aboriginal peoples.[318] For the same reasons, the political trust cases can also be distinguished in regard to any fiduciary duties that arose from the factual relationship of *locus parentis* or guardian.

This leaves the possibility of political trusts arising under the *Aboriginals Ordinance* and *Welfare Ordinance*.[319] As noted above, the plaintiffs submitted that the "vast powers" under, *inter alia*, the *Aboriginals Ordinance* and *Welfare Ordinance*, that allowed the government to control virtually all aspects of an aboriginal person's life,[320] and more specifically authorized the removal and detention of part-aboriginal children, placed the plaintiffs in a position of "inequality" and "vulnerability" in regard the government and thus the government was bound to "act in their interests."[321] Under *Aboriginals Ordinance*, section 7 and *Welfare Ordinance*, section 24 a fiduciary relationship with the Directors was also said to arise from their role as the legal guardians of the plaintiffs.[322] Were these obligations purely governmental obligations within the political trust cases?

It is submitted that the legislation indicates that it was intended to create a "true trust," not merely an exercise of the Crown prerogative or discretion under a "political trust."[323] In *Tito v. Waddell, (No 2)* the Court stated that the nature of the trust created by statute is determined as a matter of construction of that instrument, having regard to its nature, effect and terminology.[324] As to the nature of the legislation, clearly these acts were not in the nature of a Treaty between two sovereign states.[325] Rather, as O'Loughlin J. stated in *Cubillo 2*, the underlying government policy, including that of assimilation, was based on the best interests of the aboriginal person and thus a form of paternalism.[326] As to the effect of the legislation, while the extent of the legislative control is more fully discussed below, for the present purposes it suffices to note that, as stated by the plaintiffs in *Cubillo*, the legislation controlled nearly every aspect of the lives of aboriginal people.[327] Thus the effect of the legislation was to place them in a position of vulnerability where it could be expected that the government would "act in their interests."[328] More specifically, by legislatively authorising the removal and detention of part-

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318. See generally *Guerin*, *ibid.* at 383–384; *R. v. Agawa* (1988), 65 O.R. (2d) 505, 53 D.L.R. (4th) 101 at 216 (C.A.); *Sparrow*, *supra* note 132 at 408; *Nunavik Inuit*, *supra* note 132 at 86. See also Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 2, Part 2 (Ottawa: The Commision, 1996) at 566 [*Royal Commission Report*].
319. *Cubillo 3*, *supra* note 1 at para. 452.
320. *Cubillo 2*, *supra* note 2 at para. 1298. The extent of this legislative control is discussed in more detail below.
321. *Ibid.* at para. 1287. See also *ibid.* at para. 1276.
322. *Cubillo 3*, *supra* note 1 at para. 452.
323. *Tito No 2*, *supra* note 94, citing *Kinloch*, *supra* note 293.
324. *Ibid.*
325. In *Vincent*, *supra* note 293 at 176 the political trust doctrine was held to be applicable when a Canadian aboriginal person sought to enforce a customs exemption they were supposed to receive from the *Jay Treaty*, 1794, between the British Crown and the United States. The Court held that in "an international treaty with a sovereign State, the Crown cannot be the fiduciary or agent of a subject, nor can a subject be the beneficiary of a trust." *Cf. Civilian War Claimants*, *supra* note 293.
326. *Supra* note 2 at paras. 1146 and 1305.
327. *Ibid.* at para. 1298.
328. *Ibid.* at para. 1287. See also *ibid.* at para. 1276.

aboriginal children, the effect of the legislation was to make the Commonwealth/Directors factually *locus parentis*. This effect was in addition to the fact that the Directors were the legal guardians of the plaintiffs under the *Aboriginals Ordinance*, section 7 and the *Welfare Ordinance*, section 24.[329] Thus the nature and effect of the subject legislation involved an assumption by the government of the role of caregiver. While the purported 'fiduciary' under such legislation was a government official, the relevant Director, the discretions conferred upon the Director were not unfettered.[330] Hence it is submitted that the legislation indicates that the relationship between the Commonwealth and affected aboriginal persons was intended to be equitable, not political.

Thus the political trust cases should not have prevented the plaintiffs from claiming a breach of fiduciary duties, as insinuated by the Full Court in *Cubillo 3*.[331] Parliamentary sovereignty does not prevent the Crown from being bound by equitable duties enforceable in law. Moreover, it should be noted that the very authority of the political trust cases is doubtful. These cases, particularly *Tito v. Waddell (No 2)*,[332] have been the subject of considerable criticism.[333] In this regard it should be noted that despite the plaintiffs losing in that case, the defendant British government nevertheless negotiated an out-of-court settlement.[334] Other political trust cases have been statutorily reversed by the successful government defendants.[335] Thus it is submitted that it would have been preferable for this line of case law to have been rejected and these cases determined simply on whether the subject facts gave rise to a fiduciary duty.[336]

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329. *Cubillo 3*, *supra* note 1 at para. 452.

330. *Cf. Guerin*, *supra* note 99 at 355, per Wilson J. For example, under the *Aboriginals Ordinance*, s. 6 the Director of Native Affairs, a Commonwealth public servant, had legislative authority to remove an aboriginal child, but only if it was necessary or desirable to do so in the interests of the child. While O'Loughlin J. held that the *Aboriginals Ordinance*, s. 16 gave the Director of Native Affairs an absolute power to cause "any aboriginal or half-caste" to be kept within the boundaries of an aboriginal institution without having regard to the best interests of the child (*Cubillo 2*, *supra* note 2 at para. 1156), this power needs to be considered in the context of the Director's broader statutory duties to care for aboriginal children, specified under the *Aboriginals Ordinance*, s. 5 and the *Welfare Ordinance*, s. 8.

331. *Cubillo 3*, *supra* note 1 at para. 465, citing *Tito*, *supra* note 94 at 139.

332. *Ibid.*

333. For example, Bartlett questions "why should the Supreme Court of Canada, [in *Guerin*] strive to follow a decision of the English Chancery Division which has been almost universally condemned?" (*Supra* note 296 at 371).

334. *Ibid.* at 371 at note 22.

335. In *Peinkinna*, *supra* note 293 the traditional owners sought royalties for mining on their traditional lands. The finding against the traditional owners was legislatively reversed by the Commonwealth Government through the enactment of the *Aborigines and Torres Strait Islanders, (Queensland Reserves) Self-Management Act*, Cth. 1978. Note this decision was also pre-*Mabo No 2*, *supra* note 25 at 58, where the High Court recognized aboriginal title as the pre-existing tenure of the aboriginal peoples that had its source in the "traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory."

336. Bartlett, *supra* note 296 at 371.

E. STATUTORY CONTROL

From the above analysis it will be evident that the reasons suggested by the courts in *Cubillo 2* and *Cubillo 3*, namely the absence of an economic loss, concurrent tortious claims, the proscriptive nature of equitable duties and legislative sovereignty, should not have prevented the plaintiffs/appellants claiming the existence of a fiduciary relationship between them and the Commonwealth/Directors. It is now appropriate to turn to the various potential sources of that fiduciary duty. It is submitted there are five possible sources of these fiduciary obligations:

- the broad powers of control under the *Aboriginals Ordinance*, and *Welfare Ordinance*;
- the specific powers of removal and detention under these enactments;
- the factual assumption of the role of *locus parentis*;
- the legal guardianship of the plaintiffs/appellants under *Aboriginals Ordinance*, section 7 and *Welfare Ordinance*, section 24; and,
- the Crown's historical role as guardian of the aboriginal peoples.

Each of these possibilities is considered in turn. The first four have been canvassed to some extent above, but still require some additional consideration. The final source of fiduciary obligations requires a more detailed examination.

In regard to the first source of fiduciary obligations, a fiduciary relationship may be created by statute.[337] Thus in *Guerin v. The Queen*[338] the Court recognized that the statutory regime of the *Indian Act*, provided one source of fiduciary obligations in that case. Thus Dickson J.[339] 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. This is the effect of s. 18(1) of the Act. This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligations into a fiduciary one. ..., [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.[340]

Later in his judgment Dickson confirmed that, *inter alia*,[341] the "discretion vested in the Crown, [under the *Indian Act* is] sufficient to give rise to fiduciary obligations."[342] Dickson J. added that this "discretion which is the hallmark of a

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337. *Williams No 1*, *supra* note 110 at 511; *Northern Land Council v. Commonwealth of Australia*, (1987) 75 A.L.R. 210 at 215 [*Ranger Uranium No 1 and No 2*]; *The Wik Peoples v. The State of Queensland*, (1996) 187 C.L.R. 1 at 96 [*Wik*]; *Cubillo 2*, *supra* note 2 at para. 1284.

338. *Supra* note 99. That is, in addition to, *inter alia*, the historical role of the Crown as guardian of the aboriginal people, discussed in detail below.

339. See also Wilson J. in *Guerin*, *ibid.* at 350–351.

340. *Ibid.* at 383–384.

341. In addition to the "nature of Indian title" (*ibid.* at 386).

342. *Ibid.* at 386.

fiduciary relationship,"[343] combined with the obligation to act in the best interests of the Indian peoples under the *Indian Act*, gave rise to a fiduciary duty.

As noted above, *inter alia*, the *Aboriginals Ordinance*, and *Welfare Ordinance*, conferred "vast powers" that allowed the government to control virtually all aspects of an aboriginal person's life.[344] The "legislation restricted the rights of Aboriginal people in many fundamental areas such as their freedom of movement and association, their right to marry, to work and to deal with property."[345] Thus, as Clarke notes,[346] for the plaintiffs' families to have visited them whilst inmates at these religious institutions they would have needed a permit to leave the reserve where they lived, another permit to enter the town where the then children were held and a further permit to enter the relevant institution.[347] Clarke also notes[348] that "town districts" which included Darwin and, in time, Alice Springs, where the plaintiffs were held, were "prohibited areas."[349] Aboriginal persons could be employed for less than the minimum wage, part of their wages being taken by the Protector of Aborigines to be held in trust, and, as Mr Gunner's circumstances evidence, wards may be similarly placed 'in training.'[350] These are but a few of the constraints that were imposed upon aboriginal persons under the relevant legislative regimes.[351]

Thus, these statutes conferred such control on Commonwealth authorities that it cannot be doubted that the subject aboriginal peoples, including the plaintiffs, were in a position of inequality and vulnerability. The statutory regime created a fiduciary relationship within the above discussed definition. "[T]he relationship between the parties, [was] therefore one which, [gave] the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position."[352] As McLachlin J. (as she then was) stated in *Blueberry River Indian Band v. Canada*, "[w]here a party is granted power over another's interests, and where the other party is correspondingly deprived of power over them, or is 'vulnerable', then the party possessing the power is under a fiduciary obligation to exercise it in the best interests of the other ...."[353] It is submitted that the degree of control and the consequential vulnerability of the aboriginal peoples subjected to this control placed them in a position where they should have been able to expect that

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343. *Ibid.* at 387.
344. *Cf.* the plaintiffs' submissions in *Cubillo 2*, *supra* note 2 at para. 1298.
345. See the plaintiffs/appellants submissions in *Cubillo 2*, *ibid.* See also Clarke, *supra* note 28.
346. *Ibid.* at 223 fn 24.
347. See the *Aboriginals Ordinance*, s. 16 and the *Welfare Ordinance*, ss. 17, 20 and 47.
348. Clarke, *supra* note 28 at 223 fn 25.
349. See the *Aboriginals Ordinance*, s. 11 and the *Welfare Ordinance*, ss. 55–60.
350. See the *Aboriginals Ordinance* and the *Wards Employment Ordinance* N.T. 1953, reg. 11 and ss. 15, 25–31 and 38. Even this minimum wage was often not paid and monies taken by government officials on so-called trust for the aboriginal worker were expropriated by the government. There are currently steps being taken to settle claims by such aboriginal workers seeking their wages etc that were expropriated by the Queensland government.
351. See Clarke, *supra* note 28 at 223 and 224.
352. *Hospital Products*, *supra* note 70 at 96–97.
353. *Blueberry River*, *supra* note 99 at 405.

government authorities would exercise any powers with care[354] and for their best interests.[355]

As to the second related source of fiduciary obligations, it is submitted that the powers under the *Aboriginals Ordinance* and the *Welfare Ordinance* to remove and detain part-aboriginal children away from their families, provides a further specific example of the control Commonwealth authorities had over aboriginal lives. The legislation itself recognized that these removal powers were only to be exercised where it was necessary or desirable to do so in the interests of the child[356] and thus indicated a fiduciary relationship between the Director and those aboriginal children that were so removed. Once removed, the Director had statutory duties to care for the subject part-aboriginal children.[357] The institutions to which the plaintiffs in *Cubillo* were committed were official Aboriginal Institutions in regard to which the Directors had supervisory obligations. Moreover, as asserted by the Commonwealth,[358] and accepted by the Court in *Cubillo 2*,[359] the policy of assimilation, in particular the removal of part-aboriginal children, was based on the "premise that it was in the best interests of the child."[360] Thus, the very policy of removal and detention was based on an assumption of a duty to act in the best interests of the child.

F. LOCUS PARENTIS OR GUARDIAN

Leading on to the third source of fiduciary obligations, the legislation aside, the factual circumstances of the removal and detention of the plaintiffs also gave rise to a fiduciary relationship. The children, once removed from their families, were particularly vulnerable. They were children. They were isolated from their families. Governmental and church authorities[361] now controlled all aspects of their lives and had assumed the role of *locus parentis*. In this regard, it should be recalled that in relation to Mr Gunner, O'Loughlin J. held that the Director had accepted the care and control of Mr Gunner.[362] Even absent formal legal guardianship, by assuming the role of carer of a removed part-aboriginal child these persons became bound by fiduciary duties to act in that child's best interests.

Similarly, in *Mowatt*, Dillion J. applied the principle that "everyone charged with the responsibility for the care of children is under a fiduciary duty towards such children."[363] In addition to being the plaintiff's legal guardian,[364] the Court found that the government had exercised its powers under the *Indian Act*, to remove him from his home and place him in the subject Indian residential

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354. *Ibid.*
355. Compare the plaintiffs' submissions in *Cubillo 2*, *supra* note 2 at para. 1287. See also *ibid.* at para. 1276.
356. See the *Aboriginals Ordinance*, s. 6.
357. See the *Aboriginals Ordinance*, s. 5 and the *Welfare Ordinance*, s. 8.
358. See *Cubillo 1*, *supra* note 4 at para. 13; *Cubillo 2*, *supra* note 2 at para. 5.
359. *Cubillo 2*, *ibid.* at paras. 5, 1146 and 1305.
360. *Ibid.* at para. 5.
361. Namely, AIMA in Mrs Cubillo's case and the Australian Board of Missions in Mr Gunner's case.
362. *Cubillo 2*, *supra* note 2 at para. 790.
363. *Supra* note 27 at 356.
364. *Ibid.* at 347.

school[365] and in so doing had become charged with the care of the plaintiff.[366] Thus the government stood in a fiduciary relationship with the plaintiff and thus the question in that case was simply whether that duty had been breached.[367] Strangely, the Court held the government's failure to supervise the relevant Indian residential school was negligent, but not a breach of its fiduciary duty.[368] A possible breach of fiduciary duties lay, however, with the failure to report properly and investigate the sexual abuse of the plaintiff and to care for him afterwards.[369] These failings were held not attributable to the Crown, who had been purposely kept ignorant of Clarke's assaults by the Church.[370] In essence, in this case there had been a cover-up by the school principal, Mr Harding, who knew of the assaults, but who was also sexually assaulting the children.[371] There had also been a cover-up by Church personnel who knew of the assaults. Indian residential schools were being closed down at the time and these persons sought to protect the Church's interests in such schools by not properly investigating the matter and thus not bringing attention to the school.[372]

Thus the breach was held to be attributable to the Church, but only if it stood in a fiduciary relationship to the plaintiff.[373] The Church was not the plaintiff's legal guardian.[374] However, the Church had assumed the role of "moral counsellor and protector ...."[375] The Court[376] also applied the above discussed definition of a fiduciary relationship[377] and held:

> ... the plaintiff was vulnerable as a child isolated in an Anglican institution under the control of an Anglican supervisor and principal. This control was almost absolute on a daily basis as every aspect of the plaintiff's life was subject to the determination of these residential officials. ... The Anglican Church through the principal of the residence was in a position to exercise power over the plaintiff as it pertained to his moral and emotional well-being and dignity. It did so daily by imposing religious practices and influence which involved an interaction that created trust and reliance. The plaintiff absolutely trusted that he would be properly cared for .... The Anglican Church was in a fiduciary relationship with the plaintiff when it undertook to look after his interests to the exclusion of the federal Crown following the disclosure of the abuse.[378]

It is submitted that similarly there was a factual assumption of care in *Cubillo* that should have provided a basis for a finding of a fiduciary relationship in

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365. *Ibid.*
366. *Ibid.* at 356.
367. *Ibid.* at 356.
368. *Ibid.* Note, the Court did, however, find the government liable in tort and for breach of its non-delegable statutory duties it owed to the plaintiff.
369. *Ibid.*
370. *Ibid.*
371. *Ibid.* at 311.
372. *Ibid.* at 313.
373. *Ibid.* at 356.
374. *Ibid.* at 350.
375. *Ibid.*
376. *Ibid.* at 356-357.
377. As stated in *Frame*, *supra* note 70; *Norberg*, *supra* note 90; *LAC Minerals*, *supra* note 70; *Canson*, *supra* note 149.
378. *Supra* note 27 at 356-357.

that case. In this regard it is peculiar that the judgments in *Cubillo 2* and *Cubillo 3* make no reference to this case, despite the factual similarity and parallel legal issues. While this may be because the courts in *Cubillo 2* and *Cubillo 3* had rejected the possibility of a breach of fiduciary duties because there was no "economic aspect"[379] to the plaintiffs' loss and the overlapping factual basis upon which the alleged fiduciary relationship and the claim in tort were based,[380] this did not prevent the courts considering, before rejecting, other pertinent cases such as *M.(K.) v. M.(H.)* and *Williams v. Minister [No 1]*.

Flowing on from this last possible basis for the fiduciary relationship, the subject case also involved formal legal guardianship. Under *Aboriginals Ordinance*, section 7 the Director was "the legal guardian of every aboriginal and of every half-caste child notwithstanding that the child has a parent or other relative living." In 1953, the *Ordinance* was amended so that the Director became the legal guardian of all aboriginal persons.[381] Under the *Welfare Ordinance*, section 24 the Director of Welfare was guardian of all wards.

As O'Loughlin J. recognized, "fiduciary duties may arise from a relationship that has been created by statute."[382] While the Court factually accepted this guardianship, contrary to the Full Court's assertion,[383] the fiduciary nature of the relationship between the Directors and the plaintiffs was nevertheless denied by O'Loughlin J. for the reasons detailed above.[384] Moreover, O'Loughlin J. denied that the guardian/ward relationship was an established fiduciary relationship. O'Loughlin J. asserted only that it "may" be a fiduciary relationship.[385] In this regard it should be noted that Abadee J. in *Williams v. The Minister [No 2]* also expressed the view that the guardian/ward relationship is not an established fiduciary relationship.[386] This view was expressed despite the authorities providing otherwise.[387] In essence, Abadee J. reasoned that given Gibbs C.J. and Mason J. did not include the guardian/ward relationship in their lists of established fiduciary relationships in *Hospital Products Ltd v. United States Surgical Corporation* [388] it could be concluded that the relationship was not fiduciary in nature *per se*.[389]

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379. *Cubillo 2*, *supra* note 2 at para. 1307.
380. *Ibid.* at para. 1299, following *Paramasivam*, *supra* note 16 at 218-220; *Williams No 2*, *supra* note 5; *Lovejoy*, *supra* note 16; *Prince*, *supra* note 16.
381. *Cf. Cubillo 2*, *supra* note 2 at para. 1235.
382. *Ranger Uranium No 1 and No 2*, *supra* note 337 at 215 and *Wik*, *supra* note 337 at 96, quoted in *Cubillo 2*, *ibid.* at para. 1284.
383. *Cubillo 3*, *supra* note 1 at para. 460.
384. As noted above, O'Loughlin refused to extend the notion of a "fiduciary relationship" to the subject case because, *inter alia*, the claimed conflict of interest "did not include an economic aspect"(*Cubillo 2*, *supra* note 2 at para. 1307) and the factual basis upon which the alleged fiduciary relationship was the same as that underlying the claim in tort (*ibid.* at para. 1299, following *Paramasivam*, *supra* note 16 at 218–220; *Williams No 2*, *supra* note 5; *Lovejoy*, *supra* note 16; *Prince*, *supra* note 16).
385. *Cubillo 2*, *ibid.* at para. 1290, referring to *Paramasivam*, *ibid.* at 218.
386. *Supra* note 5 especially at paras. 721–722.
387. *Countess of Bective*, *supra* note 133 at 420–421; *Hospital Products*, *supra* note 70 at 141; *Bennett*, *supra* note 133 at 411; *Williams No 1*, *supra* note 110 at 511; *Paramasivam*, *supra* note 16 at 218; *Clay*, *supra* note 133 at 205; *Brunninghausen*, *supra* note 115 at 555.
388. *Hospital Products*, *ibid.* at 68 and 96.
389. *Williams No 2*, *supra* note 5 at paras. 716 and 722. Note, ultimately, Abadee J. assumed for the purposes of that litigation that the parent/child or ward/guardian relationship was fiduciary, but held there had been no breach in that case.

Neither Gibbs C.J. nor Mason J. purported that their lists of accepted fiduciary relationships were exhaustive. Each premised their list with the qualifying words "e.g." or "viz.".[390] Moreover, Abadee J. makes no reference to the fact that in the same case Dawson J. does include the guardian/ward relationship in his list of well-established fiduciary relationships.[391] Further, and most importantly, as the Full Court recognized in *Cubillo 3*,[392] a wealth of authority provides that the guardian/ward relationship is an established fiduciary relationship. [393] Moreover, even if it was not an established fiduciary relationship, the essence of a fiduciary relationship; namely the fiduciary's position of power/control and the vulnerability of the person to whom the duty is owed; is again equally applicable to the guardian/ward relationship. In fact these principles are more applicable in this given case as the legal guardian also has legal control, not just factual control. Thus it is submitted that such a relationship "is" by its very nature a fiduciary relationship, not "may" be a fiduciary relationship as stated by O'Loughlin J.[394] Again, the plaintiffs should have been able to expect that their legal guardian would act with care and in their best interests.

G. HISTORICAL RELATIONSHIP BETWEEN CROWN AND ABORIGINAL PEOPLES

In *Cubillo* there was a further type of guardianship that could have provided a source of fiduciary obligations, namely that arising out of the historical relationship between the Crown and aboriginal peoples. Again, it is peculiar that the courts' judgments in *Cubillo 2* and *Cubillo 3* involve no consideration of the broader fiduciary relationship between the Commonwealth and the aboriginal peoples of Australia arising out of the Crown's settlement of Australia. Thus, strangely, the courts in *Cubillo 2* and *Cubillo 3* do not consider the previous Australian judicial

390. *Hospital Products*, *supra* note 70 at 68 and 96.
391. *Ibid.* at 141.
392. *Cubillo 3*, *supra* note 1 at para. 460.
393. See *e.g. Countess of Bective*, *supra* note 133 at 420-421; *Hospital Products*, *supra* note 70 at 141; *Bennett*, *supra* note 133 at 411; *Williams No 1*, *supra* note 110 at 511; *Paramasivam*, *supra* note 16 at 218; *Clay*, *supra* note 133 at 205; *Brunninghausen*, *supra* note 115 at 555.
394. *Cubillo 2*, *supra* note 2 at para. 1290, referring to *Paramasivam*, *ibid.* at 218.

discussion of this issue, much less the Canadian[395] or United States[396] case law that examines the nature of this relationship. Similarly, the corresponding Canadian case law has not to date been considered in the Canadian Native Residential School cases. It is submitted this is a serious failing, as a wealth of case law in these jurisdictions provides that the Crown stands in a fiduciary relationship with the aboriginal peoples. The issue whether the fiduciary duties stemming from that relationship would extend to the subject facts, including the removal, detention and assault of the plaintiffs, is a further issue that again, could have been assisted by an examination of the law in these jurisdictions. Ultimately it is submitted below that this case law indicates that the fiduciary duties stemming from this relationship are not confined to safeguarding aboriginal interests when extinguishing aboriginal title, but extend to broader duties that are tailored to the particular facts of the case and thus may have been applicable in *Cubillo*.

The Crown's fiduciary duty to the aboriginal peoples of Australia had been considered in three previous Australian cases namely, *Northern Land Council v. Commonwealth of Australia*,[397] *Mabo No 2*,[398] and *Wik Peoples v. Queensland*.[399] In this context O'Loughlin J. makes no reference to *Ranger Uranium No 1* and *Mabo No 2* and only makes a brief reference to *Wik* and *Ranger Uranium No 2*.[400] The Full Court did not consider these cases at all. The absence of an appropriate consideration of these cases therefore dictates the need for at least a brief discussion of these cases.

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395. *R. v. Syliboy*, [1929] 1 D.L.R. 307 at 314 (N.S. Co. Ct.); *R. v. Taylor* (1981), 34 O.R. (2d) 360, 62 C.C.C (2d) 227 (C.A.); *Guerin*, *supra* note 99; *Sparrow*, *supra* note 132 at 406 and 408; *Semiahmoo Indian Band v. Canada*, [1996] 1 C.N.L.R. 210, 128 D.L.R. (4th) 542; *Blueberry River*, *supra* note 99; *Re Canadian Pacific Ltd and Matsqui Indian Band*, [1996] 3 F.C. 373, 134 D.L.R. (4th) 555 at 579; *Van der Peet*, *supra* note 132 at 301–302, 304, 338, 340, 368–369, 380 and 395–397; *Badger*, *supra* note 132 at 331 and 354–355; *Côté*, *supra* note 132 at 417; *Adams*, *supra* note 132 at 677; *Delgamuukw*, *supra* note 132 at 322–324, 337–338, 340–342, 367–368 and 377–379; *R. v. Wolfe* (1995), 134 Sask. R. 192, 129 D.L.R. (4th) 58 at 79–80 (C.A.); *Corbiere v. Canada*, [1997] 1 F.C. 689, 142 D.L.R. (4th) 122 at 154 (C.A.); *Chippewas of Kettle and Stony Point v. AG, (Canada)* (1996) 31 O.R. (3d) 97, 141 D.L.R. (4th) 1 at 10 and 12 (C.A.); *Nunavik Inuit*, *supra* note 132 at 86 and 87.

396. Such as *Johnson v. McIntosh*, 21 U.S. 543 at 573, (1923); *Worcester v. Georgia*, *supra* note 132 at 544; *Cherokee Nation v. Georgia*, *supra* note 132; *Jones v. Meehan*, 175 U.S. 1 at 16, (1899); *United States v. Waller*, 243 U.S. 452, (1917); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 at 113, (1919); *Cramer v. United States*, 261 U.S. 219 at 229, (1923); *United States v. Creek Nation*, 295 U.S. 103 at 110, (1935); *Seminole Nation v. U.S.*, 316 U.S. 286 at 296–297, 62 S. Ct. 1061 (1942); *Manchester Band of Pomo Indians Inc v. United States*, 363 F. Supp.. 1238, (1973); *Morton v. Ruiz*, 415 U.S. 199, (1974); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 at 379, (1975); *Ute Indian Tribe v. Utah*, 521 F. Supp. 1072, (1981); *Kenai Oil and Gas Inc v. Department of Interior*, 522 F. Supp. 521, (1981); *American Indian Residing on Maricopa-AK Chin Reservation v. U.S.*, 456 U.S. 989; 102 S. Ct. 2269, (1982); *Pechanga Band of Mission Indians v. Kacor Realty Inc*, 459 U.S. 1171; 103 S. Ct. 817, (1983); *United States v. Mitchell*, (No 2), (1983) 463 U.S. 206; *United States v. University of New Mexico*, 731 F 2d 703 at 706, (1984); *Navajo Tribe of Indians v. U.S.*, 9 Cl Ct 227, (1985); *Gila River Pima Maricopa Indian Community v. United States*, 8 Cl. Ct. 569, (1985); *United States v. Abeyta*, 632 F. Supp. 1301, (1986); *Assiniboine and Sioux Tribes of Fort Peck Indian Reservation v. Board of Oil and Gas Conservation of Montana*, 792 F 2d 782, (1986); *Little Earth of United Tribes Inc v. United States Dept of Housing and Urban Development*, 878 F.2d 236, (1989); *Havasupai Tribe v. United States*, 752 F. Supp 1471, (1990); *Mille Lacs Band of Chippewa Indians v. State of Minn*, 48 F.3d 373 (1995); *Inter Tribal Council of Arizona Inc v. Babbitt*, 51 F.3d 199, (1995); *State of Conn ex rel Blumenthal v. Babbitt*, 899 F. Supp. 80, (1995); *Kerr-McGee Corp v. Farley*, 88 F. Supp. 2d 1219, (2000).

397. *Ranger Uranium No 1 and No 2*, *supra* note 337.

398. *Supra* note 25.

399. *Supra* note 337.

400. Merely citing these cases as authority for, *inter alia*, the proposition that fiduciary duties may arise from a relationship created by statute (*Cubillo 2*, *supra* note 2 at para. 1284).

The facts in *Ranger Uranium Nos 1* and *2* were not unlike those in the leading Canadian case, *Guerin v. The Queen* discussed above. The Aboriginal Northern Land Council sought to have the Ranger Uranium Mining Agreement set aside for being in breach of the Commonwealth government's fiduciary obligations. The plaintiff alleged that the Commonwealth had failed to adhere to its promise of ensuring that any mining agreement negotiated pursuant to the *Aboriginal Land Rights (Northern Territory) Act*, Cth. 1976 would be fair and not to the disadvantage of the relevant traditional owners. It was also alleged that the Commonwealth had breached its fiduciary obligations by threatening to repeal the *Aboriginal Land Rights (Northern Territory) Act* if the Council did not agree to the terms of the mining agreement. While in *Ranger Uranium No 1* the High Court believed the allegations in the statement of claim raised arguable causes of action and hinted at adopting the reasoning in *Guerin v. The Queen*, the Court felt that the matter had not been sufficiently argued before it.[401] The Court was not, therefore, prepared to hand down a final determination upon the point without the full benefit of counsels' assistance. The case was further stated to the High Court.

In *Ranger Uranium No 2*[402] the High Court held that that no fiduciary duty arose out of the "bare terms" of the subject statutory provisions, *Aboriginal Land Rights (Northern Territory) Act*, section 44.[403] The High Court asserted, however, that in differing circumstances the Commonwealth may have been bound by a fiduciary duty to act in the interests of the subject aboriginal persons when negotiating with the Land Council. Thus the Court suggested that if the benefits to be paid under the negotiated agreement were to be paid by the miner, rather than the Commonwealth, and the Commonwealth was to be a conduit through which payments were to pass to the traditional owners, "the Commonwealth may come under a fiduciary duty in its negotiations with the Land Council. That depends on issues of fact and, perhaps, on the nature of the interests of the aboriginals, (whether statutory or common law interests) in the land the subject of the negotiations."[404] The Court continued by affirming that the category of fiduciary duties is not closed, citing *Guerin v. The Queen*. Most importantly the High Court concluded by asserting:

> Whether the nature of the relationship at common law between an identified group of Aboriginal people and the unalienated Crown lands which they have used and occupied historically and still use and occupy is such as to found a fiduciary relationship or a trust of some kind is a question of fundamental importance which has not been argued on the present stated case.[405]

Thus, strangely, in *Ranger Uranium No 2* counsel failed to argue that a fiduciary duty arose out of the historic occupation of aboriginal lands, as opposed to the particular provisions of *Aboriginal Land Rights (Northern Territory) Act*,

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401. *Supra* note 337 at 10.
402. *Ibid.* at 215.
403. This section of the Act allows the Commonwealth to grant mining concessions over aboriginal land, but only once it has reached an agreement with the Northern Land Council as to payment and terms and conditions.
404. *Supra* note 337 at 215.
405. *Supra* note 99 at 384.

section 44. The High Court's comment clearly indicated, however, that it thought it to be an arguable proposition.

Peculiarly, when this "question of fundamental importance" was argued in *Mabo No 2*, only one of the majority Justices, Toohey J., addressed the issue.[406] The facts in this case have been detailed above. In *Mabo No 2*, the plaintiffs submitted that the defendant state was bound to recognize and protect their territorial rights. It was submitted that a fiduciary obligation to so protect the aboriginal title stemmed from the "relative positions of power of the Meriam people and the Crown in right of Queensland with respect to their interests in the Islands."[407] Any breach of this obligation rendered the Queensland government accountable in law for any consequent damage.[408] As noted above, Toohey J. accepted this submission, rejecting the defendant's suggestion that the Crown had an absolute power of extinguishment, unhampered by such fiduciary duties. He declared that it is "precisely the power to affect the interests of a person adversely which gives rise to a duty to act in the interests of that person ... ."[409] Following the decision in *Guerin v. The Queen*,[410] he stated that it was the very power to extinguish the aboriginal title, and the aboriginal owner's consequent vulnerability, that gave rise to this "fiduciary obligation on the part of the Crown."[411] The power to so destroy the aboriginal title was so extraordinary that it was appropriate for "[e]quity to ensure that the position, [of the Crown] is not abused."[412]

Toohey J. believed the particular obligations stemming from the fiduciary relationship are tailored to the "specific relationship from which it arises."[413] However, he said that certain obligations, such as the duty to act for the benefit of the beneficiaries, are applicable to all cases.[414] As noted above, in the subject case, Toohey J. found this fiduciary duty obliged the Crown to "ensure the traditional title is not impaired or destroyed without the consent of, or otherwise contrary to, the interests of the titleholders."[415]

It should be noted that Dawson J. in his dissenting judgment in *Mabo No 2* and Brennan C.J. in his dissenting judgment in *Wik*, rejected the suggestion that the Crown was bound by any fiduciary duty to safeguard aboriginal interests. While these judgments cannot be considered here in great depth,[416] given the importance

406. *Supra* note 25. Note, a majority of the justices of the High Court of Australia held that aboriginal title was recognized at common law and, in the absence of an effective extinguishment, such tenure preserves the original occupants' right to possession of their traditional lands in accordance with their customs and laws.

407. *Ibid.* at 176.

408. *Ibid.* at 177, per Toohey J.

409. *Ibid.* at 200–201.

410. *Supra* note 99 at 376.

411. *Supra* note 25 at 203.

412. *Ibid.* Toohey J. found an additional basis for this fiduciary duty to lie in the Queensland government's dealings with the subject Islands. Toohey J. believed the declaration of the subject Islands as an aboriginal reservation and the condemnation of purported sales of aboriginal land by the government to be sufficient on their own to create a trust/fiduciary relationship, requiring the Crown to act in the best interests of the aboriginal occupants of such lands (*ibid.*).

413. *Ibid.*

414. As opposed to the 'trustee's' own benefit or that of a third party (*ibid.* at 204).

415. *Ibid.* at 204 and 214.

416. See Cassidy, *supra* note 281.

of the issue, some consideration of their reasons is warranted. In essence, Dawson J. believed the fiduciary duty was dependent upon the continued existence of the aboriginal title and as he asserted that the plaintiffs' aboriginal title had been extinguished on annexation the possibility of a fiduciary duty had disappeared.[417] The majority of the Court held however, that, to the contrary, the aboriginal title had not been extinguished upon annexation[418] and thus Dawson J.'s rejection of the Crown's fiduciary obligations was based on an erroneous premise.

Brennan C.J. in his dissenting judgment in *Wik* also rejected the existence of any fiduciary relationship between "the Crown and the holders of the native title."[419] In essence he asserted that "sovereign power of alienation" was absolute[420] and it was self-contradictory for the Crown to enjoy this power, yet be "under a fiduciary duty to the holders of native title to advance, protect or safeguard their interests."[421] The existence of the power of extinguishment begs the question of how it is exercised. The latter may be governed by a fiduciary duty. Thus not every extinguishment of aboriginal title will be inconsistent with the existence of a fiduciary duty. If the extinguishment is consensual and on just terms there will be no breach of the fiduciary duty. If, however, the terms are not just, as in *Guerin v. The Queen*, the fiduciary duty will be breached. The coincidence of the power of extinguishment and a fiduciary duty is not self-contradictory. This is the very reason why the fiduciary duty is imposed in this context. It is to ensure the power of extinguishment is properly exercised.[422]

Both Dawson J.[423] and Brennan C.J.[424] rejected the United States cases[425] and, *inter alia*, the Canadian authority, *Guerin v. The Queen*, supporting the plaintiffs' submissions, on the basis that the former were based on the status of Indian tribes as domestic dependent Nations and the latter was based on the subject statutory regime and thus these cases were said to be irrelevant to the Australian situation.[426] This is erroneous. Briefly, the United States cases were not decided on the basis of the sovereign character of the Indian Nations. While, as noted below, these cases refer to the status of the Indian peoples as domestic dependent Nations, in this context it is the notion of "dependency", rather than the sovereignty of Indian Nations, that the courts are emphasizing. Moreover, it will be seen that these courts found the duty to stem from the relationship between a 'discovering' state and the aboriginal peoples, rather than statute law.[427]

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417. *Supra* note 25 at 164 and 166–167. See also Cassidy, *ibid.*
418. *Mabo No 2*, *ibid.* at 51 and 68.
419. *Ibid.* at 150. See also *ibid.* at 160.
420. *Ibid.* To this end he suggested that the aboriginal title had not been recognized prior to *Mabo No 2* and as a consequence no restrictions had been placed on the Crown's power to grant land.
421. *Ibid.* See also Cassidy, *supra* note 281.
422. See *Mabo No 2*, *supra* note 25 at 200–201.
423. *Mabo No 2*, *ibid.* at 164 and 166–167. See also Cassidy, *supra* note 281.
424. *Mabo No 2*, *ibid.* at 161. See also Cassidy, *ibid.*
425. See the cases cited in footnote 396, above.
426. *Mabo No 2*, *supra* note 25 at 161, 165 and 167.
427. See especially *Johnson v. McIntosh*, *supra* note 396 at 573; *Worcester*, *supra* note 132 at 544–545 and 599; *Cherokee Nation*, *supra* note 132 at 16, 17, 20 and 53. See also *Cramer*, *supra* note 396 at 229; *Creek Nation*, *supra* note 396 at 110; *Jicarilla Apache Tribe*, *supra* note 421 at 1566–1567 in support of the proposition that the trust relationship exists independently of any treaty or statutory provisions.

While it is true that the disposition of land in *Guerin v. The Queen* was statutorily regulated, from the Court's judgments it is clear that its conclusion was based on the general nature of aboriginal title at common law, rather than this statutory regime. Thus the Court stressed in that case that the fiduciary relationship "has its roots in the concept of aboriginal, native or Indian title."[428] This equitable obligation, while confirmed in *Indian Act*, s. 18, existed independently of the terms of that statute[429] or "any other executive or legislative provision."[430] The Supreme Court of Canada in decisions such as *Blueberry River Indian Band v. Canada* and *Kruger v. The Queen*[431] has subsequently confirmed that the fiduciary duty is not sourced in statute law. Thus these dissenting Justices erroneously rejected the relevance of the pertinent United States and Canadian case law.

H. IS THE FIDUCIARY DUTY CONFINED TO EXTINGUISHING ABORIGINAL TITLE?

Dawson J.'s approach to this matter raises another important issue that is yet to be specifically resolved by the courts. It will be recalled that Dawson J. asserted that the fiduciary duty is dependent upon the existence of the aboriginal title.[432] As noted above, in *Guerin v. The Queen* the fiduciary duty was also stated as having "its roots in the concept of aboriginal, native or Indian title"[433] and, in particular, arising out of the Crown's powers of extinguishment of such title.[434] These comments may suggest that the Crown's fiduciary relationship is confined to cases such as *Guerin v. The Queen* and *Mabo No 2* where there is a surrender or purported extinguishment of aboriginal title. If the Crown's fiduciary relationship is so confined, it would have no possible application in the context of the removal, detention and assault of part-aboriginal children.

It is submitted that the better view is that the fiduciary duty stems from a broader historical relationship between the Crown, as the 'discovering' Nation, and the aboriginal peoples, as the traditional owners. Thus the duties stemming from this fiduciary relationship are not confined to protecting aboriginal interests when extinguishing the aboriginal title. In this regard three points can be made.

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428. *Guerin*, *supra* note 99 at 376, per Dickson J. See also Wilson J. who stated that the "obligation has its roots in the aboriginal title of Canada's Indians as discussed in *Calder v. Attorney General of British Columbia*" (*ibid.* at 348-349).

429. *Ibid.* at 349, per Wilson J.

430. *Ibid.* at 336, per Dickson J. See further Dickson J.'s judgment in *Guerin* (*ibid.* at 376-382). Similarly Dickson J. held that the "aboriginal title existed in Canada ... independently of the Royal Proclamation" (*ibid.* at 377).

431. *Supra* note 317 at 597.

432. *Mabo No 2*, *supra* note 25 at 166-167.

433. *Guerin supra* note 99 at 376, per Dickson J. See also Wilson J. who stated that the "obligation has its roots in the aboriginal title of Canada's Indians as discussed in *Calder v. Attorney General of British Columbia*" (*ibid.* at 348-349).

434. Dickson J. states that the "fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indian and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest is inalienable except upon surrender to the Crown" (*ibid.* at 376). He continues in the next paragraph by stating: "[a]n Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place with the Crown then acting on the Band's behalf. ... The surrender requirement and the responsibility it entails are the source of a distinct fiduciary obligation owed by the Crown to the Indians" (*ibid.* at 376).

First, while in *Guerin v. The Queen*[435] the Court was concerned with the surrender of the aboriginal title, it is evident from the Court's judgments that it believed the fiduciary duty was not confined to this fact scenario. Thus Wilson J. recognized that a general fiduciary obligation of the Crown pre-existed the surrender of the aboriginal title. Wilson J. asserted that even pre-surrender, "the Crown does hold the lands subject to a fiduciary obligation to protect and preserve the band's interests from invasion or destruction."[436] Subsequent courts have confirmed that this duty extends beyond the confines of surrenders of aboriginal title.[437]

Second, the Crown's power to extinguish aboriginal title is linked to a broader historical fact, namely the Crown's acquisition of sovereignty. Upon discovery, the Crown acquired the exclusive right[438] of pre-emption.[439] The discovering sovereign received an inchoate title, known as the radical title, which is subject only to the aboriginal title.[440] It is only upon the surrender of the aboriginal title that the sovereign's inchoate title combines with the aboriginal title to constitute a complete title, *plenum dominion*.[441] Thus the right of pre-emption gave the Crown a right as against other Nations and settlers to extinguish the aboriginal title.[442] In turn, with the acquisition of sovereignty and the right of pre-emption

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435. *Supra* note 99. See also Bartlett, *supra* note 296; Hurley, *supra* note 203; Darlene Johnson, "A Theory of Crown Trust Towards Aboriginal Peoples" (1986) 18 Ottawa L. Rev. 307; D. Paul Emond, "Case Comment: Guerin v. The Queen" (1986) 20 Estates and Trusts Reports 61; Richard H. Bartlett, "The Fiduciary Obligation of the Crown to the Indians", (1989) 53 Sask. L. Rev. 301; Maureen Ann Donohue, "Aboriginal Land Rights in Canada: A Historical Perspective on the Fiduciary Relationship" (1990) 15 Am. Ind. L. Rev. 369; Camilla Hughes, "The Fiduciary Obligations of the Crown to Aborigines: Lessons from the United States and Canada" (1993) 16 U.N.S.W.L.J. 70; David P. Owen, "Fiduciary Obligations and Aboriginal Peoples: Devolution in Action" (1994) 3 Can. Native L. Rep. 1; Leonard I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada*, Toronto: University of Toronto Press, 1996).

436. *Guerin, ibid.* at 355. Both Wilson and Dickson JJ. sourced the fiduciary duty in the aboriginal title generally, not just its surrender. Thus, Dickson J. asserted the fiduciary relationship "has its roots in the concept of aboriginal, native or Indian title" (*Guerin, ibid.* at 376, Dickson J.). Thus, Wilson J. stated that the "obligation has its roots in the aboriginal title of Canada's Indians as discussed in *Calder v. Attorney General of British Columbia*" (*Guerin, ibid.* at 348-349). *Cf.* Brian Slattery, "Understanding Aboriginal Rights"(1987) 66 Can. Bar Rev. 727 at 754-755.

437. See especially *Kruger, supra* note 317 at 597, 647 and 658.

438. See *Johnson v. McIntosh, supra* note 421 at 573; *Worcester, supra* note 132 at 545; *R. v. Symonds*, (1847) N.Z.P.C.C. 387 at 388-389 and 394 [*Symonds*]; *Mabo No 2, supra* note 396 at 88.

439. Which Dickson J. recognized was "designed" to interpose the Crown between the Indians and third parties to enable the Crown to safeguard the rights of the aboriginal owners against exploiting colonists (*Guerin, supra* note 99 at 383). In *Symonds, ibid.* at 391, the Court also stressed that the rationale for the exclusive right of pre-emption was to protect the aboriginal owners from exploitation by land speculators. See also *Johnson v. McIntosh, supra* note 396 at 573; *Jones, supra* note 396 at 16; *Mitchell, supra* note 396; *Delgamuukw, supra* note 132 at 303. See also Julie Cassidy, "Aboriginal title: 'An overgrown and poorly excavated archaeological site'?" (1998) 10 International Legal Perspectives Journal 39.

440. See *Johnson v. McIntosh, ibid.* at 573 and 588; *Worcester, supra* note 132 at 544; *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 at 403 (P.C.); *Mabo No 2, supra* note 25 at 48, 50, 68, 72-73 and 86-87; *Wik, supra* note 337 at 185, 235 and 256. See also Burke, "The Cherokee Cases: A Study in Law, Politics and Morality" (1969) 21 Stan. L. Rev. 500; Jill Norgren, *The Cherokee Cases: The Confrontation of Law and Politics*, (New York: McGraw Hill, 1996); Cassidy, *ibid.*; Kent McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2002) 47 McGill L.J. 473.

441. *St Catherine's Milling and Lumber Co v. The Queen*, (1888) 14 App. Cases 46 at 55 (P.C.) [*St Catherine's*]; *Guerin, supra* note 99; *Mabo No 2, supra* note 25 at 50; *Wik, ibid.* at 234.

442. *Johnson v. McIntosh, supra* note 396 at 573; *Worcester, supra* note 132 at 545; *Symonds, supra* note 438 at 388-389 and 394; *Mabo No 2, supra* note 25 at 88.

came fiduciary obligations to protect aboriginal interests.[443] Thus as Dickson J. noted in *Guerin v. The Queen*,[444] the Crown's right of pre-emption was designed to interpose the Crown between the Indians and third parties to enable the Crown to safeguard the rights of the aboriginal owners against exploiting colonists. Thus the Crown's ability to extinguish aboriginal title is part of a broader protective relationship arising out of the acquisition of sovereignty.

Third, at times the courts have referred to the broader historical relationship between the Crown and aboriginal peoples, namely the Crown's role as guardian of the aboriginal peoples, as the source of this fiduciary relationship. Thus, in *Guerin v. The Queen*,[445] at times the Court used more general language that indicated an acknowledgement that the fiduciary duty impacts upon this broader aboriginal/Crown relationship.[446] Wilson,[447] Estey[448] and Dickson[449] JJ. all at times identified the source of this fiduciary duty to be the broader historical relationship between the Crown and the aboriginal peoples, not merely the Crown's power to extinguish aboriginal title.[450] Thus Wilson J. stated that this fiduciary duty is "an acknowledgement of the historic reality" of prior Indian occupation.[451] Similarly, Estey J. noted that legislation enacted both before and after confederation reflected a "strong sense of awareness of the community interests in protecting the rights of the native populations in those lands in which they had a long-standing connection."[452] Dickson J. also recognized in his judgment the "historic

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443. See *Paul v. Canadian Pacific*, [1988] 2 S.C.R. 654 at 677, 53 D.L.R.(4th) 487; *Mitchell*, *supra* note 396 at 141; *Hopton v. Pamajewon* (1993), 16 O.R. (3d) 390, 109 D.L.R. (4th) 449 (C.A.); *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119, 147 D.L.R. (4th) 1. For relevant New Zealand and Australian cases see also *Symonds*, *supra* note 438 at 391; *Mabo No 2*, *supra* note 25 at 194. Note, this paternalistic basis for the inalienability of aboriginal title has been criticized as inappropriate in modern society. See also McNeil, *supra* note 253.
444. *Supra* note 99 at 383.
445. *Ibid.*
446. *Cf.* Slattery, *supra* note 436 at 754–755.
447. Note, while the decision was unanimous, all members of the Court believing that the Crown was under some form of fiduciary duty to act in the band's best interests. The source of the obligation, however, differed. Thus, Wilson J., (with whom Ritchie and McIntyre JJ. concurred) also found the Crown liable for breach of its fiduciary duties, but on the basis of a breach of an express trust. Wilson J. believed that upon surrender of the Band's land, the Crown's pre-existing fiduciary duty crystallized into an express trust (*supra* note 99 at 355). The reserve lands constituted the trust *res* and the Crown was obliged under the "terms" of this trust to hold the land for the purpose originally agreed to by the Indian band.
448. Note, Estey J. believed, however, that the subject fiduciary obligation stemmed from the principal/agent relationship existing between the government and the band for the purpose of negotiating the lease with the golf club. He believed the *Indian Act* created a form of statutory agency between the Crown and the band, which in turn gave rise to a duty to act in the principal's (band's) best interests (*ibid.* at 391). It is submitted that this characterization is inappropriate because, *inter alia*, an agent is usually subject to the direction of the principal, yet in the context of Crown/aboriginal relations, the former's paternalism often denied the latter any say in even those matters most directly affecting their lives. Moreover, Estey J.'s statement that the "results are the same" and agency is simpler than equity to apply to "native rights" (*ibid.* at 394–395) is hardly an appropriate reason for using the former, rather than the latter and fails to acknowledge that there are important differences in the doctrines' operations. For further criticism of Estey J.'s characterization see Bartlett, *supra* note 296 at 372; Hurley, *supra* note 203 at 565.
449. Note, Dickson J. (with whom Beetz, Chouinard and Lamer JJ concurred) found the Crown liable for breach of its fiduciary duty (as opposed to a strict trust) owed to the aboriginal peoples.
450. *Cf.* Hurley, *supra* note 203 at 591–592.
451. *Supra* note 99 at 349.
452. *Ibid.* at 392.

responsibility that the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties."[453] As noted above, the Court made it clear in its judgments that this responsibility predated and existed independently of the duties under the *Indian Act*.[454] The *Indian Act* was merely an "acknowledgement" of the historical responsibility that the Crown has for the aboriginal peoples.[455] It is this broader historical relationship of the Crown as the guardian of the traditional peoples that provides the source of the Crown's fiduciary relationship.[456]

Moreover, it is clear from not only *Guerin v. The Queen*,[457] but also subsequent cases[458] that it is this more general fiduciary role, rather than the mere power of extinguishment of the aboriginal title, that provides the basis for the Crown's fiduciary responsibilities. Thus in *R. v. Agawa*[459] the Court cited *Guerin v. The Queen*[460] as authority for the courts' recognition of the fiduciary "responsibility of Government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation." Similarly, in *R. v. Sparrow*[461] the Court followed *Guerin v. The Queen*,[462] asserting that the "*sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation."[463] The Court later reiterated the need to "uphold the honour of the Crown ... in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal people."[464]

The Court in *R. v. Sparrow*[465] also asserted that "the honour of the Crown is at stake in dealings with aboriginal peoples" and thus regard must be had to the "special trust relationship and the responsibility of the government vis-à-vis aboriginals ... ".[466] Thus the Court referred to the applicability of the fiduciary duty to

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453. *Ibid.* at 383–384.
454. *Cf.* Hurley, *supra* note 203 at 588.
455. *Supra* note 99 at 349.
456. See also Hurley, *supra* note 203 at 591–592.
457. *Supra* note 99. See also Bartlett, *supra* note 296; Hurley, *ibid.*; Johnston, *supra* note 435; Emond, *supra* note 435; Bartlett, *supra* note 435; Donohue, *supra* note 435; Hughes, *supra* note 435; Owen, *supra* note 435; Rotman, *supra* note 435.
458. Hurley, *ibid.* at 591, note 125 also cites earlier Canadian cases that have recognized this historical guardianship. See *e.g. A.G. (Ontario) v. A.G. (Canada), (Re Indian Claims)*, [1885] S.C.R. 434, [1897] A.C. 199; *R. v. Morely*, [1932] 4 D.L.R. 483 at 513 (B.C.C.A.); *Re Kane*, [1940] 1 D.L.R. 390 at 397 (N.S. Co. Ct.); *St Ann's Island Shooting and Fishing Club Ltd v. The King*, [1950] S.C.R. 211 at 219, 2 D.L.R. 225.
459. *Supra* note 343 at 216, citing *Guerin*, *supra* note 99, quoted with approval in *Sparrow*, *supra* note 132 at 407–408.
460. *Ibid.*
461. *Supra* note 132 at 408.
462. *Supra* note 99 at 382.
463. Quoted with approval in *Nunavik Inuit*, *supra* note 132 at 86; *Royal Commission Report*, *supra* note 318. See also *Blueberry River*, *supra* note 99 at 405, per Gonthier J.
464. *Supra* note 132 at 410. The Court also stated that 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" (*ibid.*, quoted with approval in *Nunavik Inuit*, *supra* note 132 at 86). See also *Royal Commission Report*, *supra* note 318.
465. *Ibid.*
466. *Ibid.* at 1114. See also *Van der Peet*, *supra* note 132 at 338; *Badger*, *supra* note 132 at 360, *supra* note 132 at 331 and 354–355; *Nunavik Inuit*, *supra* note 132 at 82 and 98.

general "dealings" between the Crown and the aboriginal peoples, not simply dealings with aboriginal lands. In this regard it will be recalled that the Court in *R. v. Sparrow*[467] believed *Guerin v. The Queen*[468] provided "a general guiding principle for s. 35(1)" that specified that "the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples."[469] Here the Court clearly recognizes that the Crown's fiduciary obligations extend far beyond the narrow confines of the extinguishment of aboriginal title, particularly given that, as noted above, *Constitution Act, 1982*, section 35(1) recognizes and affirms all existing aboriginal rights, not just aboriginal title. Similarly, in *R. v. Adams*, Lamer C.J. recognized that "the Crown's unique fiduciary obligations towards aboriginal peoples" prevented Parliament infringing "aboriginal rights ...".[470]

This view also accords with the characterization of the fiduciary relationship between the government and the aboriginal peoples of the United States.[471] Briefly, the courts' recognition of the government's fiduciary duty stems back to the Marshall Court.[472] This Court found the fiduciary duty to stem from the relationship between a 'discovering' state and the aboriginal nations.[473] In *Cherokee Nation v. Georgia*,[474] in the course of characterising the relationship between the government and the aboriginal peoples, Marshall C.J. rejected the notion that the Indian nations were strictly "foreign nations," preferring to designate them as "dominated domestic dependent nations."[475] In turn they were stated to be in a "state of pupillage. Their relation to the United States resembles that of ward to his guardian."[476] In the same case Thompson J. recognized the Indian nation as an "inferior ally" or "weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one."[477] In the subsequent case *Worcester v. Georgia*,[478] Marshall C.J. again asserted that the Indian peoples had placed themselves "under the protection of one more powerful."[479] Thus while the Court refers to the status of the Indian peoples as domestic dependent Nations, as noted above, in this context the notions of vulnerability or dependency are emphasized as a source of governmental obligations to protect Indian interests. As confirmed by subsequent courts, this fiduciary duty exists independently of any statute law

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467. *Ibid.*
468. *Supra* note 99. The Court also referred to *Taylor*, *supra* note 395.
469. Quoted with approval in *Nunavik Inuit*, *supra* note 132 at 86. See also *Royal Commission Report*, *supra* note 318 at 566.
470. *Adams*, *supra* note 132 at 677.
471. See the cases cited in *supra* note 421.
472. In cases such as *Johnson v. McIntosh*, *supra* note 396 at 573; *Cherokee Nation*, *supra* note 132 at 16, 17, 20 and 53; *Worcester*, *supra* note 132 at 544–545 and 559.
473. In these cases the courts expressed the "guardian-ward relationship as a natural incident of, [aboriginal title]; since Indians were not citizens, the guardianship concept provided a way in which their ownership of real property could be acknowledged and protected." See (Reid Peyton Chambers, "Judicial Enforcement of the Federal Trust Responsibility to Indians" (1975) 27 Stan. L. Rev. 1213.
474. *Supra* note 132.
475. *Cherokee Nation*, *ibid.* at 17. See also *Worcester*, *supra* note 132 at 559.
476. *Cherokee Nation*, *ibid.*
477. *Ibid.* at 53.
478. *Supra* note 132.
479. *Ibid.* at 560–561.

or treaty.[480] Hence, it is submitted that this line of United States cases suggests the fiduciary duty to be sourced in the broader historical relationship between the 'discovering' Nation and the traditional owners.

Thus the fiduciary relationship is grounded in the historical relationship between the Government/Crown and the aboriginal peoples and requires the Crown to have regard to this fiduciary duty in all dealings with such peoples. As noted above, historically, this fiduciary relationship was seen as a consequence of aboriginal peoples being in a state of tutelage[481] or wardship.[482] While these notions are now outdated, they have been replaced by a modern day relationship that accommodates the self-determination of aboriginal Nations.[483] Dickson J. in *Guerin v. The Queen*,[484] believed this modern day fiduciary relationship to be *sui generis*; in some ways trust-like and in other ways akin to an agency relationship.[485] Dickson J. added that given "the unique character both of the Indians' interest in land and of their historical relationship with the Crown, the fact that this is so should occasion no surprise."[486]

Ultimately, how ever the fiduciary relationship is described, once seen as it is a consequence of this broader relationship, there is no reason that this line of cases should be confined to dealings with the aboriginal title.[487] In turn, if the source of the obligation is not necessarily the aboriginal title, but rather this broader relationship, there is no reason why breaches of the fiduciary duty could not arise apart from an unfair extinguishment of the aboriginal title. Thus it is submitted that this general fiduciary duty could provide a source of actionable claims, including[488] those arising from the removal, detention and assault of part-aboriginal children as in *Cubillo*.

I. EVALUATION: CONTENT OF THE FIDUCIARY DUTIES

Particularly once it is accepted that the Crown's fiduciary duty is not confined to cases of extinguishment of aboriginal title, the content of the fiduciary obligations attaching to the duty will need to be determined on a case-by-case basis. As noted above, it is well established that the "categories of relationships that give rise to fiduciary duties are not closed and the content of the fiduciary duty varies with the type of relationship to which it is applied."[489] Thus the duty is tailored to the

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480. See *Cramer*, *supra* note 396 at 229; *Creek Nation*, *supra* note 396 at 110; *Jicarilla Apache Tribe*, *supra* note 421 at 1566–1567.
481. Under Spanish law see *e.g. Chouteau v. Molony*, (1853) 9 Pet. 711 (U.S.S.C.).
482. *Cherokee Nation*, *supra* note 132 at 17.
483. See *Alaska v. Native Village of Venetie Tribal Government*, 521 U.S. 1103; 117 S. Ct. 2478 (1997).
484. *Supra* note 99 at 385.
485. Estey J. also characterized the aboriginal/Crown relationship as akin to that of a principal/agent in *Guerin*, *ibid.* at 391.
486. *Ibid.* at 387.
487. See *United States v. Sandoval* 231 U.S. 28, (1913).
488. It could also provide a source of rights for the misappropriation by governments of aboriginal wages and welfare payments, noted above.
489. *Nunavik Inuit*, *supra* note 132 at 86. See *Guerin*, *supra* note 99 at 384; *Mabo No 2*, *supra* note 25 at 203; *Williams No 2*, *supra* note 5 at para. 707; *Delgamuukw*, *supra* note 132 at 370 and 378; *Hospital Products*, *supra* note 70 at 68, 96 and 102; *LAC Minerals*, *supra* note 70; *Breen No 2*, *supra* note 16 at 284; *Frame*, *supra* note 70, Wilson, J.; *Hodgkinson*, *supra* note 99.

"specific relationship from which it arises."[490] However, certain minimal duties will always apply. In *Delgamuukw v. British Columbia*,[491] the Court asserted that the fiduciary duty will always involve a duty of consultation and that the nature and scope of that duty will vary with the circumstances. In most cases, however, the duty will be "significantly deeper than mere consultation .., [and] may even require the full consent of an aboriginal nation ...".[492] Moreover, in all cases the fiduciary will be bound to act with the utmost care and loyalty and for the benefit of the person to whom the duty is owed.[493] Thus, in *Guerin v. The Queen*, Dickson J. asserted that equity "will not countenance unconscionable behaviour in a fiduciary whose duty in that of utmost loyalty to his principal."[494]

In the context of the removal and detention of part-aboriginal children, the Crown's fiduciary duty will involve as a minimum the duty to act with care and in the best interests of the child. In the particular facts in *Cubillo* it may be suggested that these duties were breached. Arguably the very removal of the plaintiffs from their families was a breach of these duties as being not in the best interests of the plaintiffs and their families.[495] In this regard there are a couple of key facts that should be recalled. Both Mrs Cubillo and Mr Gunner were removed to locations far away from their homes; Darwin in Mrs Cubillo's case, Alice Springs in Mr Gunner's case. While O'Loughlin J. noted that under institutional/departmental policy families were allowed to visit the children, distance was not the only barrier between the plaintiffs and their families. As noted above, aboriginal persons needed permits to leave a reserve, to enter a town and to enter the institutions. The possibility of the plaintiffs having contact with their families once removed must be considered in light of these facts. Thus their removal should be seen as a permanent removal from their families.

O'Loughlin J. in *Cubillo 2* found that as early as the 1940s "the importance of affection in a child's normal development and the role played by parental affection in behaviour disorder" had been recognized.[496] Moreover, from his review of the documentary evidence he found that even "as early as 1911, it was recognised that there 'would probably be an outcry from well meaning people about depriving the mother of her child'...".[497] Thus even during the periods when Mrs Cubillo and Mr Gunner were removed from their families there was an awareness that this was not in the best interests of a child.

The forcible detention of the plaintiffs in the subject religious institutions would also involve breaches of this duty. Even if the cultural loss stemming from

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490. *Mabo No 2*, *ibid.* at 203. See also *Hospital Products*, *ibid.* at 102; *Hodgkinson*, *ibid.*, quoting *National Westminster*, *supra* note 188; *Williams No 2*, *supra* note 5 at para. 707.

491. *Supra* note 132 at 340 and 378.

492. *Ibid.* at 341.

493. *Mabo No 2*, *supra* note 25 at 203; *Kruger*, *supra* note 317 at 647; *Blueberry River*, *supra* note 99; *Hospital Products*, *supra* note 70 at 102; *Hodgkinson*, *supra* 99, quoting *National Westminster*, *supra* note 188; *Williams No 2*, *supra* 5 at para. 707.

494. *Supra* note 99 at 344. See also *Kruger*, *ibid.* at 598.

495. See also Julie Cassidy, "Cubillo & Gunner v. The Commonwealth: A Denial of the Stolen Generation?" (2003) 12 Griffith L. Rev. 114.

496. *Supra* note 2 at para. 1455.

497. *Ibid.* at para. 267.

the Government's policy of assimilation was not seen as a breach of fiduciary duties as it was based on a misguided notion of being in the best interests of the child,[498] ultimately, factually the forcible detention of the plaintiffs in these institutions was clearly not in their best interests. As noted above, O'Loughlin J. was critical of the conditions in these institutions,[499] particularly those at the St. Mary's hostel.[500] Corporal punishment in the institutions was found by O'Loughlin J. to be "very severe."[501] Further, it is submitted that, as suggested by the Full Court,[502] in light of the Reports to the Native Affairs Branch,[503] the Commonwealth knew, or ought to have known, that Mr Walter was assaulting some of the children.[504] Factually, the Commonwealth had failed to protect the plaintiffs from the assaults by Mr Walter and Mr Constable. Moreover, these broader facts show that the Commonwealth had failed to properly supervise the institutions to which the Director, a Commonwealth public servant, had committed the plaintiffs. In this regard it should be noted that O'Loughlin J. concluded that the "Director had failed to exercise his supervisory and regulatory powers over St Mary's Hostel."[505] Thus it is submitted that it is arguable that the Commonwealth failed to exercise care and act in the best interests of the plaintiffs as required by its fiduciary duties.

VI. Conclusion

IN ONE SENSE, the plaintiffs in *Cubillo* were defeated by the passage of time. O'Loughlin J. found that there was a "huge void" of evidence in many important areas.[506] As the plaintiffs bore the burden of proof,[507] the death of key witnesses[508] and the loss of documents, if they ever existed,[509] made it difficult for them to prove the factual basis of their cases. There will also be the suggestion that the plaintiffs' cases were factually weaker than that of other members of the stolen

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498. *Ibid.* at paras. 1146 and 1305.
499. *Ibid.* at paras. 1141 and 1535.
500. *Ibid.* at para. 1073.
501. *Ibid.* at para. 592.
502. *Cubillo 3, supra* note 1 at para. 333.
503. For example, reports in the Native Affairs Branch's files expressing concerns as to Mr Walter's propensity for violence. There was the report of Mr Dentith, the Superintendent of the Bagot Reserve, to Mr McCaffrey the Acting Director of Native Affairs, dated 27 July 1954 that concerned young boys who had been flogged by Mr Matthews and Mr Walter several days earlier. There was the report of Mr McCaffrey to the Administrator under cover of a memorandum dated 28 July 1954 concerning the conduct of Mr Matthews and Mr Walter, (with a handwritten notation of the Administrator on that memorandum). There was also the report of Mr Dentith to the District Superintendent, Native Affairs Branch dated 27 October 1954 concerning an attack by Mr Walter upon another young boy. See *Cubillo 2, supra* note 2 at paras. 664, 668, 669, 671, 672 and 674. See also *Cubillo 3, ibid.* at paras. 126-129, 333 and 382.
504. *Cubillo 3, ibid.* at para. 333.
505. *Cubillo 2, supra* note 2 at paras. 1141, 1241, 1262 and 1268.
506. *Ibid.* at para. 1264.
507. See *ibid.* at paras. 1538–1539.
508. See *Cubillo 3, supra* note 1 at para. 30 for a list of important witnesses that had not given evidence.
509. Note in regard to the removal of Mrs Cubillo the absence of any documentation: *Cubillo 2, supra* note 2 at para. 56.

generation, in particular, in regard to the issue of lack of parental consent, and thus should not have been used as the basis for such an important 'test case'.[510] Nevertheless, the fact is that the plaintiffs were committed to religious institutions, away from their families, where they were forcibly detained and whilst in the care of these institutions they were physically and/or sexually assaulted.

Ultimately, it was not merely the passage of time that provided a barrier to success for the plaintiffs. It has been suggested in this article that the reasoning adopted by the courts in *Cubillo 2* and *Cubillo 3* inappropriately allowed them to reject the existence of a fiduciary relationship in this case. By asserting that the plaintiffs could not claim a breach of fiduciary duties in addition to their tortious claim[511] and suggesting that equitable damages could not be sought as the plaintiffs had suffered no economic loss, only physical and psychological damage,[512] the courts avoided considering if the facts gave rise to a fiduciary relationship. It has been submitted that these doctrines limiting the scope of the fiduciary relationship are ill-founded and/or inapplicable to the facts in *Cubillo*. In this regard it has been contended that the approach of the Canadian courts is preferable to that in *Cubillo 2* and *Cubillo 3*. Moreover, once these doctrines have been so rejected, it has been submitted that there were a number of factual bases that could have supported the claim of a fiduciary relationship in *Cubillo*. It is disturbing that these doctrines were used by the courts in *Cubillo 2* and *Cubillo 3* in a manner that meant that the very question whether there was a factual fiduciary relationship was never considered. It is hoped that if the Australian High Court has an opportunity to review these doctrines that it will look to the Canadian courts for guidance.

This article has also suggested an alternative source of equitable rights for aboriginal claimants in this context, namely the Crown's general fiduciary relationship with the aboriginal peoples that arose out of settlement. This fiduciary relationship has been given scanty consideration in Australia. Even in Canada, were it has been more extensively judicially recognized, its parameters remain unclear. Ultimately the matter will have to await the outcome of the current Native Residential School litigation where the issue whether the removal, detention and assault of aboriginal children breached this general fiduciary will have its first judicial consideration.

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510. *Cf.* Clarke, *supra* note 28 at 226. Perhaps it would have been more appropriate to use as a 'test case' a case of clear forcible removal in the absence of parental consent or neglect.

511. *Cubillo 2*, *supra* note 2 at para. 1299, following *Paramasivam*, *supra* note 16 at 218–220; *Williams No 2*, *supra* note 5; *Lovejoy*, *supra* note 16; *Prince*, *supra* note 16.

512. *Cubillo 2*, *ibid.* at para. 1307.