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FIDUCIARY DUTIES
Obligations of Loyalty and Faithfulness

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Release No. 59, March 2019

What's New in this Update:

New case law and commentary, including the following recent decisions:

- **Fiduciary Per Se Relationships — Caretaker Roles — Senior Management and "Key" Employees** — The motion judge was prepared to accept that the appellant owed fiduciary duties to AIM, duties that had not ended automatically with the termination of employment. However, he found that the evidentiary record was insufficient to support a finding that the appellant had breached any continuing fiduciary obligations. In essence, the motion judge found that AIM failed to put its best foot forward on the motion; it presented no evidence to counter the appellant's evidence that he refrained from soliciting AIM's customers. The motion judge's analysis was a

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question of mixed fact and law and was entitled to deference. Justice Huscroft saw no basis for the court to interfere with the motion judge's findings on appeal: *Kerzner v. American Iron & Metal Company Inc.*, (2018), 51 C.C.E.L. (4th) 1, 2018 ONCA 989, 2018 CarswellOnt 20637, 299 A.C.W.S. (3d) 756 (Ont. C.A.).

- **Fiduciary Per Se Relationships — Caretaker Roles — When Does the Duty to Consult and Accommodate Arise? — Crown Conduct or Decision** — The appellant argued that the Crown had a duty to consult them on the development of environmental legislation that had the potential to adversely affect their treaty rights to hunt, trap, and fish. The Court was therefore required to answer a vexing question it had left open in the past: Does the duty to consult apply to the law-making process? Justice Karakatsanis (Wagner C.J. and Gascon J. concurring) concluded that the duty to consult does not apply to the law-making process. Two constitutional principles – the separation of powers and parliamentary sovereignty – dictate that it is rarely appropriate for courts to scrutinize the law-making process. The process of law-making does not only take place in Parliament. Rather, it begins with the development of legislation. When ministers develop legislation, they act in a parliamentary capacity. As such, courts should exercise restraint when dealing with this process. Extending the duty to consult doctrine to the legislative process would oblige the judiciary to step beyond the core of its institutional role and threaten the respectful balance between the three pillars of democracy. It would also transpose a consultation framework and judicial remedies developed in the context of executive action into the distinct realm of the legislature. Thus, the duty to consult doctrine is ill-suited to the law-making process; the law-making process does not constitute "Crown conduct" that triggers the duty to consult. Justice Karakatsanis explained that this was not to suggest, however, that when the legislation undermines s. 35 rights, Aboriginal groups would be left without a remedy. Clearly, if legislation infringes s. 35, it may be declared invalid pursuant to s. 52(1) of the *Constitution Act, 1982*. Further, the Crown's honour may well require judicial intervention where legislation may adversely affect – but does not necessarily infringe – Aboriginal or treaty rights. However, the resolution of such questions must be left to another day. Justice Abella (Martin J. concurring) agreed with Justice Karakatsanis that the appeal should be dismissed on the grounds that judicial review under the *Federal Courts Act* is not available for the actions of federal Ministers in the parliamentary process. But, in her view, the enactment of legislation with the potential to adversely affect rights protected by s. 35 of the *Constitution Act, 1982* does give rise to a duty to consult, and

legislation enacted in breach of that duty may be challenged directly for relief. Justice Brown observed that while Justice Karakatsanis appeared to accept that parliamentary privilege and the separation of powers preclude judicial imposition of the duty to consult, her conclusions were less than categorical on this point. Whether a court may impose a duty to consult upon the process by which legislative power is exercised is not a question of mere "restraint", "forbearance", "reluctance", or of deciding whether imposing a duty to consult would be an "ill-suited" or "inappropriate" constraint upon that exercise of power. Rather, it is a question of constitutionality going to the limits of judicial power, which should receive from a majority of the Court a clear and constitutionally correct answer. Justice Karakatsanis would, however, go further, raising — and then leaving open — the possibility that legislation which does not infringe s. 35 rights but may "adversely affect" them, might be found to be inconsistent with the honour of the Crown. In so doing, however, she undercut the same principles which led her to conclude that imposing the duty to consult would be "inappropriate" in the circumstances of this case. Further, by raising the possibility that validly enacted and constitutionally compliant legislation which has not or could not be the subject of a successful s. 35 infringement claim can nonetheless be declared by a court to be "not consistent with [the honour of the Crown]", Justice Karakatsanis would throw this area of the law into significant uncertainty. Such uncertainty would have deleterious effects on Indigenous peoples, and indeed on all who rely upon the efficacy of validly enacted and constitutionally compliant laws. Justice Brown therefore could not endorse Justice Karakatsanis's reasons. Finally, Justice Rowe (Moldaver and Côté JJ. concurring) concurred with the reasons of Justice Brown. In particular, Justice Rowe would adopt Justice Brown's analysis with respect to the lack of jurisdiction of the Federal Court to conduct the review under the *Federal Courts Act*; the distinction between the Crown and the legislature; the preparation of legislation as a legislative function; the separation of powers, notably between the legislature and the judiciary; and the critical importance of maintaining parliamentary privilege. To this, Justice Rowe would add three main points. First, the fact that the duty to consult has not been recognized as a procedural requirement in the legislative process does not leave Aboriginal claimants without effective means to have their rights, which are protected under s. 35 of the *Constitution Act, 1982*, vindicated by the courts. Second, recognizing a constitutionally mandated duty to consult with Indigenous peoples during the process of preparing legislation (and other matters to go before the legislature

for consideration, notably budgets) would be highly disruptive to the carrying out of that work. Finally, an additional and serious consequence to the appellant's suggested course of action would be the interventionist role that the courts would be called upon to play in order to supervise interactions between Indigenous parties and those preparing legislation (and other measures) for consideration by Parliament and by provincial legislatures: *Mikisew Cree First Nation v. Canada (Governor General in Council)* (2018), 426 D.L.R. (4th) 647, 20 C.E.L.R. (4th) 1, 2018 CSC 40, 2018 CarswellNat 5579, 2018 CarswellNat 5580, 2018 SCC 40, 296 A.C.W.S. (3d) 451 (S.C.C.).