

**AFN/INAC JOINT INITIATIVE FOR POLICY DEVELOPMENT
LANDS AND TRUST SERVICES**

**FIDUCIARY DUTY THINK TANK
MEETING REPORT**

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**The Delta Hotel
Ottawa, Ontario
March 17-18, 1999**

Prepared For:

**The Assembly of First Nations
AFN/INAC Joint Initiative for Policy Development (LTS)**

By:

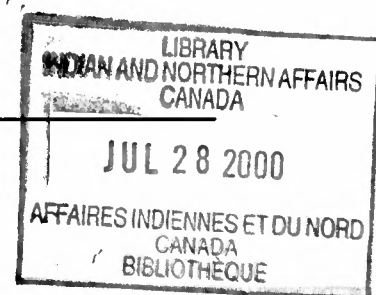


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Introduction

On March 17-18, 1999 the AFN/INAC Joint Initiative for Policy Development Lands and Trust Services, held a Fiduciary Think Tank. The meeting allowed for a free flowing discussion on the fiduciary issue and included participants from the department of Indian Affairs and Northern Development, other federal departments, First Nations, Aboriginal organizations, and Elders.

The meeting report on the Fiduciary Think Tank has been formatted to identify the main themes discussed during the meeting. The information has been assembled from both plenary presentations and facilitated breakout discussions. The documents provided to the Think Tank participants have also been attached to the report.

Opening

Elder Martin Assinewe provided an opening prayer and Elder Billy Two-Rivers provided a smudge and words of advice for the meeting participants.

Former Justice Robert Reid, Legal and Mediation Advisor, Indian Claims Commission, thanked the Elders for the opening prayer and provided introductory comments as chair for the meeting. He mentioned that this meeting is being held to promote discussion on the fiduciary issue and briefly explained the process for the think tank participants. Justice Reid then introduced each of the following speakers.

Opening Remarks

Bob Watts, Department of Indian and Northern Affairs (DIAND)- Assistant Deputy Minister of Lands and Trust Services, thanked the Elders for their opening prayer and extended a welcome to all meeting participants. He provided a background on LTS and on the current AFN-INAC joint initiative. Mr. Watts emphasized the department's efforts to work jointly with First Nations in a process, led by First Nations, which would result in recommendations to be offered jointly on a variety of topics. Mr. Watts stated that one of the unique aspects of the initiative includes the development of a dispute resolution process which has been implemented to assist continued dialogue when encountering difficult issues. Mr. Watt's concluded by commending the AFN joint initiative staff, including Vice-Chief Tom Bressette, in addition to the department's staff for their efforts on the initiative thus far.

Norma Diamond, Director of the AFN Lands and Trusts Unit, welcomed the participants to the meeting. Ms. Diamond mentioned the AFN's role as a facilitator in the process and emphasized that this process is first and foremost, First Nations-driven. Ms. Diamond emphasized the importance of identifying First Nations needs and priorities through different activities, specifically the focus groups, research papers and the regional involvement sessions. She informed the group that the joint initiative is in it's first phase, which is mainly a

communications and information-gathering stage. Ms. Diamond stated that the AFN realizes that this joint initiative holds both opportunities and challenges for First Nations. She encouraged the group to look at this joint initiative as an opportunity to structure change on our own terms, as First Nations in Canada .

(Ms. Diamond's speaking notes have been attached as Appendix A)

National Chief Phil Fontaine provided opening remarks and welcomed participants to the meeting. He discussed the relationship that First Nations and the government are attempting to establish. The relationship is one of partnership where the emphasis is on a cooperative approach. The National Chief stated that he has been criticized at times for not being aggressive enough in getting the First Nations message across to the public. He recognizes, that we as First Nations, need to "negotiate change" and to convey our message in such a way as to gain the support needed. The National Chief encouraged the group not to be fearful in applying a different, more balanced approach in establishing this new relationship, to the benefit of First Nations people in Canada.

(The National Chief's speaking notes are attached as Appendix B)

Presentations to Plenary

Professor Kent McNeil of the Osgoode Hall Law School, provided an overview of the research paper he prepared for the LTS initiative entitled "The Lands and Trust Services Initiative: Its Potential Impact on the Federal Government's Fiduciary Obligations - Part I". Professor McNeil identified the main themes covered in his paper for the think tank participants.

(Professor McNeil's research paper is attached as Appendix C).

Charles Pryce, Senior Council on Aboriginal issues with the department of Justice, presented the document "Fiduciary Relationship of the Crown with Aboriginal Peoples: Implementation and Management Issues - A Guide for Managers". Mr. Pryce explained that this guide was created following the Sparrow decision in 1990, and was subsequently updated in 1995. He explained that this guide is not a legal opinion or a government policy. Rather, this guide was created in order to assist Manager's within the government in dealing with issues relating to fiduciary. Mr. Pryce stated that there are "significant differences" between the guide and Professor McNeil's research paper. He noted two areas in particular where they differed. These include a "top-down vs. bottom-up approach" as well as issues regarding the obligations and infringement justifications. Mr. Pryce stated that there have been a number of important legal decisions since 1995, and a working group has been assembled to discuss revisions to the guide, however, he mentioned that the fundamentals would not change.

(The guide provided by the department of Justice is attached as Appendix D)

Discussion Themes

Four breakout groups were facilitated by Mr. Joe Miskokomon, Ms. Anne Noonan, Justice Robert Reid and Mr. Tony Mandamin. The following information is a summary of the discussion that took place during the two day session.

A Clear Definition of “Fiduciary”

A clear and understandable definition of fiduciary was mentioned as a need by the think tank participants. The following points were made during the meeting discussions:

- This definition must be understood and agreed upon by all parties, including those directly impacted by fiduciary, specifically by First Nations people;
- the need to convey this definition to community people in plain language was recognized as crucial and necessary;
- the acknowledgement that fiduciary has many facets and that it extends beyond merely the legal considerations;
- the nature of fiduciary needs to be clarified in terms of whether it will continue to evolve or become static;
- it was acknowledged by all participants that in attempts to develop a clear definition, many issues must be considered and included within the definition. The complexity of such an effort was noted by the Think Tank participants;
- it is important to be aware that from a legal perspective fiduciary is defined by the courts. It is the courts way of controlling power between two parties. The courts create the obligation to police the federal governments actions. If one wants to define fiduciary obligations, you have to negotiate and agree on the obligations. Neither side is in a position to impose fiduciary obligations on the other.

Questions related to the Fiduciary Definition

- reduction of fiduciary obligations - do we know what the obligations are? They are broad, vague. What does it mean?;
- fiduciary was based on the balance of power, can this change to meet our developmental needs?;
- define obligations - what impact will it have on our communities?
- can we come to a common understanding?;
- define perspective - Aboriginal and non-Aboriginal - what does it mean to apply that definition?;
- not coming from a treaty group, we would still regard ourselves as having a fiduciary relationship with the Crown. What does it really mean?;
- Citizenship and the relationship with Canada? or does fiduciary come from our

- dependancy on the Crown?;
- who is involved in terms of the fiduciary obligation? and how far-reaching is the fiduciary obligation?.

Identification of Fiduciary Infringements

The Think Tank participants mentioned the need to identify and address structural infringements within legislation which impact upon inherent aboriginal rights.

The following points were put forward by think tank participants regarding the issue of structural infringements:

- structural infringements involving natural resources i.e. fishing, timber, etc. need to be addressed;
- the issue of infringement justifications must also be addressed;
- within the legal perspective, the protection of rights can have two meanings:
 - the government cannot do anything to infringe the right without falling within the established justification guidelines;
 - how far does the government's responsibility extend in terms of protecting against third party or provincial infringements?.

The Fiduciary Definition Held by the Federal Government

Think Tank participants requested clarification on the federal government's role and understanding of its fiduciary obligations and responsibilities.

The following points were mentioned:

- have not received the federal perspective of fiduciary, simply a guide book with disclaimers;
- "the honour of the Crown" has an empty meaning to most First Nations in Canada and would like a clear definition from the government of Canada as to what the meaning of this statement is;
- the federal government has reneged on many of its obligations relating to their fiduciary responsibility;
- when a First Nation does win a court case the government "closes it's doors" in a sense and becomes even more strict.

It was mentioned that the federal government has to make changes, the following changes were suggested:

- develop new mechanisms and ideas;

- establish a third order of government;
- create an Aboriginal representative in the Senate and House of Commons; and
- change INAC to Aboriginal Affairs.

Participants felt that the government has an obligation to ensure that the treaties and their conditions are upheld and fulfilled. Need to be clear about the role of Canada within the treaties, as successor state of treaty.

The Fiduciary Definition Held by First Nations

The point was mentioned that the legal theories are too narrow in scope and need broader interpretation from a First Nations perspective. The discussion included the following comments:

- the First Nations people recognize the fiduciary relationship and believe that the Crown “took on” the fiduciary duty, and this is evident in several constitutional documents;
- it was expressed by several participants that the term “fiduciary” does not mean anything to First Nations and that it is not a First Nations word. The term “fiduciary” has only been used following the Guerin decision of 15 years ago. The original term was “trust”;
- maybe we have to define our responsibility;
- need to understand each parties role;
- responsibility to our own people is fiduciary, yet we have nothing left to entrust;
- fiduciary is a concept based on the Royal Proclamation;
- gain a better understanding on how First Nations see fiduciary duty and its impact;
- we (First Nations) must also establish more responsible governments;
- First Nations feel the government wants to off-load their fiduciary obligations;
- First Nations do not believe that section 35 of the Constitution Act, 1982 protects their interest.

Role of the AFN and the LTS Joint Initiative

Questions concerning the role of the AFN in the joint initiative were mentioned, as well as clarification on the purpose of the think tank. It was apparent that some participants were apprehensive about whether this think tank was considered a “consultation”, however, they were reassured that the think tank was an exercise in information-gathering as part of the joint initiative process.

The following comments were put forward:

- find out what role the AFN will play as it relates to federal/provincial governments - are they trying to identify obligations?;
- LTS - where do we want government to maintain its duties and what are they?;
- do they want us to consent to INAC to give authority back to us?;

- perception that LTS is a way for the federal government to negotiate out of their obligations;
- where is the initiative going and how does fiduciary duty fit in?;
- insufficient time for this type of discussion and process;
- policy development can make it clear that we are distinct nations, but one policy does not fit all;
- an opportunity is being provided to move forward, if you postpone, the opportunity may be lost;
- how the initiative proceeds will be very important;
- participant in this focus group to ensure that this process does not result in a definition of fiduciary without first going out to First Nations themselves, without first being programmed within existing perspectives;
- the government is putting these documents out to serve as tools against our First Nations views. If this initiative is to be pursued, resources are needed at the local level. LTS is too limited and we are going outside the reserve boundaries and impacting on individuals. Concerned with what will happen next;
- There are concerns that the government will listen to our perspective and then shut their doors. There is uncertainty as to whether to trust this process;
- process is a little too fast. We need to go back and do our homework. There is a need to sit down with the federal government and understand the real impact of the treaties;
- participants expressed apprehensiveness about the joint initiative.
The issue of consultation was brought up as some participants requested clarification and assurances that this think tank would not be considered "consultation" with First Nations on the issue of fiduciary. It was reiterated that the think tank is not a consultation, rather that it is an exercise in information-gathering.
- must be an application of fiduciary principles in this joint initiative.

Process That Will Allow for a Broader Participation in the Joint Initiative

Comments were provided on measures that could be taken to increase participation and understanding of the LTS joint initiative at the community level. Participants felt that the process should be as far-reaching as possible. The following comments indicate this concern:

- find ways of being able to communicate with communities, in order for communities/people to have a voice in the outcome. Documents are complicated and need to be available in plain language to allow for a broad understanding;
- increase public education;
- continue/expand process beyond this conference;
- AFN-LTS is attempting to provide a forum to facilitate dialogue to ensure First Nations are capable of making informed decisions at the community level;
- not just the federal government that can define this issue - also requires First Nations involvement/input;

- the need to improve the process and the information exchange process;
- develop an approach where once clear, it can be implemented;
- Aboriginal people need to be pro-active and drive this file;
- need time to have a comprehensive strategy - research process;
- First Nations have a responsibility to put forward their views on what they want to see;
- the short time frames are worrisome - there is a need for more time for discussion;
- if we do not know where we come from, how we can move forward?. Get a better idea of where First Nations are coming from - a perspective on the fiduciary relationship;
- Forums like this require that participants do their own research. We can come up with the academic side, but it should also incorporate the human side. The methodology to get information on real life situations and find the problems that exist and find where the government is not meeting their obligations;
- regarding the focus group process generally - struggling with the format and process, especially when it is obvious that we cannot adequately define the fiduciary obligation/responsibility;
- concerns about how this joint initiative process will alter the relationship and the fiduciary obligations the government holds towards the First Nations;
- request for further information, such as more reports, prior to returning to community and advocating the joint initiative process.

Communications Strategy For First Nations

The think tank participants recognized the importance of developing and implementing an effective communications strategy in an effort to reach as many First Nations as possible. The First Nations need to be made aware of the LTS joint initiative. It was also noted that this information must be communicated in plain language to be understood by the average First Nations Band member.

The following points were made regarding communicating to First Nations:

- speak in plain English when communicating;
- Chiefs/Leaders need to use their power to educate our own people;
- need to bring information back to communities;
- need to continue these workshops at the community level in order for people to become familiar with the terms;
- get the grass roots perspective and agree on some principles. A policy guide that would be expanded to include a First Nations perspective;
- be able to look at the fiduciary relationship and how it reflects on the grassroots people. We need to elaborate on the consultation process;
- communities do not talk about fiduciary, they talk about partnership. In looking at the reality, the meaning is lost;
- sometimes fiduciary involves a trust and there are legal distinctions involving a trust.

Trust to a lawyer means very specific things. While in the ordinary language it means a very different thing. The human element is lost. There is a need to think of these words as the ordinary person would. Suggestions made to try to develop the basic principles and understandings in plain language. The relationship should be defined through agreements on the basis of their own understandings. If the courts come in, it will become a legal relationship and not necessarily what people want.

Present Relationship Between the Government and First Nations

The concept of the fiduciary relationship between First Nations and the government is a complex one. Think Tank participants discussed the uncertainties and the areas they felt were included within the fiduciary relationship. There were many comments indicative of distrust and suspicion on the part of the First Nations towards the government. The comments outlined below illustrate the discussions which took place:

- conflict between legal theory and First Nations taking over administration that reduces fiduciary responsibility;
- what the government wants and does and what First Nations want and does are two very different topics;
- First Nations want to be dealt with honestly and with respect;
- Elders feel that the truth is hidden from them, especially by the government;
- government acts arbitrarily;
- encouraging fiduciary conflicts - negotiating deals with resource extraction;
- the Indian Act still confines First Nations, and First Nations cannot move forward on development;
- the Indian Act itself breaches fiduciary;
- the term (fiduciary) implies incompetency and the government as our keeper which continues to insult our intelligence, especially with respect to past and current abuses/injustices;
- fiduciary responsibility has caused over-cautiousness which limits what they can do with or without an agreement;
- definition of the obligation does not translate when providing basic services;
- fiduciary = poverty and forced assimilation, i.e. housing programs so limited that people have to move off-reserve;
- LTS will still not provide for full control; who drafts legislation?;
- the federal government says "prove to me that we have a duty"; this should not be the case;
- the federal government is seen as off-loading responsibilities with administrative transfers;
- First Nations and the Crown historically respected each other's sovereignty through sharing, now there is no sharing;
- need to develop the concept of "equal partnership";

- need for in-depth consultation;
- government continues to decide what direction to take without First Nations input;
- Government does not want to recognize rights and obligations;
- First Nations people want message sent to DIAND;
- the federal government wants to get out of their fiduciary obligation;
- there is a sense of frustration, and a need to push government to live up to its fiduciary obligations;
- the federal government has not listened to First Nations;
- Government policy has not changed, there are no First Nations sitting in positions of power/decision-making at INAC or within the federal government;
- government says that they want to co-manage with First Nations, they have not proven that they can take care of the land themselves; i.e. uranium mining in the NWT during the 30's and 40's - the whole area is "hot" due to uranium being dropped all over the area;
- control = responsibility;
- INAC structure leads to conflict;
- discrepancy between on and off-reserve First Nations and their access to services and programs.

Questions relating to the Relationship

- policy changes are constant, how does this relate to fiduciary?;
- can we update the fiduciary relationship in a way that does not impinge upon either party (Feds./First Nations)?;
- do you think fiduciary contributes to or encourages continued dependency by First Nations on the government?;
- can Canada exonerate itself from the fiduciary responsibility towards the Aboriginal population of Canada?;
- what can be done to improve or eliminate problems and situations that are not just/fair in today's reality?;
- do governments want to negotiate away their obligations?.

Trust and Responsibility

The issue of trust and its meaning within the fiduciary relationship was discussed and the following comments were mentioned regarding it:

- A participant stated that responsibility is not the issue, that it is accountability back to First Nations. It was mentioned more than once that trust between the government and First Nations does not exist due to past injustices committed by the federal government,

many of which have never been compensated for or acknowledged by the government;

- First Nations shared with the newcomers to this land and they continue to benefit from this land. It is time to make them live up to and honour their obligations.

Issue of Partnership

The issue of partnership was brought up on several occasions, mainly in regards to the definition of “partnership” and what it will entail. This is illustrated by the following comments:

- DIAND should have the Department of Justice write a legal opinion on what exactly “partnership” is;
- as a term, partnership, involves certain legal elements and meanings and these need to be considered and clarified;
- when you talk about fiduciary you are talking about a relationship;
- initially, the name of this initiative was called the “partnership initiative” but the Chiefs did not feel that a partnership existed, it was then changed to the “joint initiative”;
- there has to be a willingness and desire to seek and establish a partnership (both parties have to want this) - honour, respect, trust and integrity are in the First Nations genes and these qualities do not exist in today’s reality. We have a 500 year history of not being dealt with honestly and respectfully;
- government to clarify the meaning of “partnership”.

Questions on Partnership

- the question of “how do you get to a partnership and still maintain the Crown’s commitment to Aboriginal people?”;
- how do you balance “partnership” and “fiduciary”?;
- when looking at “trust” and “trustee”, “fiduciary”, “partnership”, which is the strongest word? Is the use of fiduciary, a softening of the language where nothing has really changed? Partnership should be the strongest word. It is up to First Nations to strike the balance and strive for an equal partnership;
- if the partnership agreed to in the past worked, what made it work?.

First Nations Access to Information

It was pointed out that when First Nations try to get lands records from INAC it is a major problem. The following were suggested as mechanisms for change:

- 1) accessing information;
- 2) accessing funding.

It was mentioned that the AFN is working on the issue of access to information.

Fiduciary and the Link to the Treaties

The issue of how fiduciary is linked to the treaties was a widespread consideration for many think tank participant's. Opinions on the topic were offered and requests for clarification were noted. Many felt that this particular issue is a fundamental one. The following comments were mentioned:

- you cannot separate treaty, fiduciary and relationship;
- discussion on relationships should have treaty as a foundation;
- starting from the basis of a sacred relationship amongst races in order to co-exist;
- treaty attempted to define the relationship of First Nations and others for co-existence;
- the government is afraid to reference the treaties because they mean a lot to us and not to them;
- treaty process and need to develop new relationships - provincially or federally, re: fear of off-loading;
- basis of treaties not being implemented - a marginalization of our treaty relationships, we need to get to the truth of the matter;
- fiduciary must respect and protect the treaty relationship;
- treaties are one-sided according to government interpretation, and First Nations are not respected for their interpretation or implementation;
- any relationship will be based on treaty through respect and should be the basis of decisions and relations;
- not taking First Nations perspective into consideration as it relates to the treaty Relationship;
- the Crown has to fulfill treaty obligations when they are clear;
- there is an obligation to uphold and recognize treaty rights;
- comment was made by another participant that they want to see the development of fiduciary issues from the treaty perspective;
- the higher moral understanding of the treaties that exists within the First Nations does not exist within the government;
- something that goes back to the treaty relationship, specifically how First Nations see the treaties is how it is supposed to be. It has to start with the treaty obligations and from that everything else flows.
- the Crown's responsibility to protect treaty and Aboriginal Rights and the obligations that flow from those treaties.
- the "trust" and "trustee" relationship was a good way to establish assimilation practices. The decline in the respect for our treaties led to the White Paper. The government saw their actions as perhaps being liable. The demeaning language has now been removed and fiduciary becomes a limiting tool, in terms of limiting their responsibilities. Process is related to the reduction of liability.

- our treaty was signed before Alberta was born. Are their existing papers that examine the provincial fiduciary? Does the formation of a province impact on the fiduciary responsibilities, flowing from treaties? The purpose of the treaty was to free up lands for transfer to the provinces. While peace treaties were signed to work together the legal documents were in fact secession documents. The treaty interpretation is the fiduciary interpretation. There are obligations to ensure the partners have equal benefit from the fruits of the land;
- there are many interpretations of the treaties. The “spirit and intent” is not considered. If the Crown has the fiduciary duty, they should look after the rights of all Aboriginal people. Treaty 8 goes beyond the reserve boundaries. We were to continue to live as if we never entered into treaty.
- How does fiduciary relate to treaty? It was mentioned that fiduciary is used as a tool in court to point out First Nations discrepancies in the partnership. A participant asked “how do we take agreements and bring them up to the Treaty status?”

The Fiduciary and Self-Government

Another issue that was consistently mentioned was the link between the fiduciary relationship and self-government, and how they impact upon one another. The following comments illustrate some of the discussion on this issue:

- do not accept the theory that Canada can grant self-government to First Nations when the right is already held by First Nations;
- not all First Nations have agreed to come under the Constitution Act of Canada;
- if the Royal Proclamation of 1763 recognized “Nations” how then can First Nations come under the control of Canada without their consent? What is the nature of this consent?
- what are the sources of fiduciary? - Royal Proclamation, 1763 recognized “nation-to-nation”;
- traditional forms of government have to be recognized by the federal government, with an attempt to accommodate those other forms of government;
- there must be a recovery of our values, cultures and society, including governments;
- Canada must apply international standards for the recovery of First Nations governments and societies;
- First Nation Control: Resources, all services/programs, and LTS (Bands can opt in or opt out);
- the government is responsible for the rights and title of First Nations. If it is taken away we must be sovereign nations;
- treaties do not reflect the true intent of First Nations. Fiduciary is not limited to the Guerin and Sparrow cases, that comes from the treaties. The federal government is following a plan to reduce their obligation to First Nations through the self-government process. Canada has a fiduciary obligation to encourage, finance and maintain Aboriginal self-government. Failure to act will be a violation of the federal government fiduciary

- responsibility;
- do we want sovereignty or the continuation of the fiduciary relationship?.

The Impact of Fiduciary on Lands and Resources

Much of the discussion on the fiduciary obligation involved the issue of lands and resources. The following points outline specific issues mentioned in relation to lands and resources and how they are affected by fiduciary:

- how does fiduciary relate to Indian Oil and Gas?;
- clarity needed on title to land;
- land selection process an issue;
- the recognition of Aboriginal title.

Famous land court cases were discussed as examples of the ways that the federal government has not fulfilled its obligations to First Nations.

For example:

- diamond mining in the Northwest Territories. Interested parties are “staking claim” to land and not consulting First Nations. Corporations are told to negotiate with the federal government because it is their land. First Nations are outraged that this is occurring. Participants felt that Chiefs and First Nations leadership need to take a more “pro-active” stance in these matters;
- the Department of Fisheries and Oceans was mentioned as an additional example. Specifically the policy on relocation of Salmon. Salmon stocks continue to decline, yet the federal government is negotiating 50% of the stock to the United States. This directly affects First Nations ability to fish and compete. It was stated that despite the Sparrow decision all appeals to the Minister have fallen on deaf ear;
- another example indicative of the problems First Nations encounter with government and government policy - a land claim agreement signed 6-7 years ago which is considered a constitutional document is still subject to government policy (Additions to Reserves policy). A policy which was implemented after the land claim agreement. A policy that First Nations did not ask for and were not involved in drafting.

Fiduciary in Practice

Discussion regarding how fiduciary functions in daily practice was considered.

- description of a court case within Treaty 6, involving hunting and fishing rights and how the government has eroded the First Nations right to hunt and fish. The federal government position is that the treaty right was extinguished as a result of the National Resource Transfer Agreement (NRTA). He asked the group “where is the fiduciary

obligation when the Crown's role has been adversarial?". No fiduciary role is evident in this particular case and does not see it in his experience

Provincial Government's Involvement in Fiduciary

The issue of the role of the provincial government as it relates to fiduciary was discussed during the think tank. The following comments were made on this topic:

- living in Quebec, we live daily under provincial guidelines. Does the government give more to the province in the transfer of health and education responsibilities? Does the federal government give more responsibility to the provinces than First Nations?;
- provincial governments have impacted on the delivery of specific programs and therefore on the fiduciary relationship. The federal government signed treaties and then transferred the lands and the stewardship along with it. Municipalities are also involved;
- no further transfer of power to provinces, power should be transferred directly to First Nations.

First Nations Capacity Building

The think tank participants discussed the issue of capacity building and how it relates to fiduciary. The participants recognized the need for further capacity building within First Nations and the government role in providing the necessary resources to promote and facilitate capacity building within First Nations. The following points expand upon the discussion on capacity building:

- need to give First Nations access to resources so they will not be dependent on government;
- adequate resources are necessary;
- First Nations must be economically viable before they take over responsibilities;
- The Indian Resource Council is presently involved in activities where fiduciary issues are predominant. It was mentioned that we have to build the capacity to control the administration and management of Indian oil and gas resources. When First Nations Bands want to progress they run into a dilemma. The more you take over your own affairs the more you reduce the fiduciary responsibility of the Crown;
- fiduciary is a recent word - changed from trust and responsibility to a new title to define the relationship. Need to understand the words used before and what we use now. Presentations this morning lacked the relationship with people. How does it apply to our daily lives. Need to balance the realities within the new relationship. What brought this commitment into existence?. Have to know how things are structured and how they relate to the Crown. If they do not understand our perspective how can we move forward? Who is Gathering Strength?, the Department or the First Nations?. Recommendations come from our people and should go back to the people;

- First Nations communities have to get stronger. It was mentioned that we, as First Nations, have to put ourselves in a position to get things done. Past injustices must also be addressed and compensated for;
- the National Chief encouraged First Nations not too be so territorial. Need to collectively resolve issues of our relationship between the Crown and First Nations. It was stated that everything stems from that relationship. The need for education and a change of attitude was recognized. It was noted that change has to come from within;
- the point that the government has not shown First Nations respect was mentioned by several participants. Also the opportunity for First Nations to make change as they enter the new millennium was noted.
- the statement was made that First Nations cannot be expected to impulsively enter into a new relationship when it was just recently that the Minister apologized to the First Nations people.

The Dilemma of Increased First Nations Control and the Reduction of Government Fiduciary Obligation

Another fundamental issue discussed at some length involved the dilemma First Nations face, which is the reduction or an altering of the Crown's fiduciary obligation as a result of First Nations gaining greater control and making progress in different areas. The following points expand upon this issue:

- it was mentioned that when agreements are signed the nature of the fiduciary is altered. The fiduciary obligation remains, but takes on a different role. The example of an administrative transfer was given. The fiduciary obligation is no longer the administration of the program but one of funding and ensuring capacity;
- a participant mentioned that as his First Nation progressed within the pilot process the fiduciary obligation changed. It was concluded that the fiduciary duty was to support the capacity to administer the programs. It was noted that First Nations have to develop their own methods of delivery and then hold the government responsible to maintain the capacity;
- Addressing the on-going dilemma First Nations face when they take more control resulting in the nature of the fiduciary obligation changing or being reduced. Why does the fiduciary obligation decrease? Is this necessary or justifiable?.

Aboriginal Culture

The following points were mentioned to explain how fiduciary duty is related to the maintenance of Aboriginal culture:

- loss of language which reflects our values and principles;
- we are losing our land and lost it because of our empathy for mankind;

- teach in our language (Mohawk) in order to transfer to the young people our principles;
- our world view is unique;
- even the issue of reclaiming land for ourselves is a part of their system, not necessarily ours ...dilemma remains;
- what is traditional?;
- we need an Aboriginal perspective;
- we need to control our own land base, control over language and teachings;
- traditional leadership, not Indian Act Chiefs, are directed by our clan mothers who are the decision-makers;
- accept our principle of ownership;
- we have a responsibility to preserve/protect languages, culture - which is part of the federal government's fiduciary duty;
- laws of traditional territories need to be developed that have been passed down through generations;
- requires judges to understand our history, culture and way of life;
- there is no respect by the government for traditional laws and how they are applied within the traditional territories;
- as a people we have to be observant of our history.

Relationship of Fiduciary and International Law

The suggestion was made that First Nations in Canada should pay close attention to international law cases and decisions, and how they impact upon First Nations in Canada. Also to be cognizant of the fact that decisions made regarding First Nations in Canada may affect and impact upon indigenous peoples throughout the world. The following comments were offered:

- clarification on what exactly the fiduciary responsibility is in the context of international law and treaty relationships with the Crown (Canada);
- what we decide upon eventually may affect other indigenous peoples of the world.

Human Rights

- The issue of human rights must be examined and included in discussions. Consider what has been occurring and decided internationally and how it applies in Canada.

Identification of Mechanisms for Resolving Disputes Outside of the Court System

There was discussion on exploring options as possible alternatives to pursuing claims through the courts and to involve traditional law whenever possible.

The following points were mentioned which expand upon this discussion:

- find creative ways to address the issues from a traditional point of view;
- problem-solving mechanisms outside of courts;
- having the courts determine the scope of the fiduciary duty is not the most appropriate option; why should it be the only option?;
- government can design grey area where fiduciary does not apply and close in on our rights, i.e. tax interpretation;
- how can you balance a fiduciary obligation and the public interest?; If it gets down to this, we get into a battle of semantics;
- it was noted that for many First Nations it is a “scary” prospect to pursue litigation as the means to settle issues relating to fiduciary. Discussion involved participants considering other options in attempting to define the fiduciary obligation in the courts. It was suggested that an analysis of fiduciary should result in possible mechanisms that will clarify the fiduciary obligation and identify the federal government perspective where first Nations have taken control.

It was emphasized that First Nations communities must be consulted and involved in the process of attempting to define and clarify the fiduciary obligation, as they are the party directly affected by it.

Possible Solutions

The following comments were mentioned by the meeting participants as potential solutions or alternative methods of dealing with or examining issues related to the fiduciary duty:

- provide resources to First Nations and remove structural infringements by outside governments;
- separation of service delivery from fiduciary;
- must move beyond the fear of change i.e. Indian Act amendments, etc;
- do we need to be locked into the current terminology or is there another method of describing our co-existence?;
- develop an overall strategy to advance cases that may benefit us;
- need to see the “big picture” and how it all fits;
- range of fiduciary and its impacts needs to be defined, understood and agreed to as it’s applied;
- regardless of policy, government should respect wishes of the community;
- new arrangements need to enhance the historic relationship;
- need to push 3rd order of government;
- governments have a responsibility to do no more damage. Whether they can protect Aboriginal rights while sitting in a position of conflict is an issue. The Indigenous Bar Association has suggested an Attorney General specific to the protection of Section 35. If

- we agree that there is an irreconcilable conflict of interest and if Section 35 rights are as important as Section 91 and 92, should they not have the same protection?;
- the suggestion was made to establish a litigation fund to assist First Nations in meeting the challenge if they find themselves in court as a result of a breach on the part of the government;
 - have the Governor General sign agreements with First Nations as a sign of change and new obligations continued by the Crown;
 - need to settle the arguments in our own minds first (First Nations) and then we can proceed;
 - the establishment of legislated standards regarding the management of trust funds, as are in place in the United States and internationally;
 - Trust Funds, Indian Monies and treaty payments are managed by the government, within the Consolidated Revenues Fund. As a result the government collects resources and they remain in the government's accounts. This is a conflict of interest. It was mentioned that First Nations come up with ways to manage these things for themselves to make money grow at the community level (ie. First Nations bank, First Nations Insurance and Peace Hills Trust).
 - Saskatchewan has the "treaty land entitlement", which not everyone agrees with - however, it is based on treaty and deals with the ATR policy. It includes a process to deal with third party interests (i.e. municipalities) and involves a negotiated compensation package (negotiated by First Nation's that signed on and the province);
 - many say that it has not stood up enough in the area of third party interests;
 - only apparent alternative is to sit down and try to work through the issues and come to an agreement;
 - The question was asked "What can be done today, realistically?"; It was suggested that little steps can be taken to "start" stopping the way things are and that it cannot be stopped overnight;
 - i.e. the Union of Ontario Indians purchased stocks in Noranda, not as an investment but as a "tool";
 - The establishment of an independent Auditor General was suggested in order to monitor disagreements regarding fiduciary and specific to Section 35. The point was made that the government is seen as in conflict in terms of attempting to resolve disagreements over fiduciary obligations and responsibilities;
 - First Nations need to speak with one voice - this will be difficult, but we must move beyond our own individual/group priorities.

Elder's Comments

The following include some of the comments offered by the Elders during the two day session:

- keep in mind the importance of the quality of life at the grassroots or community level;
- the need to ensure that the discussions will make sense at the grassroots level and that the

- support of our communities is needed. Friendship and communications amongst ourselves is very important. People want to know where we are heading;
- the voice of First Nations youth also should be heard;
- the discussions were difficult to understand as the language involved alot of legal terminology and concepts, rather than explanations being offered in plain language;
- the importance of education for First Nations in order to learn to deal with the government on equal-footing;
- the need for the government to “honour the promises of the past”;
- suggestion that group participants be seated in a circle as is First Nations custom;
- the legal system is foreign to our people and a philosophy of life that is foreign;
- First Nations cannot be without the entities that are out in nature (plants, sky, birds, etc.);
- we are responsible to the next 7 generations;
- responsibility to inform our people in a way that they understand;
- continue to involve the people in the things that concern them;
- First Nations should continue to live close to mother earth. We should look at this from the perspective of our continued survival;
- we have to take the government to task on their policies that are strangling our communities. Without being adversarial, we have to speak honestly;
- agreements are being signed between federal and provincial governments that affect our lives and we are not consulted. There is a lot of work to be done. We have to live by the spirit of our treaties. Our minds will not be changed by governmental agreements;
- our education is a tool, that we should not fear. First Nations always have to ask permission. We always seem to ask someone if it is O.K. to do this or that;
- any agreement with the federal or provincial government should be signed by the Prime Minister or first ministers of provinces. How many chiefs or leaders have been invited to sit at the federal-provincial agreements? None;
- agreements must be based on treaties. What is the role of INAC ? Advocate? Advisory? Who speaks for the Crown? What role will aboriginals play in resources that cross boundaries;
- fiduciary responsibility must continue and even be increased.

Closing

Justice Reid thanked the participants for their attendance and efforts in trying to work through a complex and difficult topic area. Elder Martin Assinewe closed the think tank meeting with a prayer.