

For Treaty peoples or First Nations, the unilateral imposition of the *Indian Act*, including the residential school system, represents a fundamental breach of the Crown's Treaty obligations and fiduciary duty to deal with them honourably in both principle and practice.

The Crown's position as a fiduciary with regard to Aboriginal peoples is clearly a complicated and potentially conflicting area of legal obligation. As a fiduciary, the Crown, through the Government of Canada, has a legal obligation to act in the best interests of Aboriginal people to whom it owes a fiduciary obligation. This is the same case for the Bureau of Indian Affairs in the United States, which is commonly referred to as a "Trustee." As a trustee, the Bureau of Indian Affairs has a similar obligation to act in the best interests of Native Americans, and to ensure that other government departments do not act in a manner that contravenes tribal rights and interests or the government's lawful obligations. In the United States, the Solicitor's Opinions issued from time to time by the Department of the Interior, which has authority over the Bureau of Indian Affairs, are used to give direction to government generally as well as to explain and justify government action. In Canada, it must be recognized that the federal Department of Justice has two important, and potentially conflicting, roles when it comes to Aboriginal peoples:

- 1) The Department of Justice Canada provides legal opinions to the Department of Aboriginal Affairs and Northern Development Canada (AANDC) to guide the department in its policy development, legislative initiatives, and actions. Those opinions, and the actions based on them, invariably affect Aboriginal governments and the lives of Aboriginal people significantly. Often, those opinions are about the scope and extent of Aboriginal and Treaty rights, and often they form the basis upon which federal Aboriginal policy is developed and enacted.
- 2) Justice Canada also acts as the legal advocate for AANDC and the government in legal disputes between the government and Aboriginal people. In that capacity, it takes instruction from senior officials within the Department of Aboriginal Affairs when the department is implicated in legal actions concerning its responsibilities. It gives advice about the conduct of litigation, the legal position to be advanced, the implementation of legal strategy, and the decision whether to appeal a particular court ruling.

Upholding the honour of the Crown, and disputing a legal challenge to an official's or department's action or decision, can sometimes give rise to conflicting legal obligations.

In the Commission's view, those legal opinions should be available, as of right and upon request, to Aboriginal peoples, for whom the Crown is a fiduciary. Canadian governments and their law departments have a responsibility to discontinue acting as though they are in an adversarial relationship with Aboriginal peoples and to start acting as true fiduciaries. Canada's Department of Justice must be more transparent and accountable to Aboriginal peoples; this includes sharing their legal opinions on Aboriginal rights. As noted above, there is precedent for making this change. Not only has the United States Department of