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**FIDUCIARY DUTIES
Obligations of Loyalty and Faithfulness**

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What's New in this Update:

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

- **Fiduciary Per Se Relationships — Caretaker Roles — The Crown — Honour of the Crown — A Duty to Consult Prior to Enforcement —**
The most fundamental aspect of the appeal was whether a duty of enforcement consultation exists in law and in the circumstances of the case. Justice Gogan concluded that the duty to consult remains available to uphold the honour of the Crown if required to further the goal of reconciliation. What is required is dictated by the circumstances. The AFS Agreement contemplated enforcement of terms and prosecution for contravention of the communal licence. However, the charges against Martin and Googoo, and the evidence around this

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issue at trial, revealed uncertainties or misconceptions around this part of the Agreement. Enforcement had not been the focus of the contractual or broader relationship up to that point in time. In Justice Gogan's view, this exemplified the need for ongoing consultation. Any overriding or persisting issues could be resolved in the ongoing annual negotiations. There was no question that the interim nature of the AFS Agreements underscored the fact that the parties remained in an ongoing and evolving relationship. However, on the basis of fresh evidence, Justice Gogan concluded that adequate notice was given to Waycobah of Martin and Googoo's breach of the terms of the Communal Fishing License. Feedback was invited. No response was provided before the decision to charge. The duty to consult was discharged. Justice Gogan stopped short of endorsing enforcement consultation as a general concept. Given that the honour of the Crown is always at stake in dealings with Aboriginal peoples, such cases will demand an assessment of whether a duty to consult arises, and if so, what it entails in the circumstances. In the context of this assessment, technical and administrative defences are to be discouraged. The ultimate goal of reconciliation should be the focus and a prospective approach is encouraged: *R. v. Martin*, 2018 CarswellNS 462, 2018 NSSC 141 (N.S.S.C.).

- **Remedies for Fiduciary Breach — Personal Remedies — Accounting of Profits** — The trial judge concluded that Warrack was liable for theft of a corporate opportunity. As director of Metalworks, Warrack owed a duty of loyalty and good faith to Metalworks, and to advance Metalworks' best interests. Specifically, he was under a duty not to usurp or divert a maturing business opportunity of the company to himself or another party with which he is associated. The opportunity was offered to Metalworks as an existing tenant. Metalworks' name was on the original purchase agreement. The building was integrally related to Metalworks' business i.e. buying its own premises. Metalworks made no informed rejection of this opportunity. Warrack must therefore account for the profits obtained from the transaction of \$802,000: *Metalworks Canada Ltd. v. Warrack*, 2018 CarswellAlta 1136, 2018 ABQB 443 (Alta. Q.B.).