

A FIDUCIARY THEORY FOR THE REVIEW OF ABORIGINAL RIGHTS

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ABSTRACT

This thesis takes as its focus R. v. Guerin, [1984] 2 S.C.R. 335 and seeks to assess its possibilities as the source of a legal principle to guide the constitutional review of the aboriginal and treaty rights protected by s. 35 of the Constitution Act, 1982.

In Chapter 1, the decision and the commentary to which it gave rise is discussed. Chapter 2 reviews the history of the law of aboriginal rights with a particular focus on the Indian law of the United States. Chapter 3 reviews Canadian Native law with a particular stress on the trust obligation. In Chapter 4 the language of trusts is reviewed and the influence of International law is canvassed. After a brief discussion of fiduciary law, the chapter closes with a suggested basis for a constitutional fiduciary principle. Chapter 5 opens with a discussion of s. 35 of the Constitution Act, 1982. The theory is then proposed.

The theory would find its origin in the common law recognition of the pre-contact sovereignty of the aboriginal peoples and its denial by the colonizing nation at the time of colonization. The assumption of legislative power by the Crown came with an obligation, acknowledged by the Crown, that it must use its legislative power so as to protect and promote the interests of the aboriginal peoples in order to assist them through the process of colonization. It is suggested that s. 35 of the Constitution Act, 1982 may have made that obligation justiciable and may require the courts to check the exercise of its legislative power to make certain that any negative effect on the aboriginal peoples is justified. The standard, being a fiduciary one, would be high.

The thesis closes with an application of the theory to some past and present issues in Native law.

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INTRODUCTION

In December 1984 the Supreme Court of Canada delivered its long awaited decision in Guerin v. The Queen.¹ The Court held that the Crown owed the Musqueam Indian Band a fiduciary duty in relation to surrenders of reserve lands.² The language of the case indicates strongly that the case was intended to operate as a general rule covering all Indian Act surrenders. The duty, which could be varied in any particular case, was one which required the Crown, when leasing the surrendered lands, to act in the best interests of the Band. The three opinions handed down all gave extensive justification for the particular duty which they held the Crown owed the Indians.

In March of 1985, the Federal Court of Appeal held that the federal government owed a fiduciary obligation to the Penticton Indian Band which was not breached when they acted against the interests of the Band in expropriating reserve lands for use as an airfield in wartime.³ The expropriation was held not to be a breach of duty because the government was merely balancing the "competing considerations"⁴ pertinent to Departments with different mandates. The government was permitted balance its duty to the Indians against the requirements of the Department of National Defence. In reaching this opinion for the majority, Urie J. gave no reasoned analysis on how the courts, and more importantly the Bands, might judge the balancing process. He offered only proof that the different interests

had been considered. The provisions of the Constitution Act, 1982, it should be noted, were relevant to neither of these cases.

In August of 1988, the Ontario Court of Appeal held that although the Treaty right to fish of the Batchawana Indian Band had not been extinguished and was, consequently, constitutionally protected, it could nevertheless be derogated from by regulation validly aimed at the conservation of the fish stocks.⁵ The argument of Blair J.A. for the Court, is comparable to that of Urie J. in the Federal Court of Appeal three years earlier. He states:

Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others. This is recognized in s. 1 of the Canadian Charter of Rights and Freedoms which provides that the limitation of Charter rights must be justified as reasonable in a free and democratic society. In the United States the rights proclaimed by the Bill of Rights are not qualified by a provision similar to s. 1 of the Charter, yet they have been subjected nevertheless, to reasonable limitation by judicial decisions.

The test of reasonableness has been applied to Indian treaty and aboriginal rights.⁶

Finding the impugned licensing provisions to be reasonably aimed at conservation, Blair dismissed the appeal. In doing so, like Urie before him, he offered no principled theory for balancing the competing interests: the rights of the Indians, the need for conservation, and the rights of the commercial fisherman and of the general public.

What these cases amount to, and there are others which follow a similar pattern, is an acceptance by the courts of the opinion of the relevant department of the Crown regarding the weight to be given to the now constitutionally protected

rights of the First Nations. That, it is suggested, is not acceptable. I do not suggest here that aboriginal and treaty rights should be allowed to override all competing interests. I suggest that the courts should take a more principled and active role in the protection of those rights. Without that, the constitutional entrenchment of aboriginal and treaty rights will have been an empty exercise. It is not enough simply to check that the Crown took the aboriginal interest into account. The courts, it is suggested, must make certain also that the balancing was properly carried out and must do so in a principled way. I suggest here that the opinion in Guerin of Mr. Justice Dickson,⁷ as he then was, might provide the basis for principled review of that balancing.

The Guerin decision was one of the first Native law cases considered by the Supreme Court of Canada after the constitutional entrenchment of aboriginal and treaty rights. And although it concerned only the protection of Indian Act reserve lands, Dickson, with three of the eight judges deciding, handed down an opinion which dealt with the issue in a very broad manner.⁸ The opinion of Madame Justice Wilson, with two other members of the Court, seemed to support the general tenor of Dickson's opinion.⁹ It is suggested here that the Court was offering an indication of how it was predisposed to interpret the constitutionally protected Indian rights.

The analysis of Dickson's opinion offered here suggests that the fiduciary obligation recognized in Guerin contains five elements. The duty originates in the Band's interest in their reserve land coupled with the fact that the Band can

surrender its interest only to the Crown. The third element is a legislative scheme which invites the scrutiny of the courts. That is provided by the Indian Act and its delegation, to the Governor in Council, of a discretion in relation to land surrenders. The purpose of the duty, the fourth element, is found in the protective role of the Crown, recognized throughout Indian/European and Indian/Canadian relations, and which is codified in the provisions of the Royal Proclamation of 1763¹⁰ and the Indian Act.¹¹ Finally, the law of fiduciaries provides a principle to connect the above elements, one which can guide the courts in their checking of the actions of the government. The obligation, of course, is intended to protect the Indian land rights.

The theory suggested here would go further than protecting land rights. It would provide a minimum standard for the interpretation of s.35 rights. I would suggest that the interests recognized in the Guerin case are inevitably limited by the facts of the case itself. So, consequently, is the law. Guerin is limited to land issues. But the recognition of land rights is only one element in the field of aboriginal rights. The special status of the aboriginal peoples as peoples, as the First Nations in today's parlance, is, it is suggested, the essential aboriginal and treaty right. A general theory, if it is to be useful, must be relevant to the implications of this special status. Dickson's opinion, I suggest, might contain the germ of such a general theory.

The protection of rights in land, I suggest, is merely the result of the recognition of special status. They seem to be the premier aboriginal right only because they are the first to come to court. Recognition of the land right implies

special status. The Constitution Act, 1982, s. 35, it is suggested, entrenches the special status. A similar development can be discerned in the Indian law of the United States.¹² It is suggested that the recognition of the land right in Johnson v. McIntosh led inevitably to the recognition of a limited right to self-government in Worcester v. Georgia.¹³ I make no argument here about the right to self-government in Canadian Native law. I note it only because it represents the extreme recognition of special status.

The theory supporting a broader fiduciary obligation proposed here looks to the base of the elements recognized by Dickson in Guerin. The interest in land is only one aspect of the pre-contact relationship of the Indian Nations to their lands. It originates in, and is an element of, the pre-contact sovereignty of the Indian nations. The surrender requirement originates in the Doctrine of Discovery, the same principle which is at the root of United States Indian law. Integral to the Doctrine of Discovery is the special duty owed By the Crown to the Indian peoples. A general fiduciary duty would originate in these two elements.

Section 35 of the Constitution Act, 1982 invites the scrutiny by the courts of Crown action in relation to Indian matters. The fourth element, the purpose of the duty, since this is a constitutional theory, is provided by aboriginal rights sections of the new Constitution. A purposive analysis of s. 35 suggests that the purpose of the section is to provide the aboriginal peoples with a special status within Canada: a special status I have called a "measured separateness".¹⁴ The protective role of the Crown, I argue, is only one aspect of the duty of the Crown to Canada's aboriginal

peoples. Alongside and inextricably bound up with that duty is one to assist the First Nations to adjust to colonisation. Together these constitute a broader duty, called the trust obligation, which is at the heart of native law. I call it here the wardship to emphasize the duties it contains. It is a role that the government has actively assumed, albeit on occasion in a somewhat equivocal fashion. The connecting principle is, as it is in Guerin, provided by the law of fiduciaries.

The synthesis of these elements reveals, I argue, a theory which is well equipped to assist the courts in the determination of the content of s. 35 and in the balancing of those rights with the rights of others. It might serve also to suggest standards by which to judge the legislative and administrative actions of the Crown. A major problem for the aboriginal and treaty rights provisions of the Constitution is that the beneficiaries of those rights do not have sufficient political power to control their implementation. The aboriginal peoples make up between 2% and 5% of the Canadian electorate.¹⁵ Constitutional protection of their rights might counteract that imbalance.

In Chapter One, after a brief review of the Guerin decision, I note that the commentators have uniformly opined that the decision shows potential for developing Canadian Native law. However, none go on to develop a theory how that development might be sustained. Chapter Two opens with a discussion of the trust obligation from the earliest days of Spanish colonization to its entrenchment in the law of the United States. I make the argument here that the trust obligation is the central aspect of Native law and that it results from the denial of Indian sovereignty

by the colonizing European nations. The centrality of the trust obligation, I suggest, can be seen in both the Spanish colonial law and in the decisions of Chief Justice Marshall.

The chapter closes with a discussion of the trust obligation as it is found in the United States law today. I note that the trust obligation is in part only a moral obligation, and in part a set of enforceable legal duties. While the law is United States' law is well defined, it does not include any restriction on the legislative power of Congress. I note that some commentators favour such a restriction and that some intimate that such a limitation has been considered by the Supreme Court of the United States.

Chapter Three is devoted to a discussion of Canadian Native law. I note that the Canadian law mirrors that of the United States. In particular, it is shown that the trust obligation in Canada, a discussion of which occupies the majority of the chapter, is also part moral, and part legal. I argue that the legally enforceable trust obligation originates in the more general moral one, and that in fact, the legally enforceable form is a codification of certain aspects of the broader, unenforceable duty. I suggest that the broader duty is at the heart of Canadian Native law.

Chapter Four opens with a review of the law and language of trusts. I show that there is some precedent for holding the Crown to a trust obligation to its citizens, and that properly controlled, it might perform a valuable function in domestic law. I show, however, that it has been used to justify some very political decision-making on the part of the bench. This susceptibility represents a serious

danger. A review of the Native law trust and the International law trusteeship suggests that properly controlled, it can be a very useful concept.

It is suggested that a properly articulated purpose can control the public law fiduciary obligation. I then argue that the purpose of the trust obligation in Canadian law, like that of Spanish and United States law, is to compensate for the denial of sovereignty at the time of colonization. The Doctrine of Discovery and its denial of Indian sovereignty and of the right to have input into, or power over, the new governing regime, charged the colonial regimes with a duty to protect the Indian. The practice of the government, through both legislative and administrative arms, has been to protect the First Nations from the excesses of the colonists. It has also been, albeit rather half-heartedly much of the time, to assist their adjustment to the arrival of the European. This role, to both protect and promote, has informed and guided the Crown/Indian relationship and forms the backdrop against which s. 35 must be read. I have called it a wardship rather than a trust obligation in order to emphasize the positive duties it includes.

I close the chapter by suggesting that fiduciary law can support a concept which is designed, like the wardship, to both protect and promote a broad set of Indian interests. Such a theory need not be property-centred but can be centered upon power. A power-centered fiduciary rule can serve to protect less tangible interests such as Indianness and economic well-being.

Chapter Five opens with a discussion of the aboriginal rights provisions of the Constitution Act, 1982. A purposive analysis suggests that s. 35 entrenches the right

of the aboriginal peoples to a measure of separateness within Canada. The legislative power of the Crown vis a vis the First Nations while not ousted, has been limited so as to protect that measured separateness. The Crown, I argue, has a positive duty to protect the special status of the aboriginal peoples. Even so, the rights of the aboriginal peoples may have to be balanced against other rights. Furthermore, the obligations of the Crown to the First Nations may also have to be balanced against the Crown's other obligations. I argue that fiduciary law can channel that balancing.

I do not suggest any substantive content of s. 35. Substantive rights can only be dealt with in relation to specific groups of aboriginal peoples.¹⁶ The theory offered here allows a central role to the trust obligation and would require the Crown to preserve and support the special status of the aboriginal persons. I suggest that only such rights as are essential to the "measured separateness", essential that is to aboriginality, have been entrenched. The theory offered here would allow only such derogation from aboriginal rights as can be justified by the Crown. Finally, in order to illustrate the possible application of the theory, I apply the theory to three aboriginal rights issues. With that the thesis comes to a close.

The theory presented here, it is suggested, might provide for a principled review of governmental actions such as those in the two cases mentioned at the beginning of this introduction. At the very least, it might provide a principled equivalent to section 1 of the Charter for the aboriginal and treaty rights provisions of the new Constitution: An equivalent which would require the courts to check the

adequacy of the balancing of interests undertaken by the Crown in its governance of Canada. Finally, it might provide a standard, or a method of determining the standard, by which the actions of government might be judged: A standard which, to address the nightmare of equity, will not vary with the Chancellor's foot.

NOTES

1. Guerin et al. v. The Queen, [1984] 2 S.C.R. 335; 13 D.L.R. (4th) 321; 55 N.R. 161; [1984] 6 W.W.R. 481; 59 B.C.L.R. 301; [1985] 1 C.N.L.R. 120 (S.C.C.) reversing [1983] 2 F.C. 656; 143 D.L.R.(3d) 416; 45 N.R. 181; [1983] 2 W.W.R. 686; 13 E.T.R. 245; [1983] 1 C.N.L.R. 20 (C.A.) which reversed [1982] F.C. 385; 10 E.T.R. 1; [1982] 2 C.N.L.R. 83 (T.D.). All cites are to W.W.R.
2. The three opinions handed down differed on the nature of the duty, see infra c.1.
3. Kruger et al. v. The Queen (1985), 17 D.L.R. (4th) 591, [1985] 3 C.N.L.R. 15 (F.C.A.), Heald J., dissenting on the point.
4. ibid., C.N.L.R. 51.
5. R. v. Agawa (1988), 65 O.R. (2d) 505, [1988] 3 C.N.L.R. 73 (Ont C.A.). The rule is applied from Sparrow v. The Queen (1986), 9 B.C.L.R. (2d) 300, [1987] 1 C.N.L.R. 145 (B.C.C.A.) which is discussed infra, c. 5.
6. ibid., 89/90.
7. Mr. Justice Dickson was became Chief Justice in 1985 after the Guerin decision was handed down. I shall, for the sake of consistency, for the most part refer to him by his present title.
8. I make this point in Chapter 1, infra.
9. While Wilson held that the particular relationship in the Guerin case was a true trust, she speaks of a "general fiduciary obligation" recognized by the Indian Act which crystallizes upon surrender into a full blown trust. See infra.
10. Royal Proclamation of 1763, R.S.C. 1985, Appendix II, No. 1.
11. See for example, Indian Act, R.S.C. 1985, c. I-5, s. 18.
12. Such an argument is made in C.F. Wilkinson American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy (New Haven & London: Yale University Press, 1987). See infra .

13. Johnson and Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823); Worcester v. Georgia, 31 U.S. (6 Pet.) 535, 8 L.Ed. 483 (1832). See also: G.S. Lester, The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument, (J.S.D. thesis, York University, Toronto, 1981) [unpublished]; G.S. Lester Aboriginal Land Rights: Some Notes on the Historiography of English Claims in North America (Ottawa: Canadian Arctic Resources Committee, 1988). And see infra .

14. The phrase is from Wilkinson, supra note 12, 14-19.

15. Due to the difficulty in determining the number of Metis persons the figure is approximate. Frideres suggests the higher figure: J.S. Frideres, Native People in Canada: Contemporary Conflicts, 2nd Ed. (Scarborough: Prentice-Hall Canada Inc., 1983), 10. Jackson suggests the lower figure: M. Jackson, "Locking Up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release" unpublished, 1988.

16. Kruger and Manuel v. The Queen, [1978] 1 S.C.R. 104; 75 D.L.R. (3d) 434; [1977] 4 W.W.R. 300.

CHAPTER 1

ANTICIPATING THE CONSTITUTION: R. v. GUERIN

R. v. Guerin¹ was the first case considered by the Supreme Court of Canada after the coming into force of the Constitution Act, 1982.² The aboriginal rights provisions of the Constitution are vague. The major provision can be found in s. 35. It reads:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

35(2) In this Act, "aboriginal peoples of Canada" includes Indian, Inuit and Metis peoples of Canada.

Section 52 protects these rights. It reads:

52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

Case law since the decision in Guerin has to some extent fleshed out the force and content of these provisions, but there is still not any really consistent theory informing aboriginal rights in Canada.

Guerin itself predated the enactment and did not, consequently, raise any issues regarding the interpretation of the new Constitution. Nevertheless, I suggest here that the case, and in particular the opinion of Mr. Justice Dickson, as he then was, might provide the basis for a theory for the constitutional protection of

aboriginal rights in Canada. It seems very likely that the interpretation of the new provisions of the Constitution would have been very much in the minds of the Justices as they grappled with the Guerin case. I am encouraged in this opinion by the broadness of the decision of Mr. Justice Dickson, as he then was. Further support for such a proposition might be found in some of the decisions and opinions handed down by the now Chief Justice during his years on the bench.

Dickson could be characterized as a systematizer in law. He has, of course, been a major force in the interpretation of the Canadian Charter of Rights and Freedoms.³ He was instrumental in developing the doctrine of fairness in administrative law.⁴ He was also at the court when the modern constructive trust was created in the Murdoch and Rathwell cases.⁵ In the area of Native law he attempted, in Jack v. The Queen, to create some order and fairness in the interpretation of Indian fishing rights in British Columbia by suggesting constitutional protection of a priority for the Indian food fishery over concerns other than conservation.⁶ More importantly, in the Simon and Nowegijick cases,⁷ he has set the standard for the interpretation of the Canadian treaties with the Indian Nations. I suggest here that with his opinion in Guerin, it is possible to begin a reassessment of the underlying basis of aboriginal rights in Canada. Clearly, with their constitutional protection, such a reassessment is not out of order.

a The Guerin Decision

The decision in Guerin, in particular that of Mr. Justice, now Chief Justice,

Dickson, is much broader than the case seems to have required. A decision could have been reached considering only the provisions and effect of the Indian Act⁸ and the particular facts in the case itself. Instead, both Dickson and Madam Justice Wilson, speaking between them for seven of the eight justices then active in the court, discussed the nature of the relationship of the Indians to both the land and the government.

The case itself concerns the surrender and subsequent leasing of a part of the Musqueam band reserve in Vancouver. The band leaders and the representative of the Federal government reached an oral agreement as to the terms for leasing 162 acres of the reserve to the Shaughnessy Heights Golf Club. The band then surrendered the land pursuant to the terms of the Indian Act⁹ leaving the government to complete the lease as arranged. The government later leased the land to the Golf Club on terms materially different from, and deficient to, those agreed to with the band.¹⁰ The written terms of the surrender made no reference to the oral agreement with the band but stated only, in relation to the government's obligation to the band, that the land was to be held by the Crown,

[I]n 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.¹¹

The revenues to be received under the lease were dealt with in the same document. They were to be "credited to our revenue trust account at Ottawa."¹² The Indian Act, s.18(1) provided:

Subject to the provisions of this Act, reserves shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and the terms of any treaty or surrender, the Governor

in Council may determine whether any purpose for which the lands in a reserve are used or are to be used is for the use and benefit of the band.¹³

Neither the terms of surrender nor the legislation seemed to greatly restrict the Crown's discretionary powers.

Upon learning that the terms of the lease made were not those to which the band had agreed, and after lengthy negotiations, Guerin, the Chief of the band, and other members of the band sued the Crown for breach of trust. In 1980, five years after the action was started, the action came to trial.

Mr. Justice Collier found for the Band on the basis of a trust created by oral conditions agreed to by the Band and the representatives of the Department of Indian Affairs in the negotiations leading up to the surrender.¹⁴ Apart from one meeting immediately prior to the surrender meeting, at no point during the two years of negotiations did the Indian Affairs representatives bring the two parties together. The surrender went ahead, Collier held, with the Band having made very clear the lease they expected to obtain. The Crown officials assured the Band that such a lease was to be signed. Collier held that a trust arose between the Band and the Crown at the surrender meeting, notwithstanding the written terms of the surrender and the provisions of the Indian Act. The trust was breached when the Crown officials signed a much less favourable lease with the Golf Club. The Band was awarded substantial damages.¹⁵

At the Federal Court of Appeal the decision was reversed on the grounds that, while a breach of trust had in fact occurred, there had been no breach in law.¹⁶ Mr. Justice LeDain considered three separate grounds of liability. First, he held that

the terms of the Indian Act precluded consideration of the oral terms of surrender. Secondly, he held that any trust created under section 18 of the Indian Act would be a trust enforceable through the political process and not through the courts of law. Thirdly, he noted that the creation of the reserve itself under the various acts and orders in council also did not create trust obligations.

The case was argued somewhat differently at the Court of Appeal than it had been at trial. At trial the allegation had been that the surrender had created the trust. At appeal the argument was that there were two trusts: one created by the surrender and one pre-existing the surrender, created by the Indian Act. The Crown argued that since it was the surrender document which had been approved by the Band in the vote required by the Indian Act,¹⁷ then only it, and not any oral representations made during negotiations, could form the basis of any obligation owed by the Crown. LeDain concludes:

The oral terms found by the judge were not voted on and approved by a majority of the band. They were deduced by the Trial Judge from the testimony of three members of the Band and a former official of the Indian Affairs Branch as to what was said at the meetings, and in some cases as to what was not said. The oral terms of the surrender as found by the Trial Judge were not accepted by the Governor in Council as required by the Act. What was accepted by Order in Council P.C. 1957-1606 of December 6, 1957 was the "attached surrender dated the sixth day of October, 1957". It was an unqualified acceptance of the written surrender, with no reference, written or implied, to other terms or conditions.¹⁸

The oral terms, since they had not been approved, could not form the terms of any trust.

LeDain then turned his attention to liability under the statutory trust arising through the Indian Act and the written terms of surrender. The Band argued that

the use of the language of trust in both the Act and the terms of surrender, demonstrated an intention by both parties to create a trust relationship. Consequently, they argued, the discretionary powers granted in the lease and the Act were constrained by the best interests of the Band. The Crown argued that the broad discretionary powers given to the Crown by both the terms of surrender and the Act, refute such an intention.

LeDain, after an examination of the Act, concluded that the obligations it contains are political rather than legal. He described the relationship as "a trust in the higher sense",¹⁹ following the reasoning in a number of cases which hold that the Crown can only be held to a trust obligation where there is "clear evidence of an intention to make the Crown a trustee".²⁰ He comments:

In my opinion the discretionary authority conferred by section 18 on the Governor in Council or Government, to determine whether a particular purpose for which land in a reserve is to be used is one for the use and benefit of the Band indicates, ... that it is for the Government, not the courts to determine what is for the use and benefit of the Band. That provision is incompatible, in my opinion, with an intention to impose an equitable obligation, enforceable in the courts to deal with the land in the reserve in a certain manner, and particularly, an obligation to develop or exploit the reserve so as to realize its potential as a source of revenue for the Band, which is in essence the obligation that is invoked in the present case.²¹

Then, having noted that the Indian Act confers many discretionary powers on the Minister, the Governor in Council, and the band council he reasons:

All of this, it seems to me, clearly excludes an intention to make the Crown a trustee in the private law sense of the land in a reserve. How the Government chooses to discharge its political responsibility for the welfare of the Indians is, of course, another thing. The extent to which the Government assumes an administrative or management responsibility for the reserves of some positive scope is a matter of governmental discretion, not legal or equitable obligation. I am, therefore, of the opinion that section 18 of the Indian Act does not afford a basis for an action for breach of trust in

the management or disposition of reserve lands.²²

So while it might be possible for the Crown to make itself a trustee, there is in the Indian Act and the surrender at hand, no true trust because the intent on the part of the government was to shoulder certain responsibilities as government and not to create rights in relation to reserve land for the Indian peoples.

LeDain finally refers to the nature of the discretion itself. For LeDain the parameters of the discretion can be found in the various legislative acts that delimit the relationship between the Indians and the Government. Of these, the Indian Act is decisive. Section 41 provides:

A surrender shall deemed to confer all rights that are necessary to enable Her Majesty to carry out the terms of the surrender.

Subsection 53(1) provides:

The Minister or a person appointed by him for the purpose may manage, sell, lease or otherwise dispose of surrendered lands in accordance with this Act and the terms of the surrender.

This leads LeDain to the conclusion that:

[A] conditional surrender for the purpose of leasing land in a reserve is intended to confer an authority to lease and not to impose a duty to do so.²³

The discretion is a blanket authority and not a circumscribed power to act within certain bounds. The opinion offers a bleak picture of the responsibilities of the Crown.

At the Supreme Court of Canada the trial result was reinstated, but on different grounds. Three very different opinions were handed down. Dickson, with Beetz, Chouinard and Lamer JJ. concurring, based his decision on a breach of

fiduciary obligations.²⁴ Wilson, with McIntyre and Ritchie JJ. concurring, held that a breach of trust gave rise to liability on the part of the government.²⁵ Mr Justice Estey decided on the grounds of a breach of an agency relationship.²⁶ The then Chief Justice Laskin took no part in the decision.

i The Opinion of Mr. Justice Estey

The least complicated decision is Estey's. For Estey the "primary constitutional issue" of the nature of aboriginal title does not arise in the case.²⁷ For him, the Indian Act covers the issue. He characterizes its effects in the following manner:

[The surrender is] a retention of interest and the exploitation of that interest in the manner and to the extent permitted by statute law. The Crown becomes the appointed agent of the Indians to develop and exploit, under the direction of the Indians and for their benefit, the usufructuary interest described in St. Catherine's.²⁸

In failing to follow the agreement, clearly the government has placed itself in breach of the terms of the agency relationship. If one were to agree that the relationship is one of agency, this is good agency law.

Much could be said in support of this analysis. It is not essential to concern oneself with the nature of aboriginal title in order to resolve this case. It is the opinion of all the deciding judges in the case that the government officers breached a duty owed to the Band. Disagreement arises only as to the legal character of the relationship breached. After the trial decision, the facts were never in issue. It is enough for Estey that the breach caused loss to the Musqueam band. What was

given up in the process of surrender and in the treaty process is for him irrelevant. In agreeing to act in a certain manner to further the Indian's interests under the Indian Act, the government restricted the scope of its discretion. Going beyond the mandate to which it had agreed, led to liability for the deficiency between the actual proceeds and those which might otherwise have been obtainable.

While this analysis has the merit of great simplicity, it is not without dangers and complexities. It seems, for example, difficult in the extreme to describe as an agent one who places himself in the position of intermediary between one group and another without having been appointed. A principal would normally appoint his agent. This, at least in part, allows the law to fix the principal with legal responsibility for the acts made under his name by his agent. This, I would suggest, is one of the crucial aspects of the agency relationship. Such a relationship, based upon appointment made and accepted by independent parties, rightly can be dealt with by the common law. And there is no injustice in fixing the principal with liability for the acts of his agent. Such is not the case between the government and the Indians.

Estey, quoting from Halsbury's Laws of England, notes that the "essence of the agent's position is that he is only an intermediary between the two other parties."²⁹ It is clear that in the case of the Indians the "agent" is more than a mere intermediary. The responsibilities of the "agent" under the terms of the Indian Act and the lease itself require the Government of Canada and the Governor in Council to determine whether any purpose is for the benefit of the Indians or not.³⁰ Under

the Indian Act, at least, the relationship is not one of mere agency.

In that situation, the government has, apparently without invitation, placed itself in the position of intermediary between the Indians and other inhabitants of this land. In 1763, the imperial government issued the Royal Proclamation,³¹ restricting the Indians' rights of alienation over their land. By that instrument, the government became the only entity to which Indian land might be alienated. The Indian Act continues that policy. In the ordinary law of agency it is not the agent who creates the relationship. Consequently, it seems, to this writer at least, to be somewhat overreaching to describe this relationship as one of agency.

There are further reasons to hold this position. In an agency relationship the principal has control of the relationship. Between the Indians and the government it is the government which has been the stronger party. The essence of the relationship between the government and the Indians is the subordinate position of the Indians. From the Royal Proclamation through the treaty process to today's Indian Act, the Crown has taken up the role of guardian over the native people. By the power of this guardianship the Indians have been prevented from exercising or participating in many of the normal incidents of citizenship. They have at various times in history been protected from alienating their land, from drinking alcohol and have been unable to vote.³² An agent would not normally have the power to prevent his principal from enjoying full citizenship.

Finally, a government is not usually thought of as being the agent of its subjects. A special law of agency would have to be developed for such a

relationship. The lack of that law suggests that the relationship is in fact not that of agency. Control of the acts of private ordering by individuals of their affairs is the normal subject matter of the law of agency and of the common law in general. The law, however, is less able to deal with situations where a stronger party imposes itself upon weaker one, particularly where it is done for the protection of the weaker party. This is even more the case where the stronger party is the government which has, of course, many immunities and other protections from legal liability. Such a relationship is one which can in fact be better policed by equity. The law has little experience with determining the obligations of the Crown: equity was born to it.

Overall then, it would appear that the law of agency is not the most appropriate for dealing with this situation. The government has passed numerous pieces of legislation which proclaim its intent to act in the best interests of the Indian peoples. The limits of that guardianship, however, remain obscure. The relationship, like the nature of the aboriginal title to the land, has never been fully delineated. Whether through racism, ethnocentrism, misunderstanding or misplaced concern, or even a combination of all these, the parameters of the relationship remain uncertain: what is certain is the unequal power of the Indians and the government which acts for them. Agency has little or no experience with such relationships. By contrast, such an unequal relationship provides a natural role for equity. However appropriate the law of agency might at first glance seem, it cannot describe or control a situation where the agent appoints himself and where the principal is at the mercy of his agent without having had any voice in the

appointment. Equity can.

Estey's decision then, while having the merit of great simplicity, in the end attempts too much. A new law of agency where the government is by its own action agent would have to be created. Equity provides a better model for any new law which might have to be created since the essential elements of the relationship at issue are elements that are the normal elements of the law of equity. The law of guardianship is a branch of equity. The law of trusts, which normally governs the relationships where property is held by one for the benefit of another, is another branch. The law of fiduciaries, a more general law than the previous two, is a third branch of equity. These, it is suggested, offer a more adequate doctrine for describing the relationship between the Crown and the Indian Nations.

It is to equity that both Dickson and Wilson turn in Guerin. Both find that there is a "fiduciary obligation" owed by the federal government to the Indian nations. Wilson holds that this obligation crystallizes into a full blown trust upon surrender. Dickson suggests that there can be no trust since, following the Smith case,³³ the Indians have no proprietary interest in the land. There being no trust corpus, there can be no trust. He bases liability fully upon the fiduciary obligation. Let us deal with Wilson's opinion first.

ii The Opinion of Madame Justice Wilson

Wilson says very little about the nature and origins of the fiduciary obligation owed by the government. She confines her discussion to the effects of the surrender

provision of the Indian Act, s. 18(1). She comments in passing:

While I am agreement that s.18 does not per se create a fiduciary obligation in the Crown in respect to Indian reserves, I believe that it recognizes the existence of such an obligation. The obligation has its roots in the aboriginal title of Canada's Indians as discussed in Calder v. A.G.B.C., [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145.³⁴

Wilson does not discuss the nature or scope of this general pre-Indian Act fiduciary obligation, preferring to restrict herself to the obligation as it has been affirmed under s.18 of the Indian Act.

On the nature of the s. 18 obligation she has this to say:

I think that when s.18 mandates that reserves be held by the Crown for the use and benefit of the bands for which they are set apart, this is more than just an administrative direction to the Crown. I think it is the acknowledgement of a historical reality, namely that the Indian bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it. This is not to say that the Crown either historically or by s.18 holds the land in trust for the bands. The bands do not have fee in the lands; their interest in the lands is a limited one. But it is an interest which cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with Indian title unless, of course, the Indians agree. I believe that in this sense the Crown has a fiduciary obligation to the Indian bands with respect to the uses to which reserve land may be put and that section 18 is a statutory acknowledgement of that obligation.³⁵

When surrender occurred, for Wilson, the terms of this surrender created a "full-blown" trust.³⁶ She states:

The subject of the trust, the trust res, was not the band's beneficial interest in the land but land itself. The Crown prior to surrender had title to the land subject to the Indian title. When the band surrendered the land to the Crown, the band's interest merged in the fee.³⁷

And concludes:

[T]he fiduciary duty which existed at large under the section (s.18) to hold the land in the reserve for the use and benefit of the band crystallized upon

surrender into an express trust of specific land for a specific purpose.³⁸

So although the Crown's duty originates in the fiduciary obligation, Wilson avoids the necessity of defining that relationship by finding that ultimately a true trust is created.

Wilson, while she does suggest a general fiduciary duty which predates the Indian Act and which continues under the Act, concentrates on the facts at hand and does not develop any general theory of Crown duties towards the Indian Nations. She prefers to protect the Indian interest in reserve land. In this her opinion is well within traditional Indian law. This is not to deny its power. Wilson's opinion has the merit of avoiding statute of limitations problems by taking advantage of the various statutory protections available for trusts actions.³⁹ Also, one might assume, the true trust might allow the Band to follow the land or other property rather than only being able to pursue monetary damages. And, of course, the possibility of some development of the legal obligation of the federal government is mooted but left for a later time.

Nevertheless, she offers very little direction as to the nature of the general fiduciary obligation.⁴⁰ For this reason, I would suggest that Dickson's opinion is more interesting. He seems to go much further in describing the fiduciary obligation than would appear to be necessary for the holding in Guerin. He discusses the nature of the Indian interest in land generally rather than restricting himself to the facts at hand. It is the broadness of his opinion which gives plausibility to the argument that the decision may be intended to cover more than the facts in this

particular case.

iii The Opinion of Mr. Justice Dickson

It is the opinion of Mr. Justice Dickson, as he then was, which forms the focus of this thesis. His discussion of the fiduciary obligation owed by the government to the Indians, presents a careful and elaborate description of its origin and scope, one which, I suggest, might be in part to indicate how it is intended to interpret the new constitutional provisions. Dickson recognizes that the law of fiduciaries is a very volatile field and that, consequently, there is a need for caution lest too much be ascribed to the duty. Because of their volatility, it is necessary that fiduciary relationships be anchored very carefully to particular law and facts. In his opinion in Guerin Dickson has done just that. His duty, I suggest, has five elements. First, one needs a recognized legal interest. Second, one needs a triggering event which gives rise to a duty. It is in these first two elements in which one finds the origin of the duty. The third element consists of a legislative scheme which invites the supervision of the courts. The fourth requirement is an object or purpose for the duty, and fifth, one needs a connecting principle which ties the first four together.

Mr. Justice Dickson also recognizes a general fiduciary obligation owed by the federal Crown to the Indians. Along with Wilson, he finds the roots of this obligation in aboriginal title, coupled with the surrender requirement. Dickson, unlike Wilson, discusses its nature at some length. He states:

The fiduciary relationship between the Crown and the Indians has its roots

in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not ... in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.⁴¹

Facts are always important in determining the scope and the actual source of any particular fiduciary obligation.⁴² Dickson delves quite deeply into the facts he considers relevant. In doing so he defines, quite carefully, the relationship between the Indians, their interest in their lands, and the Crown.

The land at issue in Guerin is surrendered reserve land. Title to the land before surrender was in the federal Crown.⁴³ Referring to the Indian interest in reserve lands, Dickson states:

Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, ... that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians.⁴⁴

The Indian interest in the land, in conformity with existing Canadian law,⁴⁵ is characterized by Dickson as consisting of only occupancy and possession: It is not a proprietary right.

It is on the basis of this proposition that Dickson holds against the relationship being one of trust. Since the Indians have no proprietary interest in their land, he reasons, there is no res capable of forming the trust corpus.⁴⁶ This is a crucial point. It is the point of disagreement between Wilson and Dickson. For Wilson the surrender provisions of the Indian Act create a true trust out of the

pre-existing interest that the Indians have in their lands when joined with the title already held by the Crown.

This identifies the first element of the fiduciary principle: a recognizable legal interest. Here typically for the fiduciary relationship it is an interest in property. Dickson notes that the interest of the Indians in reserve lands is the same as that in "unrecognized aboriginal title in traditional tribal lands".⁴⁷ It would appear, therefore, that the fiduciary obligation might be traced back beyond the passing of the Indian Act.

The second requirement for the creation of a fiduciary relationship is the surrender requirement. For the Guerin case, that requirement is found in s. 39(1) of the Indian Act. Both Dickson and Wilson see the Indian Act as the expression of a long standing governmental policy. Dickson comments:

An 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 Crown first took this responsibility upon itself in the Royal Proclamation of 1763[see R.S.C. 1970, App.II, No.1]. It is still recognized in the surrender provisions of the Indian Act. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.⁴⁸ (my emphasis)

Since all that is required for the fiduciary obligation to arise is present as soon as the surrender requirement is government policy, it seems logical to assume that at least by the 7th October 1763, the date of the Royal Proclamation, the government stood in some sort of fiduciary relationship with the Indian nations. And since the Royal Proclamation predates the Indian Act, it follows that the "distinct fiduciary obligation" owed under the Indian Act would not necessarily be that owed under any

pre-existing general fiduciary relationship. Since this policy pre-dates even the Royal Proclamation, it is possible that a fiduciary relationship might have arisen even before 1763.

The third element, one necessary for an enforceable duty, is a legislative scheme which invites the supervision of the courts. The particular fiduciary obligation in Guerin finds expression in the Indian Act, s. 18(1) of which grants to the Governor in Council, the Crown, a discretion in relation to surrenders. The existence of this discretion, which appears absolute but is not since it must be carried out in a fashion consistent with the purposes of the Act, gives the courts a supervisory role. Dickson explains:

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 Indian's best interests lie. This is the effect of s. 18(1) of the Act.⁴⁹ (my emphasis)

It is the existence of the fiduciary relationship together with this discretion that opens the door for the courts. He concludes:

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 obligation into a fiduciary one.⁵⁰

And of course, this fiduciary obligation is a legal, not merely a moral or governmental, one. That means that the power to decide and to act is not absolute: it is charged with a duty.

We shall see below that the fiduciary principle can be somewhat wayward. It needs to be channelled in order that the court supervision not become a

substitution of the court's opinion for that of the Crown.⁵¹ That role is performed by the fourth element: the purpose or object of the duty. That purpose Dickson finds in the protective role of the Crown. He comments:

The purpose of the surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with a declaration that [at p. 128] "great Frauds and Abuses have been committed in purchasing the Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians..."⁵²

It is worth noting once again that Dickson refers to both the Royal Proclamation and the Indian Act as embodying this protective duty. The object or purpose is to assist the court in determining what facts and law should be considered in relation to a particular fiduciary relationship. This permits the determination of the scope of the duty.

Finally, one needs a connecting principle and it is the fiduciary relationship to which Dickson turns to tie the elements together. Blandly put, a fiduciary relationship requires the fiduciary to act so as to further the interests of another. That duty, of course, can be narrowed in various ways. That is the case here. In fact Dickson seems to allow that any general fiduciary obligation might be broader:

The discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case. This is as true of the Crown's discretion vis-a-vis the Indians as it is of the discretion of trustees, agents, and other traditional categories of fiduciaries. The Indian Act makes specific provision for such narrowing in ss. 18(1) and 38(2). A fiduciary obligation will not, of course, be eliminated by the imposition of conditions that have the effect of restricting the fiduciary's discretion.⁵³

There is an implication here that any general fiduciary obligation may be broader than that under the Indian Act provisions and the even narrower one under the terms of the surrender in Guerin. Let us look more closely at the "narrowing".

Section 18(1) of the Indian Act provides:

Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which the lands in a reserve are used or are to be used is for the use and benefit of the band.

Section 38(2) allows:

A surrender may be absolute or qualified, conditional or unconditional.

By contrast, the Royal Proclamation provides only for outright sale:

[I]f at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively in which they shall lie.

So if there is a fiduciary obligation existing under the Royal Proclamation its scope would be judged by the intent of that instrument. Its function was to protect the Indians and guarantee them justice.⁵⁴

There would appear to be two distinct forms of narrowing provided for in the Indian Act. First, the Indian Act itself narrows the discretion by requiring it to be exercised in accord with the provisions and philosophy of the Indian Act. The philosophy of the Indian Act, of course, is often said to be assimilationist.⁵⁵ Since 1969, that may have changed. Second, the Indians may provide for narrowing through a treaty or through the terms of a surrender. A general fiduciary obligation

arising before the Indian Act would presumably reflect the dominant policy pursued at the particular time, whether it be that of the Royal Proclamation or other instruments.

Dickson, presumably by way of clarification, discusses the obligation further.

He quotes an article by Professor Ernest J. Weinrib:

[Where there is a fiduciary obligation] there is a relationship in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.⁵⁶

Dickson then continues:

I make no comment upon whether [Weinrib's] description is broad enough to embrace all fiduciary obligations. I do agree, however, that where 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.⁵⁷

The obligation might be raised where the power has been taken unilaterally. Perhaps then, even in the absence of a statutorily entrenched policy or of some form of written guidelines, the courts might have the duty to check and supervise the exercise of the delegated power.

Let us look more closely at the origin of Dickson's fiduciary obligation. For Dickson, it is the surrender process which defines the scope of the particular fiduciary obligation. In Guerin, oral undertakings were given by the Crown which were not written into the surrender document. The Crown argued that they did not form part of the surrender since the wording of the Indian Act along with the

surrender document specifically ousted them. Dickson seems to agree with this contention. He comments:

[T]he surrender document did not make reference to the "oral" terms. I would not wish to say that those terms had nonetheless somehow been incorporated into the surrender.⁵⁸

But that is not the end of it. He continues:

Nonetheless, the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act (emphasis)

The fiduciary obligation stands above the actual terms of the surrender and can, as it clearly does here, restrict them. This is important and radical. Dickson is suggesting that what the Crown says will be the standard by which to judge what it does. And while for Dickson it is the surrender requirement which creates the fiduciary obligation, it would appear to be the surrender process which defines the scope of the duty. This distinction might have particular relevance for a treaty related fiduciary obligation, should one be held to exist.

In Guerin the discretion of the government was narrowed perhaps to the point of extinction, not by the legislation or the surrender document, but by the negotiations leading up to the surrender. The Band surrendered its interest in the land on the strength of a particular lease. The breach occurred when the government signed a lease which was deficient in relation to that agreed to with the Band. The lease, while deficient, did not fall nor was it corrected.⁶⁰ The terms of the legislation and surrender documents allowed the government to do what it did.

The oral assurances were not part of the lease.⁶¹ The surrender and lease stand.

However, the oral representations were not empty. Dickson states:

The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act.⁶²

Having promised a certain lease, the Crown could not, without permission, agree to another:

When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, less favourable terms, should have returned to the band to explain what had occurred and seek the band's counsel on how to proceed.⁶³

The remedy, for this particular duty, for Dickson, was to be found in the principle of equitable estoppel.⁶⁴

The remedy for breach of any broader duty may be different. Dickson comments:

In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.⁶⁵

So while the relationship is not one of trust, the remedy is identical.⁶⁶ And it is the "statutory scheme" which defines the fiduciary duty.⁶⁷

It is worth noting two things in passing. While Dickson is discussing a remedy for breaches of the Indian Act duty, he does nothing to negate the possibility of a breach of any pre-Indian Act fiduciary obligations. On a more negative note, his remedy may be susceptible to limitations problems. Generally, limitations do not

run where a trust is fraudulently breached. Wilson, utilising the true trust, avoids some limitations problems. Dickson's opinion would seem to limit the remedy to damages rather than any tracing remedy that might be available through a trust. Those, however, are not problems to be addressed here. After all, should the fiduciary obligation form the basis for a theory of constitutional review, such problems are unlikely to arise. It should not be possible, after all, to lose constitutional rights through the operation of rules such as limitations and laches.

What Dickson has done is not radical. He has read into a statute an implication that any discretion found therein must be exercised in a manner consistent with the Act as a whole. The Indian Act, in Dickson's view, invites the courts to check the exercise, by the Crown, here exercised through the Department of Indian Affairs and Northern Development, of a delegated discretion. What Dickson has described here is a theory of judicial review of administrative action designed to address the special obligations which the federal government owes the Indians.

A governmental power possessed by the federal Parliament has been delegated to the Governor in Council. In the hands of the one to whom it has been delegated, it takes on the policy of the legislation within which it has been delegated. The fiduciary obligation arising out of the historical relationship between the Indians and their land together with the historical and legislative relationship between the Indians and the federal government, invites the courts to check the exercise of that delegated power. The exercise will be judged against a fiduciary standard. The

government will be forced to live up to any promises made, both to the Indians and to the third parties, such as the lessee here. However, as I hope I have demonstrated here, Dickson has laid out an elaborate theory which, while it covers the case at hand, might also be developed to cover obligations well beyond those in Guerin itself.

The theory proposed in Guerin by the now Chief Justice Dickson was probably not absolutely necessary for the facts in the case itself, but it is a well considered one. As has been noted above, it is not the first time that Dickson has attempted to clear up some of the confusion which permeates the area of native law in Canada. Before considering the broader implications of Dickson's opinion, it is useful first to look at some of the commentary that the Guerin decision has precipitated.

b The Decision Discussed

If confined to the facts and the particular obligation at issue, the decision does not greatly alter the law. In fact, perhaps the major change which can be noted is the placing out of reach of proprietary remedies in relation to the loss of Indian lands. Such is, it is suggested, the effect of substituting a fiduciary for a trust relationship. This is undoubtedly a change to be regretted. But it is not my purpose here to dwell on such issues. My interest is in the ramifications of the fiduciary analysis for constitutional review of aboriginal rights.

The majority of the commentary on the case concerns itself with issues, such

the protection of reserve lands, directly raised by the case. It deals with such issues as the nature of the interest of the Indian Nations in their land, both reserve and unsurrendered lands. Also covered is the legal nature of the obligation of the government vis-s-vis the land before and after surrender. Such issues are only indirectly of concern in this thesis. I am more interested in the possibilities of the case for producing a more general theory for the interpretation of the constitutional protections of the rights of aboriginal peoples. Consequently the literature can be dealt with fairly quickly.

The literature on Guerin shows a remarkable consistency. Almost all commentators criticize the decision in that it unnecessarily limits the interest of the Indians in reserve lands. All see at least a glimmer of hope within the gloom. Two views emerge although no one commentator fits into either category. There is the pessimist's view which stresses the limits of the decision in relation to the interest in land. And there is an optimist's view. These focus more on the broader ramifications of the decision.

Bartlett's main concern appears to be the protection of reserve lands and he criticizes the inappropriateness of equating the Indian interest in reserves with that in unsurrendered traditional lands.⁶⁸ The denial of a trust in the statutory scheme, not only appears to contradict the policy behind the establishment of reserves,⁶⁹ it makes limitations legislation significant. Since most of the contested surrenders took place outside the limitations periods the denial of a trust relationship in the Indian Act effectively prevents litigation even of surrenders which took place under the

"most corrupt circumstances".⁷⁰ This important point is not the focus of this thesis.

For Bartlett the glimmer of hope is twofold. First he recognizes that implicit within the decision is that the obligation would appear to attach to surrenders of traditional lands and thus make breaches of treaty justiciable. Furthermore, the cause of action can be pursued against the Crown in both its provincial and federal manifestations.⁷¹ This, it is suggested, is a reasonable conclusion.

The most complete discussion of the case is Hurley's, although he is at times unduly critical.⁷² Hurley's paper really centres upon the nature of the interest of the Indian Nations in their land. That being the case, much is not relevant here, though the criticism is well put. His argument is that the Indian interest is in fact a proprietary one and that cases from St. Catherines through Star Chrome to Guerin itself are wrongly decided in that they do not recognize that. I have a great deal of sympathy with this view but it is not relevant to this thesis. Indeed, it might be said that such an analysis is not so much one of Guerin but rather of the earlier cases. It is, therefore, in some ways not a very useful commentary.

Hurley does make some interesting comments on the fiduciary duty and on its possibilities for broadening the scope of the legal obligations of the government. He notes early in the paper:

[This article] attempts to relate the Court's treatment of [the Crown's fiduciary] duty to the guardianship doctrine developed by the United States Supreme Court, and it speculates as to the future applications of the doctrine of Crown fiduciary duty in Canada.⁷³

The fiduciary duty, for Hurley, is part of this guardianship.

Later he relates the fiduciary duty and the guardianship in this way:

For Dickson J., the surrender requirement reflects the Crown's acknowledgement of the duty incumbent upon it, by virtue of its historical role as guardian of the Indians, to protect their title in land. But if this is so, the surrender requirement is not, contrary to Dickson J.'s earlier assertion, itself a source of fiduciary duty. Rather, it is a specific manifestation of a general fiduciary duty, and this duty in turn derives from the guardian relationship existing between the Crown and the Indians.⁷⁴

This would have many ramifications. Hurley comments:

[T]he Crown's fiduciary duty would appear to extend to all groups which are considered as Indians or aboriginal peoples for the purposes of the Constitution. ... It has been argued above that, since the Crown's fiduciary duty stems from its general guardianship of the Indians, it applies to the Crown's relations in general with Indians. For example, the Crown's fiduciary duty would require it, at a minimum, to give full effect to its undertakings under existing land claim agreements such as the James Bay and Northern Quebec Agreement. ... It would also seem to require the federal government not to remain passive but to act positively on behalf of native peoples to settle their aboriginal and treaty claims vis-a-vis recalcitrant provincial governments.⁷⁵

Hurley prefers to found a general fiduciary obligation in the historical relationship between the Indian Nations and the Crown. He sees potential for the protection of less tangible aboriginal rights should the guardianship become the basis for the fiduciary obligation.⁷⁶ He notes that the United States guardianship has given rise to certain specific duties, and comments:

This inference of specific duties from a general guardian relationship seems to recommend itself more than Dickson J.'s deduction of the Crown's fiduciary duty from incidents like the surrender requirement. In any event, having now affirmed the principle of the Crown's fiduciary duty towards the Indians, the Supreme Court of Canada has given Canadian courts the opportunity to profit from American judicial experience with the practical consequences of that duty.⁷⁷

One might quibble with Hurley's impatience with Dickson on this point. It does seem to be something of a chicken and egg problem.⁷⁸ That aside, Hurley has hit

upon what is, I would suggest, the interesting aspect of the decision. It does have exciting possibilities for a more general Crown obligation to the Native peoples of Canada. And this, as Bartlett comments, could include both the federal and provincial governments. Unfortunately, Hurley does not develop these assertions into theory or principle.

On the most important point, that of a standard for judging when a breach has occurred, Hurley suggests only a "good faith test".⁷⁹ This he borrows from the United States law. I suggest below that the American law has limited value in delineating the fiduciary obligation and its breach in Canada. I suggest that the duty, because of the constitutional protection offered by s. 35 of the Constitution Act, 1982, would be a very different and much stronger duty in Canada than in the United States.

Johnston picks up the point regarding the relevance of the United States Indian fiduciary cases.⁸⁰ Johnston criticizes Dickson's opinion for much the same reasons as Bartlett and Hurley. While she recognizes that the obligation might arise before surrender, she reads the opinion as denying that possibility. She comments:

Hence, the scope of the fiduciary duty which Mr. Justice Dickson outlines is not coextensive with the powers unilaterally assumed by the Crown.⁸¹

I have suggested that such is not the case. The confusion derives from the fact that the obligation being litigated in Guerin is a particular "narrowed" duty rather than the general duty which exists as a result of previous surrenders or takings. I point this out only because Johnston also makes the point that the fiduciary obligation held to exist in Guerin allows the Crown to "exercise its powers of management [of

Indian lands] with impunity."⁸² This, I agree, is the crucial point. I would suggest, however, that this absolute power comes not from a lack of duty. Rather, it comes from the doctrine of Parliamentary supremacy which has made the general duty non-justiciable. The Constitution Act, 1982 will, it is hoped, have changed that.

Johnston would prefer a much broader duty attaching to all the discretionary powers granted under the Indian Act. She laments that Dickson turned away from the law of trusts, "which could provide concrete standards and remedies" to an uncertain sui generis fiduciary duty.⁸³ Johnston suggests, however, and this is her glimmer of hope, that the fiduciary obligation of the United States government to the Indian Nations could be used to flesh out the Canadian situation. This would, she suggests, provide those broader standards and remedies. She comments:

Through its legislation dealing with Indians, the Canadian government has unilaterally undertaken to regulate almost every aspect of Indian existence. Under this comprehensive statutory scheme, the Minister of Indian Affairs is accorded sweeping discretionary powers. The application of the [fiduciary principle to these powers] would lead to a recognition of a fiduciary duty coextensive with the government's pervasive pattern of control. ... However wide the discretion granted by statute, the court would be able to ensure that it is exercised correctly.⁸⁴

I would agree that the decision does just that. I would add that it might go further and serve as a check even on the legislative powers of the government. The United States law, in that it recognizes the absolute power of the federal government, is too weak for that. Nevertheless, it remains instructive.

The analysis of Pratt and McMurtry is much more complimentary of the opinion of Mr Justice Dickson.⁸⁵ These I would place amongst the optimists. However, while they see much more of the possibilities of the opinion, they also do

not develop a sound theoretical basis for their assertions. They do, nevertheless, go a long way towards drawing some of the theoretical possibilities out of Dickson's opinion. They also recognize the desirability of sound and principled theory:

The common law cannot work well unless it is strongly founded in principle. We predict that Guerin will stand for generations as the touchstone of the legal and political relationship between the Crown and the Indians and that from this new beginning a new body of law will evolve on its secure underpinnings.⁸⁶

They also suggest that Dickson's purpose in re-examining the whole framework of Canadian Native law is precisely because he wishes to construct the beginnings of a new theoretical basis.⁸⁷

In a long passage worth quoting because they explain this assertion, they declare:

Mr. Justice Dickson, by reverting to the first principles of the creation of fiduciary obligations, suggests the possible existence of fiduciary obligations of a very different nature than those involved in the surrender of the Musqueam reserve In effect, in our submission, his judgment establishes that the Royal Proclamation, a unilateral undertaking by the Crown, created an inchoate fiduciary relationship with respect to the lands of all Indian nations covered by the Royal Proclamation. This "unilateral undertaking" was combined with a discretionary power that is in part the political dominance of the Crown and its agents and in part the establishment of a legal system of land tenure which both protected and narrowed the property interest of the Indians. ... [A]ny surrender gives rise to a specific set of fiduciary obligations, but it is in fact the crystallization, realization or particularization of the previous generalized inchoate relationship.

We submit that all dealings between Indian people and the Crown are clothed with a fiduciary aspect, as the result of the Royal Proclamation.⁸⁸

McMurtry and Pratt state the core of a possible theory in this passage. I shall return to this below. They do not, however, themselves develop one.

They feel that, because the history of the many Indian Nations of Canada are

so varied, it would not be possible to develop one single theory.⁸⁹ They add that the agency theory of Mr Justice Estey might be appropriate for situations where a band has reached a sufficient stage of development that they should be allowed input into decision making which concerns them. Consequently, they make this suggestion:

There can however be a general theory of shifting emphasis along a continuum between the extremes of agency and trust, with presumptions to guide courts or negotiators as to the appropriate model in any given set of facts.⁹⁰

This seems rather to deflate the grand claims they make earlier, and to do so unnecessarily.

If the theory will vary from band to band and from year to year, then we will be back into the sort of chaos from which Pratt and McMurtry recognize that Guerin might have rescued us. Like Pratt and McMurtry, I believe that the law works best when guided by sound theory, and not theory which can vary with the Chancellor's foot. The theory must work for all situations. Certainly the scope of the duty might vary in accord with any particular situation, as might the standard by which the conduct of the fiduciary will be judged. This is normal. But it seems to defeat the purpose for the creation of theory if one allows the basis of the theory to vary from agency through trust to non-trust fiduciary law. I hope to show, in the pages which follow, that a sound and coherent theory of the legal and political obligations of the government to the Indian Nations might be developed from Guerin.

c The Fiduciary Obligation: A Theory for Constitutional Review?

The new Constitution contains two major provisions covering aboriginal rights.

Section 35 protects "existing aboriginal and treaty rights" and section 25 protects those rights are from abrogation and derogation by the Canadian Charter of Rights and Freedoms.⁹¹ The s. 35 rights are not defined in the Constitution and nor have they been defined by the courts. Some aspects of them have been recognized and defined and others might be easily predicted.⁹² For example, sections 37 and 37.1 provide for a series of First Ministers Conferences which were intended to address the content of section 35. The last of these was held in April 1987 and ended without agreement being reached. It would appear, however, that the right to some form of self-government might now be considered an aboriginal right. There was general agreement amongst the First Ministers that self-government was properly considered within the scope of the section 37 conferences. On its precise definition there was no agreement.⁹³ Section 35 rights, then, might be very broad.

It would appear also that any rights recognized by the Royal Proclamation are protected by section 35. While the section does not refer to the Royal Proclamation, section 25 includes Royal Proclamation rights amongst the "aboriginal, treaty or other rights which pertain to the aboriginal peoples" which are not to be adversely affected by the Charter of Rights and Freedoms. Since section 25 uses the word "including" rather than a phrase such as "as well as" it seems logical to assume that Royal Proclamation rights are also included in section 35 and that they are mentioned in section 25 only for greater certainty.

The Royal Proclamation clearly meets all the requirements for the creation of a fiduciary obligation. The fiduciary relationship arises through the surrender

requirement and the aboriginal interest in lands. Both are present. It can be no coincidence that both Dickson and Wilson refer to the Proclamation in their opinions as being the origin of the distinct obligations owed by the federal government to the Indians. Certainly it was not necessary for the decision. And given that the Royal Proclamation is now of constitutional status, and since, logically, it will inform the scope of the constitutionally guaranteed aboriginal rights, it would not be absurd to view Guerin as a guide for future constitutional interpretation of those rights.

Before the enactment of the Constitution Act, 1982, Canadian governments possessed what were probably unlimited legislative powers within their respective spheres. The new constitution has placed restrictions upon those powers. Sections 25 and 35 protect the peculiar interests that the Indian nations possess. I suggest that the Court, aware that the day will soon arrive when they would be called upon to interpret those restrictions, has taken the opportunity provided by the Guerin case, to indicate to the Indian nations and to the governments of Canada something of how they are predisposed to interpret them.

I argue here that the wording of particularly Dickson's opinion almost requires us to consider any proposed interpretation of the aboriginal rights provisions of the new constitution in the light of the Guerin decision. If as most commentators suggest, the fiduciary obligation extends back beyond the provisions of the Indian Act, then any attempt by the federal government to deal with Indian lands, indeed with any aboriginal right, may be susceptible to review by the courts. And any

interference with those rights must be justified and proved in accordance with the provisions of the Constitution and the fiduciary nature of the relationship.

I suggest here that it is possible that Dickson's opinion contains the germ of such a theory, centered, not upon the interest in land, but upon the "trust obligation": the guardian/ward relationship. The general fiduciary obligation referred to above is, I suggest, that trust obligation. I suggest that the government from the earliest days, took upon itself an obligation to govern with due regard to the interests of the Indian nations while they made the adjustment to the changed circumstances brought about by colonisation. While the doctrine of Parliamentary supremacy rendered that obligation unenforceable except through the political process, the entrenchment of aboriginal and treaty rights has changed that. And I suggest that the most compelling logical basis for the existence of a general fiduciary obligation is the taking of power from the Indian Nations, rather than the taking of their lands. That taking of power, the denial of sovereignty, resulted in the creation of the guardian/ward relationship, and I suggest, that relationship may be entrenched in s. 35.

The interest in lands, consequently, is not of central importance to this thesis. The focus is the reasoning in the opinion of Chief Justice Dickson. A secondary focus is what has been termed the "trust obligation" and which I, so as to emphasize the duty it carries, refer to at times as a wardship. The wardship is found from the very beginnings of the colonisation of the Americas. It guided the Spanish colonisation and it forms the centre of the Marshall decisions in the law of the

United States. With the development of the fiduciary remedy in Canada, I suggest, it now forms the centre of Canadian native law.

NOTES

1. Guerin et al. v. The Queen, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, 55 N.R. 161, [1984] 6 W.W.R. 481, 515;59 B.C L.R. 301, [1985] 1 C.N.L.R. 120 (S.C.C.) reversing [1983] 2 F.C. 656, 143 D.L.R. (3d) 416, 45 N.R. 181, [1983] 2 W.W.R. 686, 13 E.T.R. 245, [1983] 1 C.N.L.R. 20,(C.A.) which reversed [1982] F.C. 385, 10 E.T.R. 1, [1982] 2 C.N.L.R. 83 (T.D.)
2. Constitution Act, 1982, R.S.C. 1985, Appendix II, No. 45, Schedule B. Enacted as Schedule B to the Canada Act, 1982, (U.K.), 1982, c.11. In force April 17, 1982. Proclamation bringing the Constitution Act, 1982 into force, R.S.C. 1985, Appendix No. 45. The relevant provisions are ss. 25, 35, 35.1, 37, 37.1.
3. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, ibid.
4. Martineau v. Matsqui Institution Disciplinary Board, [1980] 1 S.C.R. 602.
5. Murdoch v. Murdoch, [1975] 1 S.C.R. 423; Rathwell v. Rathwell, [1978] 2 S.C.R. 436; Petkuss v. Becker, [1980] 2 S.C.R. 834.
6. Jack v. The Queen, [1980] S.C.R. 294, [1979] 2 C.N.L.R. 25. Dickson was alone in a concurring opinion, dissenting on whether the fishing rights of the Indians were constitutionally recognized. His opinion would appear to be a major influence on the recent Sparrow v. The Queen, [1987] 1 C.N.L.R. 145. See below, c. 5.
7. Simon v. The Queen, [1985] 2 S.C.R. 387, 62 N.R. 366, [1986] 1 C.N.L.R. 153 (S.C.C.); R. v. Nowegijick, [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193, [1983] 2 C.N.L.R. 89.
8. Then the Indian Act, R.S.C. 1952, c. 149 as am. by S.C. 1952-53, c. 41, S.C. 1958, c. 19, now Indian Act, R.S.C. 1985, c. I-5.
9. ibid., ss. 37-39.
10. Guerin et al. v. The Queen, [1982] F.C. 385, 10 E.T.R. 1, [1982] 2 C.N.L.R. 83 (T.D.), 109. All references are to C.N.L.R. See p. 104 for terms offered.
11. ibid., 87.

12. Guerin et al. v. The Queen, [1984] 2 S.C.R. 335; 13 D.L.R. (4th) 321; 55 N.R. 161; [1984] 6 W.W.R. 481, 515; 59 B.C.L.R. 301; [1985] 1 C.N.L.R. 120 (S.C.C.). All references are to W.W.R.
13. supra note 8, s. 18(1).
14. supra note 10, 109 & 107.
15. ibid., 133. The damages were assessed at \$10,000,000.00.
16. The Queen v. Guerin et al., [1983] 2 F.C. 656, 143 D.L.R. (3d) 416, 45 N.R. 181, [1983] 2 W.W.R. 686, 13 E.T.R. 245, [1983] 1 C.N.L.R. 20 (C.A.). All later references are to C.N.L.R.
17. supra note 8, ss. 37-41.
18. supra note 16, 61.
19. The phrase is from Kinloch v. The Secretary of State for India in Council (1882), 7 A.C. 619, 626 (H.L.). See infra c. 3, part c.ii.d.i.
20. supra note 16, 55.
21. ibid., 74.
22. ibid., 75.
23. ibid., 76.
24. supra note 12, 485ff.
25. ibid., 509ff.
26. ibid., 506ff.
27. ibid., 507. This issue had been dealt with in R. v. Smith, [1983] 1 S.C.R. 534, 147 D.L.R. (3d) 237, 47 N.R. 132, [1983] 3 C.N.L.R. 161 (S.C.C.), see infra c. 3, part a, note 20 and the accompanying text. It is worth noting that for Estey at least that the relationship at issue in Guerin is statutory. (ibid., 509).
28. ibid., 508. He is referring to the seminal case, St. Catherine's Milling and Lumber v. The Queen (1888), 14 A.C. 46, 2 C.N.L.C. 541 (J.C.P.C.), see, infra c. 3, part a.
29. ibid., 509. 1 Halsbury's 4th 418, para. 701.
30. Such powers are given in the various provisions of the Indian Act. For those at issue in Guerin, see ss. 18, 37-41.

31. The Royal Proclamation of 1763, R.S.C. 1985, Appendix ii, No. 1.
32. See for example, restrictions on sale or gifts of amunition to Indians, [S.C. 1882, c. 30, s. 3; S.C. 1884, c. 27, s. 2; R.S.C. 1886, c. 43, s. 113; R.S.C. 1906, c. 81, s. 141; R.S.C. 1927, c. 98, s. 139], power of the Governor in Council to direct how the band capital may be expended,[originally R.S.C. 1886, c. 43, s. 139 through various revisions and re-enactments to the present c. I-5, ss. 64/67], the power of the Governor in Council to direct how Indian funds shall be managed and invested,[S.C. 1868, c. 42, s. 11 through to today's c.I-5, s.61], provisions regarding intoxicants are too numerous to list,[S.C. 1868, c. 42, s. 12] through to today's c. I-5, ss. 94/102]. On the right to vote, see: R.H. Bartlett "Citizens Minus: Indians and the Right to Vote" (1979) 44 Sask. L. Rev. 163.
33. R. v. Smith, [1983] S.C.R. 554; 147 D.L.R.(3d) 237; 47 N.R. 132, [9183] 3 C.N.L.R. 161.
34. supra note 12, 517.
35. ibid. at 518.
36. The phrase is Wilson's. See ibid., 522.
37. ibid. at 521.
38. ibid. at 522.
39. In Saskatchewan for example, Limitation of Actions Act, R.S.S. 1978, c. L-15, s. 42. Professor Bartlett has made this point. See: R.H. Bartlett "You can't trust the Crown" (1984/85) 49 Sask. L. Rev. 367, 373.
40. Wilson has, in a recent case, discussed the possibilities of the fiduciary obligation in areas where it has not been previously used: See Frame v. Smith, [1987] 2 S.C.R. 790, 78 N.R. 40 and the discussion infra c. 4, part c.iii.
41. supra note 12, 494.
42. Canadian Aero Services Ltd. v. O'Malley, [1974] S.C.R. 592; 40 D.L.R. (3d) 371. See also Wilson in Guerin, supra note 12, at 511.
43. supra note 12 at 498. Indian Act, R.S.C. 1985, c. I-5, s. 2(1), defines "reserve" as "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart for the use and benefit of a band. Estey, in his opinion at 507 explained: "In 1938 ... title to the Indian land in British Columbia was transferred to the Crown in right of Canada by British Columbia Orders in Council 28 and 1036 pursuant to art. 13 of the Terms of Union of 1971." See British Columbia Terms of Union, R.S.C. 1985, Appendix No. 10.

44. supra note 12 at 499. There is some confusion raised here by Dickson's comment that the interest "gives rise upon surrender to a distinctive fiduciary obligation." This would appear to contradict his earlier statement that it is the surrender requirement which is the source of the obligation. (At 494, See infra note 48 and the accompanying text.) Johnston, infra, note 80, refers to this. The argument developed here is that it is the surrender "defines the contours" of the particular obligation in Guerin. The obligation itself exists even before surrender. It was necessary, of course, only to define the obligation as it relates to the actual surrender at issue. After surrender the obligation becomes a distinctive one. Before surrender the obligation is only a moral one.
45. The Indian interest has been defined as a "personal and usufructuary" right. See particularly, St. Catherine's, supra note 28, A.G. Quebec v. A.G. Canada, [1921] 1 A.C. 401, 4 C.N.L.C. 238 (P.C.), R. v. Smith, supra note 33. And see the discussion in c. 3, part a.
46. supra note 12, 502.
47. ibid., 497.
48. ibid., 494/5.
49. ibid., 500/501.
50. ibid., 501.
51. See infra c. 4, part a.iii.
52. supra note 12, 500.
53. ibid., 503.
54. The beginning of the Indian part of the Royal Proclamation reads in part: "And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under Our Sovereignty, Protection, and Dominion," etc. Also stated is the intent to convince the Indians of the Justice of the English government. See infra c. 2, part a.ii.
55. See, for example, John L. Tobias, "Protection, Civilization, Assimilation: An Outline of Canada's Indian Policy" in I.A.L. Getty and A.S. Lussier, As Long as the Sun Shines and Water Flows (Vancouver: University of British Columbia Press, 1983), at 39. See also, L. Little Bear, "Aboriginal Rights and the Canadian 'Grundnorm'" in J.R. Ponting, ed. Arduous Journey: canadian indians and decolonization, (Toronto: McClelland and Stewart, 1986), 243.

56. supra note 12, 501, citing, E.J. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1 at 4.
57. supra note 12, 501.
58. ibid., 504.
59. ibid.
60. It would appear that such was not requested.
61. supra note 12, 504.
62. ibid.
63. ibid.
64. ibid., 505.
65. ibid., 494.
66. It is uncertain yet whether this wording indicates that Dickson is prepared to allow the fiduciary relationship to take advantage of the trust limitation provisions. Such seems to be implicit. It is worth noting that the American caselaw has allowed this to occur. See Manchester Band of Pomo Indians v. U.S., 363 F.Supp. 1238, 1249 (1973), infra c. 2, part c.iv.
67. Dickson's opinion is very similar to the decision of the United States Supreme Court in U.S. v. Mitchell et al., 463 U.S. 206, 103 S.Ct. 2962, 77 L.Ed. 2d. 580 (1983), (Mitchell II). See infra, c. 2, part c.iv.
68. R.H. Bartlett "You Can't Trust the Crown: The Fiduciary Obligation of the Crown to the Indians: Guerin v. The Queen." (1984/5) 49 Sask. L. Rev. 367, 369. He notes that at least the 1851 legislation in the Province of Canada would appear to grant a larger interest than that held under aboriginal title. I discuss that legislation below, c. 3, part c.ii.a.
69. ibid., 369.
70. ibid., 373.
71. ibid., 374.
72. J. Hurley "The Crown's Fiduciary Duty and Indian Title: Guerin v. The Queen" (1985) 30 McGill L. J. 559. For an example of criticism which approaches the picayune, see his discussion of the source of the fiduciary duty at 566/7. He claims Dickson's analysis is "somewhat ambiguous" and then relates the elements which Dickson holds are required to raise the duty as if

each was intended to stand alone as a source of the duty. Having done this he admits: "This ambiguity may be more apparent than real since Dickson J. relates [them]." The confusion, I would suggest, is more Hurley's than Dickson's.

73. ibid., 562.
74. ibid., 586.
75. ibid., 595.
76. ibid., 591.
77. ibid., 592.
78. I suggest below that the surrender requirement is an aspect of the guardianship and that Dickson gives the surrender requirement significance because the case is a land related case.
79. ibid., 602.
80. D.M. Johnston "A Theory of Crown Trust Towards Aboriginal Peoples" (1986) 18 Ottawa L. Rev. 307.
81. ibid., 316.
82. ibid.
83. ibid.
84. ibid., 332.
85. W.R. McMurtry & A. Pratt "Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective" [1986] 3 C.,N.L.R. 19. An earlier version of this can be found The Canadian Bar Association-Ontario Continuing Legal Education, Seminar 1986.
86. ibid., 20.
87. ibid., 29.
88. ibid., 31.
89. ibid., 38.
90. ibid., 39.
91. supra note 2, ss. 25, 35.

92. Guerin also offers a definition of the aboriginal interest in unsurrendered land. The hunting and fishing rights of the Prairie Treaty Nations have been protected since 1930 by the Natural Resources Transfer Agreements and the Constitution Act, 1930. It is predictable that existing reserves and trust funds would come within s. 35.
93. For the various proposals of the First Ministers see: "Documents From the 1987 First Ministers Conference on Aboriginal Matters" [1987] 3 C.N.L.R. 1ff.

CHAPTER 2

AMERICAN INFLUENCES

The trust obligation has been central to Native law since the very earliest days of the colonisation of North America. It is there in the first major colonial legislation affecting North America, and it persists today in such legislation such as the present Indian Act¹ and the Sechelt Band Self-Government Act². Its influence can be seen in the Trusteeship in International law. It is also fundamental to the Marshall decisions of the Supreme Court of the United States which established the ground rules for Native law in that nation and in Canada.

The trust obligation required the colonizing nation to protect the aboriginal inhabitants of the new world from the excesses of the colonizers. It was intended to protect not only the land rights of the indigenous peoples, but also human and some limited civil rights. It became a necessary element of the act of colonisation in part because the colonizing nations of Europe denied the aboriginal peoples of the Americas any political involvement in the establishment of the new regimes which were then being imposed. It was, in a sense, a limitation on the governmental powers of the new governments. It was a limitation, however, which the aboriginal peoples could not enforce against the colonizers. The limitation was self-imposed and often more honoured in the breach, than in practice.

Over the years since 1492, the trust obligation has received increasing recognition by the colonial regimes, and it has become, to a degree, enforceable against the successor regimes to the colonial governments. The degree of the recognition varies from nation to nation. Some separateness is recognized in many nations in both North and South America. In the United States, the trust obligation has resulted in a limited, and precarious, right to self-government. In Canada, the situation is uncertain although some land rights and separate status have been recognized.

The Guerin case represents the most recent statement of the Supreme Court of Canada on the scope of the trust obligation.³ In his opinion, Mr Justice Dickson, as he then was, explicitly recognizes the influence of this background. In particular he notes the importance of the United States law regarding the trust obligation. He also, it is suggested here, implicitly recognizes the central and fundamental importance of the trust obligation in defining and protecting aboriginal and treaty rights in Canada. The trust obligation is the key to understanding the Guerin decision. And the key to understanding the trust obligation is to observe its historical significance in the colonization of the Americas. Of the greatest relevance is the trust obligation as it exists in the United States.

a Early Influences

i The Beginnings of Colonization

The trust relationship dates back to the very earliest contact between the two

cultures, European and Indian. Its origin can be traced to the paternalism that the colonial invaders felt towards the inhabitants of the new land, a paternalism that continues even today.⁴ It can be seen, in embryo, even in the system of land-holding utilised by the Spanish in their earliest colonies in Hispaniola. One writer describes the development of the Spanish/American landholding system in this way:

The first colonists reduced the Indians to slavery. Generous Queen Isabella, who accepted responsibility for the souls of her primitive subjects, sent Ovando as governor to Hispaniola in 1502, with strict orders against despoiling and enslaving the Indians. Ovando faithfully obeyed Isabella's instructions, whereupon the Indians fled to the mountains, dug no gold, cultivated no corn, did not answer when the church bells summoned them for religious instruction. Such idleness and disdain for the gospel provoked Isabella to action. In 1503 she ordered the introduction of the encomienda as the royal solution for regulating land and labour in America.

The encomienda (from encomendar, to entrust), a word for which there is no adequate English equivalent, was the legal device under which the Crown "entrusted" specified numbers of Indians to deserving Spaniards, the encomenderos, who thereby won definite rights over their Indians and incurred specific obligations to them. The encomendero was entitled to definite days of labor from his charges and was duty bound faithfully to serve their physical and spiritual well-being.⁵

The encomenderos received their power over the Indians together with an obligation to protect and care for them. The nature of the obligation mirrored the obligations of the Spanish Crown. The encomienda is clearly more than merely a trust relationship vis a vis land.⁶ It is the first example of the wardship of the European nations over the Indian nations of the New World.

The encomienda system was much abused and in 1512 the Laws of Burgos were promulgated. These laws codified the encomienda system and attempted to alleviate its worst excesses. They spell out in clear language the paternalism of the colonizers. The laws were justified on the grounds of the laziness of the Indians and

their inclination towards vice.⁷ These laws create a complete regime for managing the lives of the Indians, from waking to sleeping and from the cradle to the grave. Amongst other things the laws established the amount of work to be required of the Indian and the amount of holidays to be allowed.⁸ They required religious instruction for the Indians⁹ and also laid down other more trivial rules such as those preventing the Indians from sleeping on the ground¹⁰ and setting the time at which the Indians could be required to get up in the morning.¹¹ Although the Laws of Burgos are more extreme, the comparison with today's Indian Act is both striking and depressing.

The abuses continued. The Dominicans of Hispaniola, in 1519, speaking of the colonizers as "rabid dogs" reported that "as far as could be said, one hundred thousand persons, had been destroyed and lost."¹² In 1532 deVictoria, a Spanish philosopher, argued that the Indians should be respected as equals and as owners of the land they occupied.¹³ He stated:

[T]he aborigines ... were true owners, before the Spanish came among them, both from the public and the private point of view.¹⁴

In 1537 Pope Paul III issued the Bull, Sublimus Deus, which recognized the Indians as human beings.¹⁵ It stated, inter alia:

[T]he said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property; nor should they be in any way enslaved.¹⁶

In 1542 the New Laws revoked the encomienda system but within a year the New Laws were themselves revised to favour the colonists.¹⁷ h

1550 & 1551 the dispute between the colonizers and the humanitarians was publicly

mooted in the debates at Valladolid between Bartolome de Las Casas and Juan Ginés de Sepúlveda.¹⁸ This debate has been called "one of the decisive events in the history of Spain and of Mankind."¹⁹ The two participants argued the justice, or lack of it, of the war against the Indians in the Americas. Sepúlveda took the position that the war was justified in that the Indians were subhuman. De Las Casas, on the other hand, argued that they were at least of equal humanity. Sepúlveda argued, inter alia, that the Indians were so barbarous that it was justified to wage war against them to gain domination over them in order to liberate them.²⁰ De Las Casas responded, that in the large part, they were barbarous only because they lacked education.²¹

Neither debater thought for a minute that the Indians themselves should have any input into the debate. Also, neither entertained the possibility that the native religion itself might be redeemable if its worst excesses, such as the use of human sacrifices, could have been ended. They might be redeemed, for de Las Casas, if they were to give up their own way of life and submit to the dominion of Spain. Hanke quotes de Las Casas as stating at Valladolid:

[The Indians] are of such gentleness and decency that they are ... supremely fitted and prepared to abandon the worship of idols and to accept ... the word of God and the preaching of truth.²²

Clearly both de Las Casas and Sepúlveda felt that the fate of the Indians was properly in the hands of the Spanish nation. This is the attitude in which the trust relationship originates.

The Spanish experience is worthy of note because it forms the background to

the events which were to take place later in North America. In the later North American experience the debate was never joined at such a high level. In fact, the debate at Valladolid itself was, in the end, inconclusive. No clear decision was rendered.²³ The two sides are, however, very clearly demonstrated. And what is important is that neither side in the debate felt that the Indians had a right to their own culture, or to their own land or to any input into the colonial government. The encomienda system was to last until the eighteenth century. It has been blamed for the fact that today the once proud members of the great civilizations of South and central America are landless and, often, poor.²⁴

In this short account of the early Spanish activities in the Americas we can see the origin of two of the themes that are the focus of this thesis. In the attitude of the Spanish imperialist masters to their Indian "charges", particularly as evidenced in the Laws of Burgos and the debates at Valladolid, we see the trust relationship in embryonic form. In the encomienda system and the subsequent legislation we see the first examples of the relationship between the native population and the colonizers being defined in terms of a legal trust or a wardship. These two "trusts" were utilised by the Spanish to strip the indigenous peoples of their land and of their culture. Very similar devices were to be used in North America by the French and the British when they came to colonize that continent in the following century.

In North America the exploitation was rarely of such intensity and brutality as it had been further south. This is probably not due to the greater humanity of the North American colonists. The North American colonists were largely either

farmers or fur traders. Many of the farmers were Puritans to some extent at odds with the governments in England. The fur traders relied on the native population to obtain both food and the raw material of their trade. The Spanish had been from the aristocracy whose interests were in gold and, where they did cultivate the land, only in the wealth to be so realised and not in the work itself. Others were expected to do the work.²⁵ These facts alone would render the relations between the two cultures different in North and South America. But this is not the place to speculate as to what the reasons might have been. Enough to say that things were different. The Spanish had colonized through war: the North American colonizers came more or less peacefully.

Like the Spanish, the French do not seem to have recognized any right in the Indians to their land. Mr. Justice Taschereau in the Supreme Court of Canada referred to this fact in the St. Catherine's case.²⁶ He stated:

Neither in the commission or the letters patent to the Marquis de la Roche in 1578 and 1598, nor in the charter to the Cent Associés in 1627, nor in the retrocession of the same in 1663, nor in the charter to the West Indies Company in 1664, nor in the retrocession of the same in 1674, by which proprietary Government in Canada came to an end, nor in the six hundred concessions of seigniories extending from the Atlantic to Lake Superior, made by these companies, or by the Kings themselves, nor in any grant of land whatever during the 225 years of the French domination, can be found even an illusion to, or a mention of, Indian title.²⁷

The French first arrived in the New World in 1534 with Jacques Cartier's first voyage. The first French grant dates from 1540.²⁸ This and other early grants came to nought. The first successful grant was that to La Roche in 1598.²⁹ In 1603 Pierre Du Gua, Sieur de Monts, obtained a Royal Commission to establish a colony in New

France. Slattery says of this commission:

[De Monts was empowered as the Deputy of the King] to extend the King's authority as far as possible within the stated limits (delineated in the grant) and to subdue the inhabitants, thereby bringing them to the true knowledge of God.³⁰

The actual language in the grant is stronger. It requires de Monts to "assujettir, submettre & faire obeir tous les peuples de [la] terre."³¹ The purpose of the colonies in French America was, according to Slattery, "to facilitate the fur trade."³²

Slattery concludes that the French did recognize that the Indians had proprietary rights in their land. This seems hard to sustain. He comments:

The relative absence of French-Indian treaties involving cessions of territory or land rights has often been remarked. ... From this, some conclude that France did not acknowledge any sort of Indian interest in the soil. The true explanation seems somewhat different. France was primarily concerned with extending its dominions in America by incorporating Indian nations under French rule, rather than acquiring lands for settlements. ... [T]he aim was to attach the Indian nations to the French crown as subjects and vassals, and thereby obtain dominion over their territories.³³

This seems like a rather back-handed recognition of property rights in land. In truth, it is astounding to find recognition of a right in the very act of its usurpation. However the French gained their dominion over the Indian lands, the lack of executive or legislative recognition of the Indian's right to their land suggests to me at least that, ultimately, the French ignored it.

The paternalism which we have noted above as a precursor of the trust relationship, can also be seen in the dealings of the French with the native population which they displaced. Marc Lescarbot, the first historian of New France,³⁴ in 1618, said of the Indians:

I have at times seen some who doubted if one could justly occupy the lands

of New France, and deprive the inhabitants; to whom my reply has been in few words, that these people are like the man of whom it is spoken in the Gospel, who had wrapped up in a napkin the talent which had been given unto him, instead of turning it to account, and therefore it was taken away from him. And, therefore, as God the creator has given the earth to man to possess it, it is very certain that the first title of possession should appertain to the children who obey their father and recognize him, ... rather than to the disobedient children. ... The earth pertaining, then, by divine right to the children of God, there is here no question of applying the law and polity of Nations, by which it would not be permissible to claim the territory of another. This being so we must possess it and preserve its natural inhabitants, and plant therein with determination the name of Jesus Christ and France.³⁵ (my emphasis)

The indigenous population were seen as wards, not as equals just as they had been in the Spanish colonies further south. Their native land they only lived on, they did not own it.

There is some evidence that the French colonists, while they did not give legal recognition to Indian ownership, may have given de facto recognition through a practice of purchasing land from the Indians. Taschereau, in St. Catherine's, commented on this:

The King granted lands, seigniories, territories, with the understanding that if any of the lands, seigniories, or territories proved to be occupied by aborigines, on the grantees rested the onus to get rid of them, either by chasing them away by force, or by a more conciliatory policy as they would think proper. In many instances, no doubt, the grantees, or the King himself, deemed it cheaper or wiser to buy them than to fight them, but that was never construed as a recognition of their right to any legal title whatsoever. The fee and the legal possession were in the King or his grantees.³⁶

The practice never gained the status of official policy. With the British colonists in North America, we shall see, the practice of buying land was eventually accorded that status. It is worth commenting, however, that while the French may not have recognized any Indian rights to land, they would appear, at least according to

Lescarbot, to have recognized a broader obligation to "preserve its natural inhabitants".

ii The Royal Proclamation of 1763

The British colonies developed the practice of purchasing land from the aboriginal inhabitants in their early days. Gould and Semple describe the practice in one of the original colonies in this way:

In 1629 the Company of the Massachusetts Bay Colony issued instructions for the colonists to make "reasonable composition" with the native landowners in order to be free of any "scruple of intention." The right of the Crown was not questioned, yet the Indians were clearly acknowledged as having some right in the soil.³⁷

In 1633 the colony of Massachusetts passed a law requiring a licence from the colony before purchasing land from the Indians.³⁸ This policy was followed by many of the colonies.³⁹

In 1763 the policy was codified by the Imperial government with the promulgation of the Royal Proclamation. Mr. Justice Dickson comments in Guerin, that this is the first recognition of the "independent legal right" possessed by the Indians in relation to their land.⁴⁰ Certainly it is the first legislated recognition, but is in fact only the codification of a long established governmental practice. For the common law, the Royal Proclamation is perhaps the fundamental document in Indian/Crown relations. It is also an important document in the history of both the United States and Canada. It was issued following the end of the Seven Years War and established the new regime under which Great Britain intended to exploit the

wealth of North America, and sets the context in which all subsequent dealings between the Indian Nations and the Crown must be examined.

It is not possible here, nor is it necessary, to make the detailed critical analysis of the Royal Proclamation that Slattery and Lester have made.⁴¹ Since my focus is neither the nature of aboriginal title nor the question of its possible recognition, I am able to limit my analysis. It is enough to establish that the wardship is a fundamental aspect of the policy which informed the relations of the government of Great Britain with the Indians.

The prime purpose of the Royal Proclamation was to create a new governing structure for the British possessions in North America. The intent is to enable "all Our loving Subjects, ...[to] avail themselves with all convenient speed, of the great Benefits and Advantages which must accrue [from the] "extensive and valuable Acquisitions in America".⁴² To facilitate this it established three new governments and provided for the application of English laws in English style courts. It further provided for land settlements for soldiers who had fought in the then recent wars.

The final provisions lay out the policy to be followed in relation to the Indians. The preamble to this part delineates the stance taken towards the Indians:

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.⁴³

Two things are of note here. First, the guardianship role is already evident in the phrase "who live under our Protection". Secondly, the origins of the trust obligation

in relation to the land can be seen in the reserve of land to the Indians for their benefit. Title to the land is assumed by the Crown.⁴⁴ This can be seen in the preamble to the whole, noted above, which refers to "recent Acquisitions, secured to our Crown". This denial of any right to regulate or dispose of the land as they might see fit is, I suggest, an essential aspect of the wardship by the Crown of the Indians.

The Royal Proclamation also denies to the colonists power to purchase the Indian interest without Crown approval and establishes the method to be followed in purchasing that interest.⁴⁵ From the promulgation of Royal Proclamation to today, the Indians have been prevented from alienating their land except to the Crown. This requirement, it will be remembered, Dickson saw as the origin of the "distinct fiduciary obligation" owed by the Crown to the Indians.⁴⁶ Again, I suggest that this "distinct" obligation is only one facet of a general duty, the trust obligation or wardship in its broad sense, which colours the dealings of the Crown with the Indians. The general duty is not laid out with any clarity by the Royal Proclamation however and its scope must be sought in all the dealings of the Crown with the Indian nations.

The general duty is consistent with the practice of other European nations which were reviewed briefly above. The absolute power assumed by the colonial governments came with a duty to act to some degree or another, as the protector of the Indians from the worst excesses of the colonists themselves. The general duty is uncertain and can only be discovered by viewing the practice of the government

in context. The governments of Europe viewed their powers and their duties differently. After the defeat of the French and the promulgation of the Royal Proclamation, a single policy governed Indian/Crown relations in North America. With the American Revolution, which began in 1776 and lasted some seven years, and the subsequent creation of the United States of America, the history once again diverges. With the divergence in the United States comes the creation of a distinctive body of Native law.

b Native Law in the United States.

Native Law quickly became a coherent body of law in the United States. Felix Cohen, who first recognized the fact that Indian law deserved to be dealt with as a whole and as a distinct body of law, wrote:

Indian law is an extraordinarily rich and diverse field. The cases, both old and new, weave a fabric with threads drawn from constitutional law, international law, federal jurisdiction, conflict of laws, real property, contracts, corporations, torts, domestic relations, procedure, trust law, intergovernmental relations, sovereign immunity and taxation. Typically, as those fields meld into Indian law, the blend produces a new variation that could not have been predicted by analysis of the applicable law from those other fields.⁴⁷

Cohen recognized that Indian law had become a body of law in its own right, rather than a series of sub-species of other bodies. The Indian law of contract, for example, was more a part of Indian law and not so much a sub-category of the general contract law.

The Indian law recognized by Cohen can be said to contain three elements: First, absolute legislative power in the Congress; second, Indian rights; and third, the

trust relationship. Although it might appear that the land rights, including hunting and fishing rights, are the central fact of Native law, I suggest here that it is the trust relationship which is the most important aspect. To view land rights as central is to mistake the symptom for the cause. Land rights appear to be of paramount importance only because they have been central to litigation. United States' Native law begins with land litigation and rapidly progresses to much broader issues such as the constitutional position of the Indian nations in the United States. This, I suggest, is inevitable because it is the trust obligation which is central and because the trust relationship is intimately connected with the acquisition of sovereignty in North America. Indeed, the progression from land issues to the broader issues can be seen in the founding cases of Native law for both Canada and the United States: the Marshall cases.

After the Revolution, the Federal government of the fledgling United States quickly succeeded to the role from which the government in London had been ousted. The new government concluded its first post-revolutionary treaty in October of 1784.⁴⁸ It was with the Six Nations. This treaty provides, inter alia:

A line shall be drawn, beginning at the mouth of a creek about four miles east of Niagara ... upon the lake named ... Ontario; from thence ... to the mouth of Buffaloe Creek on Lake Erie; thence south to the north boundary of the state of Pennsylvania; thence west to the end of the said north boundary; thence south along the west boundary of the said state, to the river Ohio; the said line ... shall be the western boundary of the lands of the Six Nations, so that the Six Nations shall and do yield to the United States, all claims to the west of the said boundary, and they shall be secured in the peaceful possession of the lands they inhabit to the east and north of the same.⁴⁹ (my emphasis)

The preamble of the treaty reads:

The United States of America give peace to the (Six Nations), and receive them into their protection.⁵⁰

The parallels with the wording of the Royal Proclamation, as well as the acknowledgement of the trust obligation, are clear.

Later treaties, starting with the 1785 treaty with the Cherokee, contain similar language.⁵¹ The 1785 treaty, for example, provides:

For the benefit and comfort of the Indians, and for the prevention of injuries and oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with Indians, and managing all their affairs in such manner as they think proper.⁵²

In 1787, the policy enshrined in the Royal Proclamation became the official policy of the new republic.⁵³ In 1790 the first Trade and Intercourse Act⁵⁴ prohibited "any person or persons ... [and] any state" from securing title or claim to any Indian lands except "by treaty or convention entered into pursuant to the Constitution."⁵⁵

The authority for these Acts is found in the Commerce Clause and the Treaty Clause of the Constitution. The Commerce Clause states that "Congress shall have the power to regulate Commerce with foreign Nations, and among the Several states, and with the Indian Tribes."⁵⁶ The Treaty Clause allows the President the "Power, by and with the advice and consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."⁵⁷ B

1790, then, the situation of the Indians under the dominion of the United States is comparable to that which it had been under the British in 1763. There is one important difference: there are no restrictions on the powers of Congress and the President, at least when acting in concert, over Indian land. The states are in no

better position in this matter than they had been before as colonies.

In its early years the United States followed the Imperial policy in its dealings with the Indians. The early treaties were quite favourable to the Indians. As the situation of the United States became more secure, the policies followed became less favourable to the Indians. Treaty-making continued for the next one hundred years and clauses, such as those mentioned above, promising protection continued to appear in treaties throughout the period. The idea of the United States as protector was fundamental to the language of the treaties.

The treaty phase of United States/Indian relations came to an end in 1871 when Congress passed the Indian Appropriations Act which provided, inter alia:

[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.⁵⁸

During this period, which Cohen has called the formative years,⁵⁹ the foundations of native law in the United States were laid. By its close, the trust obligation was firmly entrenched at the centre of the relationship between the Indian Nations and the United States government.

In the early years of the 19th century the United States Supreme Court gave its imprimatur to the interpretation of this relationship as a guardianship. Chief Justice Marshall, in Fletcher v. Peck,⁶⁰ Johnson v. McIntosh,⁶¹ Cherokee Nation v. Georgia⁶² and Worcester v. Georgia,⁶³ established native law as a distinct field and made guardianship the core of that field. These cases are the seminal influences of

not only United States, but also of Canadian Native law. With the last of these cases in 1832, the place of trust relationship in native law was secured.

i The Marshall Cases

Marshall developed his ideas of the obligations of the government to the Indians and as to the nature of the Indian interest in the land through four cases spaced over 22 years. The first two concerned land rights: the last two had constitutional implications. His interpretation of the treaties, legislation and of constitutional and historical practice, led him to conclude that, while the Indian peoples did not relate to their land in a way that the courts could recognise as ownership, they did have some rights to it which were legal in nature. The Indian nations, he held, had rather fragile rights of possession, along with such other legal rights as treaty might guarantee to individual tribes. There existed also an obligation on the United States to protect the Indian nations. The extent of the obligation was left vague.

The first of the cases dates from 1810. In Fletcher v. Peck, a case which was more concerned with contracts than with Indians, the power of the state of Georgia to grant land subject to Indian title was questioned.⁶⁴ The Royal Proclamation, which included the lands at issue within those reserved for the Indians, was cited in support of the argument. Referring to subsequent commissions in 1763 and 1764 including that land within the borders of the colony of Georgia, Marshall responded:

[The Royal Proclamation] contained a clause reserving, ... for the use of the Indians, all the lands on the western waters. ... The lands conveyed to the plaintiff lie on the western waters. ... The reservation [in the Royal

Proclamation] for the use of the Indians appears to be a temporary arrangement, suspending, for a time, the settlement of the country reserved, and the powers of the royal governor within the territory reserved, but is not conceived to amount to an alteration of the boundaries of the colony. If the language of the proclamation be, in itself, doubtful, the commissions subsequent thereto, ... entirely remove the doubt.⁶⁵

The argument had been made that the Royal Proclamation placed the land out of the reach of the government of the colony, now the state. This argument was rejected.

He continued:

It is the opinion of this court, that the particular land stated in the declaration appears, ... to lie within the state of Georgia, and that the state of Georgia has power to grant it. ... It was doubted, whether a state could be seized in fee of lands, subject to the Indian title. ... The majority of the court is of the opinion, that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.⁶⁶

The state government could grant unsundered Indian land even though it could not affect Indian possession. I suggest that the trust obligation, in somewhat embryonic form, can be seen in the separation of the Indian and state interests, and in the granting of the power of control over title to the government. Its broader ramifications, however, remained hidden.

Thirteen years later in Johnson v. McIntosh, Marshall got to refine this judgment somewhat. This case concerned land in what is now the state of Illinois also reserved for the use of the Indians under the terms of the Royal Proclamation. The plaintiffs claimed the land under two grants made before the revolutionary war. The grants had been made by the chiefs of the tribes to private individuals. The defendant claimed though a grant made by the United States. The United States

had signed treaty with the tribes in 1795.⁶⁷ This case addressed much more squarely the question of the nature of Indian title.

Marshall, in his decision, analyzed the history of the European colonization of North America. The view he laid down has become the foundation of the relationship between the native people and their new governments for the whole continent. He discerned a fundamental principle underlying all the dealings between the two races. The principle has become known as the Doctrine of Discovery. He states:

This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.⁶⁸

Indian ownership was not even in question for Marshall.

They did, however, have some legal rights. He continues:

In the establishment of [the relations between the discoverer and the natives], the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, ... but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.⁶⁹

The right he likened to a lease in that it does not prevent the owner from dealing with the fee as he wishes.⁷⁰

Marshall then went on to establish that the United States had taken over all

the powers which originally were the Europeans. He comments:

By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the "propriety and territorial rights of the United States." ... By this treaty, the powers of government, and the right to soil, ... passed definitively to these states. ... It has never been doubted that either the United States, or the several states, had a clear title to all the lands within the ... treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government which might exclusively exercise it.⁷¹

And for Marshall it is the United States government in which the power to extinguish vested. He continues:

The power now possessed by the government of the United States to grant lands resided, while we were colonies, in the crown, or its grantees. The validity of either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative, the existence of any right which might conflict with, and control it. ... All our institutions recognize the absolute title of the crown subject only to the Indian right of occupancy; and recognize the absolute title of the crown to extinguish that right.⁷²

The powers which the United States government inherited from Great Britain over the Indians were broad indeed. They were not, for Marshall at least, unencumbered. Certain responsibilities came with them. The peculiar history of European claims to North America gave rise to these responsibilities.

Marshall notes that Britain first claimed the continent as a vacant land. Due to the impossibility, for whatever reasons, of assimilating the Indians, the British found it necessary to convert the title through discovery into one gained by conquest. These problems arise due to the nature of British colonial law. For the purposes of this thesis, it is enough to assert two points, both taken from Blackstone.⁷³ First, where the land colonized is vacant, that is to say, uninhabited, the Crown has full

title and power to dispose of it as it might. Second, that where the land is not vacant, and in particular in conquered territory, the property rights of the conquered nation survive the conquest.⁷⁴ And this was so whether they were assimilated or chose to remain a distinct people.

This law was not to be adequate for application in North America. Marshall states:

[T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness; to govern them as a distinct people was impossible, because they were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity of either abandoning the country, and relinquishing their pompous claims to it or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood and exposing themselves and their families to the perpetual hazard of being massacred.⁷⁵
(my emphasis)

I am not concerned here with the accuracy of Marshall's analysis. Others have suggested at least a "cultural chauvinism."⁷⁶ I am interested in the case as legal history, not as actual history.

Whatever the truth, Marshall used this representation of history to create a new principle of law for justifying colonial tenure in North America. He states:

That law which regulates, and ought to regulate in general, the relations between the conqueror and the conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted ... and ... sustained, it becomes the law of the land and cannot be questioned.

So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be incapable of transferring the absolute title to others.⁷⁷ (my emphasis)

Marshall, it seems, has performed an interesting trick here. He has mixed two principles of the common law to create a new principle which reflects the existing practice of the British colonial governments. On the one hand, British law required that the conquering nation respect the antecedent rights of the conquered race, and on the other, discovery of vacant land allowed the sovereign a free hand in dealing with that land. North America had been treated originally as vacant land. Later it had turned out that conquest was necessary. Nothing in the law covered this situation. To the judicial mind, Marshall's at least, this required the fashioning of a new rule of the common law. Actual conquest in British law gave absolute power. The fictional conquest of the Indian Nations, by contrast, gave a limited power, a power which was to be charged with certain responsibilities.

The sovereign, in order to maintain peace in his colonies, issued the Royal Proclamation establishing a new regime for granting land to colonists. By its terms the Indian nations were denied rights which were properly theirs under the British colonial law. This denial required that the Crown step in to protect the Indian nations from exploitation made possible by that denial of input into the new governing regime. Thus, it is suggested, the trust obligation was born.

For the imperial Crown this may have been merely a temporary regime designed to provide for the peaceful expansion of empire. For Marshall, that regime matured into a principle of the common law. He continues from the quote

immediately above:

However this restriction [on transfer] may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and to be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by the courts of justice.⁷⁸

It has, in other words, become a fundamental principle of the law of the United States presumably equal in status to the principles of Blackstone noted above.⁷⁹

And what exactly is that fundamental principle? It is not a recognition of the Indian nations as equals. Far from it. It, rather, is an entrenchment of their subordinate position. It must have been clear to Marshall, as it is clear to us today, that the European and colonist governments did not in fact respect the rights of the Indian peoples.⁸⁰ Certainly while the Indians were strong enough to challenge the might of the colonists they were feared. But once they were unable to resist the colonist's advance, the Indians rights were ignored. And, for Marshall at least, that ignoring could be justified under the principles of land tenure that had evolved. He comments:

Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers and skill prevailed.. As the white population advanced, that of the Indians necessarily receded. ... The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out accordingly to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.⁸¹

This could be described as a process of peaceful conquest.

The obligation to respect property rights of a conquered nation has been converted into a limited respect only for actual possession. In other words, as

regards Indian ownership and title to the land, the colonists treated the land as vacant. However, as regards the Indian's possession, it was necessary only to end the Indian occupation of the land. This could be done by conquest or by purchase. And if the Indians abandoned their land, for whatever reason, the Indian title was to be deemed to abandoned also. Until the Indian's possession was terminated, it was to be "protected." The protection, it would appear, is a very weak obligation in that it appears to consist only of the surrender requirement. Marshall, with an adept sleight of hand, has converted the respect due to the rights of conquered nations into protection of the right of a weaker race to possession of such land as they could hold onto.

What is even more remarkable on Marshall's part is that he has taken the policy enunciated by the Royal Proclamation and attempted to render it into a principle of the common law of the United States. On the practice of the British under the Royal Proclamation Marshall comments:

According to the theory of the British constitution, the royal prerogative is very extensive so far as respects the political relations between Great Britain and foreign nations. The peculiar situation of the Indians, necessarily considered in some respects, as a dependent, and in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies, required that means should be adopted for the preservation of peace, and that their friendship should be secured by quieting their alarms for their property. This was to be effected by constraining the encroachments of the whites; and the power to do this was never, we believe, denied by the colonies to the crown.⁸²

This course was pursued not because of the force of the common law: it was a policy decision by the government of Great Britain. By contrast, in the fledgling

United States the same course was followed but, according to Chief Justice Marshall, for a different reason. There it was followed because it had matured into a rule of the common law. Great Britain's policy had become the United States's fundamental law. It was a "new and different rule" necessitated by the "actual state of things."⁸³ And since the case was concerned with land rights, Marshall explores only that aspect. Clearly however, logic suggests a broader protective role, and Marshall soon recognized this fact.

It is to be noted that in neither of these cases did the Indians themselves appear. Finally, in the third case of the series, Cherokee Nation v. The State of Georgia,⁸⁴ they actually appeared to argue their own case. In this action the Cherokee nation attempted to prevent Georgia from executing certain acts within territory reserved to them under various treaties made with the United States government between 1785 and 1819.⁸⁵ Marshall spoke of the case in this way:

If the courts were permitted to indulge their sympathies, a case better calculated to excite them can hardly be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary for their comfortable subsistence. To preserve this remnant the present application is made.⁸⁶

The case turned on whether the Supreme Court had jurisdiction under the Constitution to hear the case. To have their case heard it was necessary for the Cherokee nation to bring themselves within the ambit of Article III of the Constitution. Article III reads:

The judicial Power shall extend to all Cases, in Law and Equity, arising under

this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ... between a State and Citizens of another State; ... between a State ... and foreign States, Citizens or Subjects.⁸⁷

The Cherokee were not citizens. They, therefore, had to demonstrate that they were a foreign state. This they were unable to do.

Marshall did agree that they were a state. He allowed:

So much of the argument as was intended to prove the character of the Cherokees as a State, as a distinct political society separated from others, capable of managing its own affairs and governing itself, has, in the opinion of the majority of the judges, been completely successful. They have been uniformly treated as a State from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee Nation as a State, and the courts are bound by those acts.⁸⁸

They were not, however, a foreign state. Consequently, the action failed:

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign states. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.⁸⁹

Here we see stated unequivocally, albeit in obiter, for the first time, the guardianship role. The Doctrine of Discovery with its separation of title and possession of land,

has led Marshall inexorably to the conclusion that a similar rule must apply to all Indian governmental powers. They were nations before contact, and nations they remain. However, as nations within the United States nation, they are nations under pupilage. In the last of his four cases, Marshall presents the fully worked out theory and the trust obligation clearly occupies a central role.

In Worcester v. Georgia one of the laws which the Cherokee objected in the previous case was directly challenged. Worcester was a white missionary from Vermont imprisoned for violating a Georgia law requiring a licence from the state to live upon the Cherokee reserve. He applied for a writ of error to the Supreme Court. Since Worcester clearly came within Article III of the Constitution,⁹⁰ the problem in the previous case was finessed.

It is my contention that in this case Marshall brings together the three previous cases and makes as clear a statement as he could on the nature of relationship between the Indians and the government.⁹¹ He reiterates much of what he has said before. He expands on other issues. And retracts nothing. That title was in the Europeans still bothers him and, once again, he justifies the point. He comments:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.⁹²

At a later point he asks, and then answers his own question:

Did these adventurers, by sailing along the coast and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? ... [P]ower, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend.⁹³

The claim was one thing: it took power and actual domination to perfect it. And, as he had noted before,⁹⁴ it was the reality of colonization which created the superiority of the European land tenure over that of the Indians. Power the Europeans certainly had.

The claim, while absurd on its face, was, when coupled with termination of possession on the part of the Indians, however effected, was sufficient to perfect title, without cession, to all that land from sea to sea. He continues, speaking of the colonial charters,:

The extravagant and absurd idea that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell.⁹⁵

Nothing here is new: Marshall has said all of this before. The claims gave title subject to the native right of possession. That possession might be purchased or taken by conquest, as he comments here, or, as he had noted in Johnson v. McIntosh,⁹⁶ it might be abandoned. The Cherokee were not in the mood to give up their territory. They had come to court the previous year precisely to protect

possession of the land that they had earlier made treaty to retain.

What is new is Marshall's discussion of the relationship between the Cherokee and the United States. He discusses at some length the meaning of the "protection" owed under the law, through both treaties and legislation, to the Indians. Speaking of the first treaty with the Cherokee, he comments:

The third article acknowledges the Cherokee to be under the protection of the United States of America, and no other power.

This stipulation is found in Indian treaties generally. ... The general law of European sovereigns, respecting their claims in America, limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things in times of peace. It was sometimes changed in war. The consequence was that their supplies were derived chiefly from that nation, and their trade confined to it. Goods, indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves - an engagement to punish aggressions in them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without surrender of their national character.

This is the true meaning of the stipulation, and is undoubtedly the sense in which it was made. Neither the British government nor the Cherokees understood it otherwise.

The same stipulation entered into with the United States is undoubtedly to be construed in the same manner. The Cherokee acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected.⁹⁷

The sentiment contained in this last sentence is instructive.

Of the same provision in a later treaty Marshall states:

[The relation of the Indians to the United States] was that of a nation claiming and receiving the protection of one more powerful, not that of

individuals abandoning their national character, and submitting as subjects to the laws of a master.⁹⁸

Discussing the legislation respecting Indians then in place,⁹⁹ Marshall notes:

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union.¹⁰⁰

He concludes:

The Indian nations had always been considered as distinct, independent political communities, retaining their original rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed. ... The term "nation" so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.¹⁰¹

The Cherokee, by their treaties and by the general law, had retained a limited right to self-government. Consequently, the State of Georgia could not pass valid laws for them. Worcester, therefore, must go free.¹⁰²

Marshall's decision to recognize the Indian nations as "domestic dependent nations" is driven by his earlier recognition of the land right. The principles which lead to recognition are the same. The British colonial law required the recognition of the pre-existing laws of the indigenous societies. The Doctrine of Discovery contraverts that law and allows the Crown to assume full legislative power over the Indians. The language of protection in the Instructions to the governors, the Royal Proclamation, and in the treaties results in the power assumed by the government

being accompanied by a duty to exercise the power with due regard to the interests of the Indians. The trust obligation, which is what the duty has been called, is the duty which accompanies the assumption of power over the Indian nations.

The exact nature of the duty is not clear from the cases. Clearly, the Indians are dependent on the superior power of the United States.¹⁰³ This being so they have a legal right to protection by that power.¹⁰⁴ The protection resembles that of a guardian and ward.¹⁰⁵ Just what is to be protected is also somewhat enigmatic. Certainly, the Indian's possession of the land is to be protected as long as it peaceable.¹⁰⁶ It is possible to conclude that, for Marshall at least, the only protection required was the protection afforded by the surrender process. Further obligations may flow from treaties¹⁰⁷ and legislation.¹⁰⁸ They may also be fundamental law. The Indians might be entitled to relief¹⁰⁹ or supplies.¹¹⁰ They are entitled to protection from encroachments on their lands and prevention of entry by "disorderly" elements.¹¹¹ Perhaps most controversially, they are entitled to self-government¹¹² and protection of their national character.¹¹³ Marshall states this strongly in Worcester v. Georgia when he says, "Protection does not imply destruction of the protected."¹¹⁴

The legal obligations which are entailed by the relationship, whatever its nature, are unclear. The Cherokee treaties, along with most of the American treaties, have the force of law. Possibly then, all the obligations mentioned by Marshall should be legally enforceable. That did not come to pass and, whatever Marshall had in mind, he did not make it clear. It was necessary for the parameters

of the obligations, and as well as the content, to be clarified through the following years.

ii Development

The authorities suggest that Indian law in the United States has three major phases.¹¹⁵ The first phase lasted from the revolution until approximately 1871. It is the period when all the major treaties between the Indians and the government were made. It is the phase in which Indian rights received some recognition. The second phase for the most part saw the government attempt, by various measures, to destroy Indian peoples as a separate and distinct fact of North American life. During this phase many different policies were developed and implemented. It was a time of assimilation, allotment and termination and it lasted until the present phase, that of self-determination, began between 1958 and 1961. This most recent phase begins with the recognition, by the authorities, that the Indians themselves should have some say as to the direction of their future, and that they should be able, if they wish, to retain their Indian identity. Within the second period, from 1934 to 1953, there had been a glimmer of these things to come.

Cohen called the first phase the formative years,¹¹⁶ and it was during this period that the foundations of native law in the United States were laid. It was a time of immense upheaval for the Indians of North America. The treaties dealt with two billion acres of their land.¹¹⁷ At the beginning, during the revolutionary war, the Indians were much sought after as allies. By 1871 they were outcasts in their

own land as the American nation took more and more of the land for its own use and herded the remaining Indians into smaller and smaller areas of poorer and poorer land. Beginning with the 1817 treaty with the Cherokee¹¹⁸ a program was initiated of removing the Indians west of the Mississippi. This became settled policy in 1830 with the passing of the Indian Removal Act.¹¹⁹

The treaties vary greatly. Some, such as the first with the Delaware and the Cherokee,¹²⁰ dealt with the Indians as equals promising fair dealing. Others, such as the 1817 Cherokee treaty,¹²¹ altered an earlier treaty. Still others terminated Indian status completely.¹²² Many guaranteed some measure of independent control to the bands.¹²³ Cohen comments:

From 1776 to 1849, all treaty limitations on the powers of tribal self-government were related in some way to intercourse with non-Indians. Treaties concluded in the last two decades of the treaty making period, however, increasingly encroached upon the autonomy of tribes.¹²⁴
(authorities omitted)

As the United States gained strength and had less to fear from the Indian peoples, so it felt less constrained from interfering in their internal affairs.

After the Civil War, settlement in the far west increased dramatically. Since Indian land could no longer be obtained by the executive through treaty, the task fell to Congress. Cohen comments:

Rapid settlement and development of the West ... demanded legislation providing for the acquisition of Indian lands and resources. The theory of assimilation was used to justify the legislation as beneficial to the Indians. Proponents of assimilation policies maintained that if Indians adopted the habits of civilized life they would need less land, and the surplus would be available for white settlers. The taking of these lands was justified as necessary for the progress of civilization as a whole.¹²⁵(authorities omitted)

Needless to say, the Indians were not asked their opinion of this development. This marks the beginning of the second phase.

Although some attempts at assimilation had been made throughout the earlier history of the United States, the General Allotment Act¹²⁶ which was passed in 1887 signified that the national policy towards the Indians had changed from one of co-existence to one of domination. This act, like so many others, was partly born out of philanthropy and was intended to advance the Indians through assimilation. This does not excuse its excesses.

The Act attacked Indian sovereignty and culture on a number of fronts. Primarily, it allowed the President to break up the reserves and to "allot the lands ... in severalty to any of the Indians located thereon."¹²⁷ This was to impose upon the Indians the European form of tenure. Cohen cites two reports of the Commissioner of Indian Affairs as asserting:

It is doubtful whether any high degree of civilization is possible without individual ownership of land.

Common property and civilization cannot coexist.¹²⁸

The land was to be granted subject to a 25 year trust period to guard against alienation.¹²⁹ This is, I believe, the first actual reference to land as being held in trust for the Indians. The Act states:

[The Secretary of the Interior shall issue patents in] the name of the allottees, which patents shall be of legal effect, and declare that the United States does and will hold the land allotted, for the period of twenty five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made.¹³⁰

A further provision allowed the government to purchase any unallotted land for

settlement. The money thus realized was to be held "in the Treasury of the United States for the sole use of the tribe or tribes of Indians."¹³¹ The marginal note speaks of this as a trust.

The Act made a further attack upon Indian lifestyle in that it granted citizenship to allottees and to any Indian taking up the habits of civilized life.¹³² In 1924, citizenship was conferred upon all Indians.¹³³

The General Allotment Act had a devastating effect on the Indians. Canby puts it most succinctly:

The primary effect of the Allotment Act was a precipitous decline in the amount of Indian-held land, from 138 million acres in 1887 to 48 million in 1934. Of the 48 million acres that remained, some 20 million were desert or semi-desert. Much of the land was lost by sale as tribal surplus; the remainder passed out of the hands of allottees. Allottees who received patents after 25 years found themselves subject to state property taxation, and many forced sales resulted from non-payment. In addition, the Indians's new power to sell land provided many opportunities for non-Indians to negotiate purchases ... on terms quite disadvantageous to the Indians. The allottees were frequently left with neither their land nor with any benefits that might have resulted from its disposition.¹³⁴

As President Roosevelt was to describe it in 1906, it was "a mighty pulverizing engine to break up the tribal mass."¹³⁵

Many other methods were utilised in aid of assimilation. Education was fundamental. Cohen comments:

Education was viewed as an important tool; schooling was intended to provide Indian children with a substitute for a civilized homelife. [The] policy replaced the Indians' own history, legends, heroes, songs, and language with those of white Americans.¹³⁶ (authorities omitted)

Everything was fair game. Cohen continues:

Coercive attempts at assimilation were applied to other aspects of the Indian's life. In 1883 the Interior Department enacted a Criminal Code forbidding

"certain old heathen and barbarous customs." Local agents tried to force white civilization upon Indians, controlling such things as hair length, funeral procedures, and beef slaughtering. Engaging in specified dances and ceremonials was made punishable in 1921.¹³⁷ (authorities omitted)

From 1891 legislation allowed the Secretary of the Interior to lease land of allottees who could not "personally and with benefit to himself improve his allotment or any part thereof."¹³⁸ The leasing power was increased over the years.¹³⁹ Cohen called the allotment policy a "systematic attempt to eradicate Indian heritage and tribalism."¹⁴⁰

In 1934 the Indian Reorganization Act¹⁴¹ was passed creating an interlude of tolerance in this period of destruction, and perhaps signalling a third, more liberal, period which was to come. Allotment was ended, the trust period of the allotments which had been made was extended indefinitely, and provisions were included which attempted to further self-government and to protect the tribal land base.

In 1953 the direction of Indian policy was changed once more as pressure mounted against the Indian Reorganization Act. On 1st August of that year, Congress adopted a resolution which, while not binding, dominated Indian affairs until the adoption of self-determination as national policy. This resolution began:

Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as ... other citizens ... and to end their status as wards of the United States.¹⁴²

Under the influence of this, Congress terminated the status of a number of tribes.¹⁴³ Lost along with this was the special relationship with the federal government.

By 1958 the unpopularity of termination led to its abandonment. In June of

1961 the American Indians at a national meeting in Chicago demanded some degree of self-determination. In 1968 the Indian Civil Rights Act¹⁴⁴ announced a new approach to Indian issues. Following the passage of this legislation consent of the tribe was required before a state government could extend its jurisdiction to cover Indian lands. Since then the extent of tribal control over the lives of their members has been gradually increasing. It now includes child welfare,¹⁴⁵ education,¹⁴⁶ and justice systems that combine traditional and American-style court systems.¹⁴⁷ This approach to Indian issues the Cohen called the modern period.

Wilkinson in a recent book, builds on the Cohen's work.¹⁴⁸ The first phase, he suggests, recognized some degree of special rights for the Indians and allowed them a "measured separatism".¹⁴⁹ This line of case law, Wilkinson suggests, is typified by the Marshall cases, and such later decisions as Ex parte Crow Dog¹⁵⁰ and Talton v. Mayes.¹⁵¹ In Crow Dog the Court held that the murder of one Indian by another was punishable only by the tribe because Congress had not provided for federal court jurisdiction. In Talton v. Mayes, the Court held that since tribal powers pre-existed the United States Constitution, the Indians were not required to meet constitutional standards. Both of these cases build upon Marshall's idea of the Indians as "domestic dependent nations". This line of cases on the whole, recognizes Indian rights.

The second historical phase, Wilkinson suggests, emphasizes federal power and is typified by what he calls the Kagama-McBratney-Lone Wolf line of cases. These cases are destructive of the notion of Indian rights. Kagama¹⁵² upheld the

Major Crimes Act¹⁵³ which Congress had passed to provide for federal jurisdiction over such crimes as murder when committed on the reservation. This, of course, was in response to the Crow Dog case. McBratney¹⁵⁴ allowed state jurisdiction over the murder of a non-Indian by a non-Indian on reservation, and Lone Wolf¹⁵⁵ allowed that Congress could unilaterally override the terms of a treaty. This second phase recognizes the absolute nature of the federal power over the Indian Nations.

The modern phase is marked by the change from the pursuit of assimilation to the encouragement of some degree of self-determination. Cohen dates the modern era from 1961 when both of the candidates for President took the position that they would not alter the relationship with the Indians without tribal consent.¹⁵⁶ Canby¹⁵⁷ dates it somewhat later, in 1968, with the passing of the Indian Civil Rights Act.¹⁵⁸ The date is not important. To some extent it might be said to have begun in 1946 with the passing of the Indian Claims Commission Act¹⁵⁹ which demonstrated the intent, on the part of the government, to come to terms with the dissatisfaction of the Indian peoples with the treatment they had received over the years from the federal government.

Wilkinson dates the modern period from the 1959 decision of the United States Supreme Court in Williams v. Lee¹⁶⁰ which recognized inherent tribal jurisdiction over contracts between Indians and non-Indians entered into on an Indian reservation. In this modern age for Wilkinson, the courts have started to grapple with the "two separate bodies of jurisprudence" which have resulted from the two earlier periods of Indian legal history.¹⁶¹ Indian law by the beginning of the

modern period, whatever starting date one might choose, is a confused body of law. The early cases recognizing Indian rights seem irreconcilable with the later cases entrenching the plenary power of Congress. Wilkinson suggests that this has not been the case.

He points out that in the modern period, one by one, the major uncertainties have been clarified. The earliest cases of the modern period, Wilkinson suggests, concerned the continued existence of the reservations themselves. The Lone Wolf line of cases established the absolute power of the federal government over the reservation, even including the power of termination. By 1959, however, the principle had been established that explicit language was required before reservation status could be lost, even though it was held that it was not necessary to state the intention to extinguish. Some cases toyed with the idea of de facto termination once checkerboarding was so extensive that the reserve had lost its Indian character. This line of cases was effectively closed in 1976 with the decision in Moe v. Confederated Salish and Kootenai Tribes.¹⁶² Similarly, the possibility of termination through non-user was mooted and finally all but rejected in Oneida v. Oneida Indian Nation in 1985.¹⁶³

With the fight for the reservations won and the land base more or less secure, the struggle turned to focus on sovereignty and powers of government as the Indians attempted to assert full tribal status. Following the pattern of the land cases, similar arguments were mooted and rejected. In U.S. v. John¹⁶⁴ the court allowed that an hiatus in the existence of a tribal government does not mean the end of the right to

tribal self-government. And in Menominee v.¹⁶⁵ even termination was held not to extinguish tribal status. These cases, as Wilkinson points out, indicate that Marshall's opinions are still very much alive.

Presently, Wilkinson suggests, the Court is attempting to work out an accommodation between the state courts and the tribal courts.¹⁶⁶ This for him would represent the final step in creating a stability within which the Indian nations might develop within the United States.¹⁶⁷ The absolute federal power of the Lone Wolf decision remains "broad"¹⁶⁸, but it has been balanced by the liberality of the earlier period.

Wilkinson's analysis is a compelling one. It has however, what I would suggest is one major fault. Wilkinson gives little weight to the trust obligation. The main value of the trust obligation for him is that it "provides as essential part of the rationale for the rules of construction that are so influential in Indian law".¹⁶⁹ It is, I suggest, the very principle which has allowed the courts to work out a reconciliation between the precedents of the nineteenth and twentieth centuries. We have seen its origins as a central aspect of the Marshall decisions. It retained vitality even during the dark years of the second period. In the modern period too, I suggest, the trust obligation remains a vital part of Indian law.

c The Trust Obligation Today

The trust obligation in United States law today has three elements. There is first a generally unenforceable moral obligation. This has resulted in the rules of

statutory and treaty interpretation which assumes an intent not to abrogate or derogate from Indian rights in federal legislation and administration. Second there is an enforceable duty which acts as a check on the power of the administration. The third element is only hinted at. It would be, if it were ever to become law, a check on the powers of the government, that is to say Congress. All three, as we have seen, originate in the decisions of Chief Justice Marshall and all three can be found in Canadian law.

i The Moral Obligation

That a moral obligation attached to the federal power over Indians was acknowledged even while Congress dealt its hardest blows to Indian rights. In Kagama, for example, a case which upheld the right of the federal government to pass legislation unilaterally taking jurisdiction away from the Indians, the court said:

These Indian tribes are wards of the nation; the communities are dependent on the United States; dependent largely for their daily food; dependent for their political rights. ... From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection and with it the power. This has always been recognized by the Executive, and by Congress, and by this Court, whenever the question has arisen.¹⁷⁰

That did not prevent the Court from upholding the legislation.

In 1877 the Court stated that the duty of protection was not a legal duty. In Beecher v. Wetherby, which concerned the grant of reservation land by the federal government to the state government without Indian consent, the court had commented:

It is to be presumed that in this matter the United States would be governed

by such consideration of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties.¹⁷¹

In 1900 an even stronger warning was heard:

It is undoubtedly true that this government has always recognized the fact that the Indians were its wards, and entitled to be protected as such, and this court has uniformly construed all legislation in light of this recognized obligation. But the obligation is one which rests upon the political department of the government, and this court has never assumed, in the absence of Congressional action, to determine what would have been appropriate legislation, or to decide the claims of Indians as though much legislation had been had.¹⁷²

In 1903, the most extreme statement of the powers of Congress over Indian matters was made, but even in this case, the potential of the trust obligation is hinted at. In Lone Wolf v. Hitchcock, it was held that the actions of Congress were beyond the purview of the court.¹⁷³ In that case Congress had acted in contravention of a treaty in ceding land without the 75% vote required under the operative treaty.

The court commented:

The power exists to abrogate the provisions of an Indian Treaty, though presumably such powers will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand in the interests of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in the Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.¹⁷⁴
(emphasis in the original)

One might wonder what the Court would have said had lack of "good faith" had been proved. In the event, the Court concluded:

In effect, the action of Congress now complained of was but an exercise of [full administrative] power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of government.¹⁷⁵

The court must, it felt, presume the good faith of Congress adding that if the Indians felt injured it was to Congress alone that they could go for redress. The court could not even inquire into the affair.¹⁷⁶

ii The Rules Of Treaty Interpretation

Out of this background, the Court developed the principles for the interpretation of Indian treaties. In U.S. v. Winans, state legislation in derogation of a treaty was attacked.¹⁷⁷ Washington State had granted river front land to non-Indians preventing Indians from reaching their traditional fishing sites. These had been guaranteed to them under treaty. The court, in awarding easements to reach the sites, reaffirmed the obligation, which had first been recognized in 1899 in Jones v. Meehan,¹⁷⁸ to construe treaties as the Indians would understand them:

As we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and as "justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection, and counterpoise the inequality "by the superior justice which looks only to the substance of the right without regard to the technical rules."¹⁷⁹

In 1886 the Court acknowledged that the roots of this doctrine were in the trust obligation:

The parties are not on equal footing, and that equality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights of private persons equally subject to the same laws.¹⁸⁰

This has become the standard for treaty interpretation in both Canada and the United States, and the restriction put on state power has resulted in very powerful pro-Indian decisions in recent years.¹⁸¹

This standard remains good today. Cohen states:

In construing Indian treaties, the courts have required that treaties be liberally construed to favor Indians,¹⁸² that ambiguous expressions in treaties must be resolved in favour of the Indians,¹⁸³ and that treaties should be construed as the Indians would have understood them.¹⁸⁴ ... The Court has [also] developed a number of special rules concerning construction of Indian treaties which, taken together create a strong presumption that treaty rights have not been abrogated or modified by subsequent congressional enactments.¹⁸⁵

These work to constrain the power of Congress. As Cohen comments:

Since Congress is exercising a trust responsibility when dealing with the Indians, courts presume that Congress' intent towards them is benevolent and (that) treaties and other federal action towards them should when possible be read as protecting Indian rights and in a manner favorable to Indians.¹⁸⁶

This point may have been heeded, to some extent in the recent Sioux Nation v. U.S.¹⁸⁷

Probably the best example of this attitude is Menominee Tribe v. U.S.¹⁸⁸ which concerned a tribe terminated in 1954. The tribe sued for compensation for lost hunting and fishing rights which had been guaranteed by treaty in 1854.¹⁸⁹ The Court held:

We find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty, particularly when Congress was purporting ... to settle the Government's financial obligations towards the Indians.¹⁹⁰

The hunting and fishing rights were held to have survived termination. This narrow interpretation of the intent of Congress is, it is suggested, a strong example of the

power of the trust obligation. The protective role prevents the inadvertent destruction of Indian rights.

iii As a Restriction on the Powers of Congress

The authoritative contemporary statement on the standard of judicial review of the actions of Congress in Indian affairs was made in 1974 in Morton v. Mancari.¹⁹¹ This case concerned a conflict between two Congressional acts. Under the Indian Reorganization Act¹⁹² the Bureau of Indian Affairs had instituted an Indian employment preference. In 1972, Congress passed the Equal Employment Opportunities Act which, inter alia, outlawed discrimination on the basis of race.¹⁹³ Some employees of the Bureau brought an action claiming that the second act implicitly repealed the earlier one. The Supreme Court did not agree and commented:

As long as the special treatment can be tied rationally to the fulfilment of Congress' unique obligation towards the Indians, such legislative judgments will not be disturbed. Here where the preference is reasonable and rationally designed to further Indian self-government we cannot say that Congress' classification violates due process.¹⁹⁴

The Court, noting that the objects of the preference was to encourage self-dependence, fulfil the federal trust obligation and to counteract the bad effects of white domination, concluded that the Indian situation was a unique one:

[I]t is an employment criteria reasonably designed to further the cause of Indian self-government. ... [T]he legal status of the Bureau of Indian Affairs is truly sui generis.¹⁹⁵

Obviously, this decision says more about the parameters of the due process

requirement rather than about the limitations upon Congress. But it does also suggest that Congressional legislation which cannot be "tied rationally"¹⁹⁶ to a legitimate purpose, might be declared ineffective. Such a standard, obviously, is, as far as native people are concerned, a very weak one. That weakness was very quickly demonstrated.

In 1977, in Delaware v. Weeks,¹⁹⁷ the Court once again reiterated that the Congressional power, while plenary, is not absolute,¹⁹⁸ and once again referred to the "tied rationally" standard. The Delaware tribe had separated into three groups during its history. Two groups remained federally recognized Indians. Of these, one group, the Cherokee Delaware, assimilated into a Cherokee band in Oklahoma. Another group, called the Absentee Delaware, settled on a different reserve in Oklahoma. The third group, the Kansas Delaware, took up American citizenship, and gave up their tribal status. All three groups, in separate actions, sued the government for land sold in contravention of treaties made before the Delaware left their aboriginal homeland and split into the three groups. Both of the first two bands were successful.¹⁹⁹ Even though there was evidence that the existence of the Kansas Delaware had not been brought to the attention of Congress when it was passing the legislation concerning the award, the third group lost.

The Court agreed that the plenary power was not absolute. The Kansas Delaware, it was held, in terminating their tribal status no longer retained an interest in the tribal property.²⁰⁰ The Court held:

[The award to the Delaware] distributes tribal rather than individually owned property, for the funds were appropriated to pay an award redressing the breach of a treaty with a tribal entity, the Delaware Nation. ... As tribal

property, the appropriated funds were subject to the exercise by Congress of its traditional broad authority over the management and distribution of lands and property held by recognized tribes, an authority "drawn both explicitly and implicitly from the Constitution itself." ... We cannot say that the decision of Congress to exclude descendants of individual Delaware Indians who ended their tribal membership and took their proportionate share of tribal property as constituted more than a century ago, and to distribute the appropriated funds only to members of or persons closely affiliated with the Cherokee and Absentee Delaware Tribes, was not "tied rationally to the fulfilment of Congress' unique obligation toward the Indians."²⁰¹ (my emphasis)

Further justification was found in the fact that the Kansas Delaware had been excluded from a previous distribution of tribal assets and also in the difficulties inherent in determining the membership of the class of the Kansas Delaware.²⁰²

The justification seems weak and it is not surprising that a strong dissent was registered. As well, the then Chief Justice Warren and another went as far, although concurring in the result, as to register their disquiet with the reasoning on this particular point.²⁰³

Mr. Justice Stevens, in his dissent, declared the exclusion to be a violation of due process. He stated:

The statutory exclusion of the Kansas Delawares from any share in the fund appropriated to pay a judgment in favor of a class to which they belong is manifestly unjust and arbitrary. Neither the actual explanation, nor any of the hypothetical explanations is "tied rationally to Congress' unique obligation to the Indians."²⁰⁴

He concludes:

[N]o principled justification for the particular discrimination ... has been identified. And ... there is no reason to believe that the discrimination is the product of an actual legislative choice.²⁰⁵

It is hard not to agree with him. The majority decision is not a well-reasoned argument. It is, rather, merely assertion and description. The reasoning, if one can

call it that, consists only in arguing that, although the Kansas Delaware were members of the tribe when the breach of duty occurred, they are not at the time of the award and therefore can rationally be denied a share. When one realises that this award was made under the Indian Claims Commission Act which was to apply the standard of "fair and honorable dealing,"²⁰⁶ the decision seems unsupportable.

It is also true that the dissent is not above criticism. Stevens discusses the "tied rationally" standard as an element of due process rather than as a constitutional limitation resulting from the special obligations owed to the Indian nations. It is arguable that Morton v. Mancari suggests that the due process obligations owed to the Indian peoples are of a different order than ordinary due process because they are coloured by the trust obligation. Stevens does not address this point.

Not much more can be said of the "tied rationally" requirement. It can be seen that its limits are confused. It is hard to see any real theoretical basis for the decision of the majority in this case. Indeed, while the Court is prepared to agree that such a control exists, it has not attempted to elaborate upon its effects. At best its meaning would appear to be that Congress can pass legislation under one of its powers which violates another of its powers. Such appears to be the meaning of the decision in Morton v. Mancari.²⁰⁷ That appears to leave Lone Wolf²⁰⁸ all but untouched.

Indeed, Morton seems to have been wrongly applied in Delaware.²⁰⁹ Whereas Morton concerns the clash between two federal powers, in Delaware it is the correctness of Congressional action that forms the issue. Certainly, exclusion of the

Kansas Delaware is "tied rationally" to Congress' obligation to the Indians. But there is a further question to be answered. Was it also delinquent? The Court failed to address that issue. In a more recent case that issue has been squarely addressed and answered.

In U.S. v. Sioux Nation,²¹⁰ the Court was asked to assess the taking of the Black Hills from the Sioux Nation in 1877. The Black Hills had been guaranteed to the Sioux for their use along with hunting and fishing rights over a larger area in the Treaty of Fort Laramie.²¹¹ By statute in 1877²¹² the hills were ceded, contrary to treaty provisions requiring approval of three quarters of the tribe in a vote, in return for subsistence rations for as long as the Sioux should need them."²¹³ The government argued in 1980 that the rations provided sufficient compensation for the land. The Court disagreed. It stated:

[I]t seems readily apparent to us that the obligation to provide rations to the Sioux was undertaken in order to ensure them a means of surviving their transition from the nomadic life of the hunt to the agrarian lifestyle Congress had chosen for them.²¹⁴

The Sioux were awarded the value of the land taken.

This would, it is suggested, be a much better precedent than Delaware. Clearly, the taking of the Black Hills and the giving of rations are "tied rationally" to the federal obligation. Equally clearly, the giving of rations is not sufficient to compensate for the taking of the land. What is more, the Court has offered reasons for reaching the decision it delivers. This is in marked contrast to Delaware. As Haught says of Delaware:

The proper test ... is whether the discrimination against the Delaware was rationally related to a legitimate governmental interest or whether it was

invidious or irrational. A review of the ... decision reveals no legitimate interest was served by excluding the Kansas Delaware.²¹⁵

Delaware is not of any great assistance in understanding the "tied rationally" standard.

Wilkinson's view of Sioux Nation is that it announces that judicial review of Congressional actions is appropriate. But he also warns that one should not take too broad a view of the case. He comments:

It is impossible to measure the extent to which the Supreme Court's clarification of the limits on Congress's powers has caused, or will cause, subtle modifications in the legislative process. It is reasonable, however, to believe that some members of Congress will act with greater awareness of the federal trust responsibility.²¹⁶

So while it may not represent the announcement that there is a constitutional check on the powers of Congress, at least Wilkinson suggests that there might one day be such a check. And that the trust obligation is the likely source of that check. As yet, however, the idea remains dormant.

iv As a Check on the Powers of the Administration

This Sioux case leads us into the second branch of the relationship between the Indians and the government: The controls on the administration and other bodies of lower status than Congress. The powers of all these bodies, in matters concerning Indians, results from Congressional delegation. Menominee,²¹⁷ for example, concerns attempts by a state government, in this case Wisconsin, to regulate fishing. The state governments, generally speaking, do not have trust obligations to the Indians, consequently they have no duty to respect aboriginal

fishing rights. But before the states can abridge aboriginal rights, whatever they might be, the federal trust obligation must have been extinguished or at least delegated to the state governments. The courts have developed a fairly strong body of procedural requirements to restrict the abuse of delegated power over the Indians.

This body of law also finds its origins in the trust obligation. It is a much more powerful control over State governments and the federal administration than it is over Congress, and it is much more consistently applied. What is more, it operates to restrict not only state governments, it restricts federal officials and even high officers of state such as the Secretary of the Interior. The cases are legion. I shall cover only a few. It is my purpose here only to show the outline of the present law in the United States.

For Marshall the Indian/government relationship resembled a guardianship.²¹⁸ In the language of today's courts, the relationship is fiduciary. There are two elements that should be discussed here. First, it is useful to discuss the subject matter of the obligations. After that, and this is the more important aspect, I shall attempt to establish the parameters of the obligations.

For the most part, there will be no fiduciary obligations without express statutory or other acknowledgment. The one exception to this, it would seem, is where Indian land or money is involved. In 1980 in Navajo v. U.S.,²¹⁹ the Court of Claims said:

[W]here the Federal Government takes on, or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has expressed

otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary relationship.²²⁰

This point was later approved at the Supreme Court.²²¹

The obligation as regards land had been recognized as early as 1919 in Lane v. Pueblo of Santa Rosa.²²² In this case the Court prevented the Secretary of the Interior from dealing with Pueblo land as public land. Lane, the Secretary of the Interior, alleged that since the Indians were wards of the United States they had no power or control over the alienation of their land. The Court responded:

Assuming, without so deciding, that this is true, we think it has no real bearing on the point we are considering. Certainly it would not justify the defendants (Lane) in treating the lands of these Indians ... as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, but an act of confiscation.²²³

Before the administration can deal with Indian lands, then, it must have been specifically authorized to do so in the manner in which it intends to.

We have seen that hunting and fishing rights are protected by the trust relationship.²²⁴ In the Winters case, the Supreme Court affirmed that rights to water also come within its scope.²²⁵ Finally rights to proceeds from sale of timber are also the subject matter of a the federal duty. In the Navajo case mentioned above, the government was held liable to account for the sale of fire damaged timber, even though there was no statute expressly so stating, because the Indians had a right to timber on the reserve.²²⁶ These at least form the subject matter of the fiduciary obligations of the government to the Indians.

A private law fiduciary must beware of conflicts of duty and duty, and of duty

and interest.²²⁷ Where the role of the government corresponds closely to that of a private law trustee then the duties also tend to correspond more closely. For example, in Manchester Band of Pomo Indians, Inc. v. U.S.²²⁸ the Federal Court held that a positive duty exists to manage Indian trust funds in the same manner as would a private trustee, which duty includes the obligation to make trust funds productive even in the absence of a specific statutory requirement to do so.²²⁹

The government had not invested the band's trust money for a number of years and then, more recently, had placed them in the Treasury. There was a statutory requirement that 4% interest be obtained on Treasury funds. The court held that the 4% was merely a floor and did not overrule the normal obligation of a trustee to obtain a proper rate of return.²³⁰

Specifically, the court stated that these trust obligations had to be met by the government:

- 1 The trustee must act solely for the interests of the beneficiary;
- 2 the trustee may make loans to himself but not in bad faith;
- 3 the trustee must account for profit, even without breach; and,
- 4 he must use reasonable care and skill, to the level of his expertise or that of a reasonable business, and that there is, normally, a duty to invest in such a way as to produce income.²³¹

The government, the court held, had borrowed the money when it placed the funds into the Treasury rather than into short term government bonds which were paying higher rates of interest.²³² It was, therefore, liable to account.

The rigour of this holding is somewhat ameliorated by the ruling, mentioned

above, in the Navajo case.²³³ The court there stated:

The present accounting claims all deal with the management and disposition of Navajo funds and property. Defendants's insistence on express or statutory terms of trust is therefore irrelevant to these claims. Nor is the court required to find all the fiduciary obligations it may enforce within the express terms of an authorizing statute (or other document). The general law of fiduciaries can be utilised to the extent appropriate.²³⁴

So far this is in agreement with the holding in Pomo. But the court continues:

This does not mean, however, that all the rules governing the relationship between private fiduciaries and accountings between them necessarily apply in full vigour in an accounting claim by an Indian tribe against the United States. We refer to such rules as the principle that once a breach of fiduciary duty is charged (without any supporting material), the beneficiary is entitled to recover unless the fiduciary affirmatively establishes that it properly discharged its trust, and the theory that failure to render the precise form of accounting required may be sufficient, in and of itself, to establish liability. In each situation the precise scope of the fiduciary obligation of the United States and any liability for breach of that obligation must be determined in light of the relationships between the government and the particular tribe.²³⁵ (authorities omitted)

Regrettably, this manages to confuse things somewhat. What should be the obligation if the government has consistently been lax in its dealings with a tribe? Would the "scope of the fiduciary obligation" permitted be less than is normally required? This decision seems unnecessarily to weaken the force of the Pomo decision without offering any "principled reasoning" in its place. In fact the court seems to follow Pomo once having found that Navajo property is involved.²³⁶ Fortunately, some of this confusion has since been dealt with in the recent U.S. v. Mitchell,²³⁷ referred to here as Mitchell II.

In this case an Indian tribe sued the government for breach of trust in that it had sold timber rights below value. The tribe alleged that a trust had been

created by the General Allotment Act.²³⁸ When this case first reached the Supreme Court, in Mitchell I,²³⁹ the Court held that no true legal trust had been created. It stated:

We conclude that the Act created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources. The Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to management of allotted lands.²⁴⁰

The case was remitted and once more the Court of Claims found a positive fiduciary duty, this time on other statutes.²⁴¹

This time the Supreme Court agreed with the lower court. It stated:

In contrast to the bare trust created by the General Allotment Act the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They therefore establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.²⁴²

The court discussed the language and provisions of the statutes and regulations involved and, commenting on the "pervasive role"²⁴³ of the Secretary of the Interior in the sales of timber, concluded:

[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). ... Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people.²⁴⁴

There is, then a true trust and a general trust obligation owed to these Indians. The true trust is enforced more or less as a private law trust, while the general trust cannot be enforced through the courts.

However, even where Indian property is involved, sometimes the government's fiduciary obligations are clearly not the same as those of a private trustee. With some varieties of subject matter, such as water rights with which the Winters case²⁴⁵ dealt, the federal government has other important interests to protect. There are the rights of other citizens, state rights and often other federal interests to respond to.

The same standard cannot be applied to governmental fiduciaries in these areas since the function of such persons is often precisely to make choices between competing interests. The governmental role is, to an extent, necessarily one riven with conflicts of interests and duties and indeed, the very object of government is to seek an acceptable balance between them. Consequently, the courts have developed a special body of law regarding these obligations of the government as fiduciary to the Indians.

In The Three Tribes of Fort Berthold v. U.S., the Court of Claims not only laid much of the groundwork of this law but also greatly clarified the pre-existing law.²⁴⁶ Throughout United States history Indian land has been taken by the government under two very different powers. This fact explains much of the apparently conflicting jurisprudence in the area. Lone Wolf, we have seen, established that land can taken by Congress even in violation of a treaty, and that the courts will not second guess the adequacy of any payment made to its Indian occupants.²⁴⁷

In 1937 the United States Supreme Court, in Shoshone Tribe v. U.S.,²⁴⁸ had

restricted the effect of that case. This case also concerned the taking of reservation lands. The Commissioner of Indian Affairs had placed Araphoe Indians on a reservation created under treaty for the Shoshone. Congress had subsequently passed a statute regularizing the situation.²⁴⁹ The Shoshone sued for the value of the lands used for the Araphoe. In finding for the Shoshone, the Court said:

[T]he Shoshone had a treaty right of occupancy with all its beneficial incidents. ... The right of occupancy is the primary one to which the incidents attach, and division of the right with strangers is an appropriation of the land pro tanto, in substance, if not in form.²⁵⁰

"Spoilation," Cardozo J., concluded, "is not management."²⁵¹ So even though Congress had approved the taking by statute, the Tribe was awarded compensation. Interestingly, Cordozo goes even further and states that the compensation awarded must include "such additional amount beyond the value of the property right as may be necessary to effect just compensation."²⁵² This seems directly contrary to the Lone Wolf decision. Fort Berthold attempts to reconcile these two apparently conflicting decisions.

The Lone Wolf land was taken by act of Congress: this is an exercise of the plenary power. In Shoshone, by contrast, the land was taken by the action of the Commissioner of Indian Affairs. This, the Court held, was compensable as a Fifth Amendment²⁵³ taking of property.²⁵⁴ The first case is an exercise of the fiduciary power: the second is not. Both takings are, up to now at least, irreversible. In Fort Berthold, the Court of Claims discusses the different standards which apply:

If a taking under the Fifth Amendment has occurred, then the appellant is ... entitled to "just compensation." ... On the other hand, if there has been no Fifth Amendment taking, appellant can recover ... only if it shows that the moneys received from the sale of the lands were so far below the then fair

market value thereof as to amount to fraudulent conduct, gross negligence, or some other breach of its fiduciary obligations on the part of the Government. A mere disparity is not enough.²⁵⁵

This raises the difficulty of how one is to decide what is a Fifth Amendment taking and what is not. The Court is fearless in its confrontation of this problem:

It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indian's property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted in regard to Indian people, it must have acted in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time. Some guideline must be established so that a court can identify in which capacity Congress is acting. The following guideline would best give recognition to the basic distinction between the two types of congressional action: Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee. While not every word of every opinion can be harmonized with this guideline, it is basic to the holdings of at least the majority of cases in this area.²⁵⁶ (my emphasis)

The conclusion states the contrast between the two powers quite concisely:

In short, it is concluded that it is the good faith effort on the part of Congress to give the Indians the full value of their land that identifies the exercise by Congress of its plenary authority to manage the property of its Indian wards for their benefit. Without that effort, Congress would be exercising its power of eminent domain by giving or selling Indian land to others, by dealing with it as its own, or by any other act constituting a taking.²⁵⁷

This is a very clear test but, obviously, it is much easier to enunciate than to apply.

Given that the role of government is to balance competing interests, there will be times when the courts will be at a loss to determine exactly which role the government has been playing.²⁵⁸ This problem was addressed in the Supreme Court

in the recent case of Nevada v. U.S.²⁵⁹ which concerned competing rights to river water between the state of Nevada, the federal government and the Pyramid Lake Paiute Indians.

The background to this case is a 1973 Federal Court decision which awarded Winters water rights to the Pyramid Lake Paiute.²⁶⁰ The Paiute reservation, which was their aboriginal land, consisted of Pyramid Lake and the surrounding land. The government, apparently in 1972,²⁶¹ while acknowledging its obligation to maintain the water level in the lake, issued a regulation claiming authority to use waters that feed the lake for purposes of irrigation. The contract to supply the water dated from 1926.²⁶² The Indians, noting that the lake has no outflow, claimed that the lake required that water to maintain its level and to sustain the fish stocks on which they depend. They also noted that the water level had dropped substantially over the previous 60 years or so. The court agreed that the government owed a duty to maintain the level of Pyramid lake and ordered the government to make new regulations.

The revised regulations eventually came before the Supreme Court. The Indians, through the United States, argued that these regulations were also in breach of the fiduciary duty of the government. The government claimed that it had duties not only to the Indians but also to the farmers with whom it had contracted in 1926.

The Court responded:

Congress ... delegated to (the Secretary of the Interior) both the responsibility for the supervision of Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. ... In this regard the Government cannot follow the fastidious standards of the private fiduciary, who would breach his duty to his single beneficiary solely by representing

potentially conflicting interests without the beneficiary's consent. The Government does not compromise its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by Statute to do.²⁶³

In a concurring opinion Mr. Justice Brennan elaborates on the effects of this:

The mere existence of a formal "conflict of interest" does not deprive the United States of authority to represent Indians in litigation. ... If, however, the United States actually causes harm through a breach of its trust obligations the Indians should have a remedy against it. ... The availability of water determines the character of life and culture in this region. Here, as elsewhere in the West, it is insufficient to satisfy all claims. In the face of such fundamental natural limitations, the rule of law cannot avert large measures of loss, destruction, and profound disappointment, no matter how scrupulously even-handed are the law's doctrines and administration. Yet the law can and should fix responsibility for loss and destruction that should have been avoided, and it can and should require that those whose rights are appropriated for the benefit of others receive appropriate compensation.²⁶⁴

The effect of this is, of course, that while the farmers get the water to which they have a contractual right, the Indians, who have been on the land since time immemorial, have a right only to compensation unless, as the footnotes to the decision suggest,²⁶⁵ other water can be found to fulfil their needs. The rule is, then, that where competing interests exist, those of the Indians will be protected by damages and not by protection or tracing of the property or other interest itself.

There may be a rider to this: Where it is a state government to which the trust responsibility has been delegated and the duty is an ongoing one, the rule may be different. In U.S. v. Washington,²⁶⁶ the Quinalt Indians of Washington state sued through the United States to prevent the state from eliminating off-reservation fishing by Indians. The Court held that the state government could only regulate the fishing as much as was necessary to preserve fish stocks.²⁶⁷ This, it would appear,

would protect the fishing rights of the Indians and enforce, rather than award damages for breach of, the trust obligation.

There are three more points which it is useful to delineate. In U.S. v. Sioux Nation,²⁶⁸ the Court held that it was open to them to check the adequacy of any transmutation of property. Of the situation in that case, and the method of review, the Court said:

[T]he historical background to the opening of the Black Hills for settlement, and the terms of the 1877 Act itself, ... would not lead one to conclude that the Act effected "a mere change in the form of investment of Indian tribal property."²⁶⁹

This is an application of the Fort Berthold decision. The Court ordered the United States to pay the value of the land taken. The money and goods given, it held, had been for the giving up by the Indians of their hunting and fishing rights: The land had not been paid for.

In Pyramid Lake Paiute,²⁷⁰ the Secretary of the Interior decided on the content of the impugned regulation on the basis of a "judgment call."²⁷¹ The court held:

A "judgment call" was simply not permissible. ... The Secretary was obliged to formulate a closely developed regulation that would preserve water for the Tribe. He was further obliged to assert his statutory and contractual authority to the fullest extent possible to accomplish this result. ... Possible difficulties ahead could not simply be blunted by a "judgment call" calculated to placate temporarily conflicting claims to precious water. The Secretary's action is therefore doubly defective and irrational because it fails to demonstrate an adequate recognition of his fiduciary duty to his tribe.²⁷²

The fiduciary nature of the duty, then, allows the court to check the exercise of discretion and also requires that the decision maker "justify"²⁷³ his decision.

In the last decision I shall look at in this section, the possibility is raised that

the federal government might be held to be liable for obligations undertaken by state governments. U.S. v. Oneida,²⁷⁴ concerns obligations arising under various treaties signed by the Oneida with the state of New York in 1795 and subsequently. The Court of Claims held that the fiduciary obligation of the federal government continues where it has actual or constructive knowledge of the signing of the treaty.²⁷⁵ The case was remitted for a decision on this issue.

This gives a fairly complete overview of the nature of the trust obligation of the United States to the Indians. It is a somewhat confusing picture. To summarize as best we can, the obligation originated with the Executive but now is the responsibility of Congress which has, to an extent, delegated it to the administration. The power of Congress is plenary but not absolute. Any treatment which falls short of the normal duty of a fiduciary must be "tied rationally" to the "unique obligation" of Congress to the Indians. Gross deviation from the duty is reviewable. Construction of instruments relating to Indians will be liberal.

Where delegated power is being exercised the standards are stricter. Where Indian property is involved, the standards to be applied will be closer to those required of a private law trustee. The more elaborate the control of the government over the subject matter of the duty, the closer will the duties owed correspond to those of private law trustees. A Fifth Amendment taking by the administration will attract damages, whereas plenary action will be compensable only when it is manifestly unjust.

Where there is a clash of Indian and non-Indians interests, the Indian

interests generally will not be protected but the Indians will receive instead a damages remedy. Where ongoing injury to some aspect of the "trust" obligation is perpetrated by a state government, the interest itself may be protected.

The subject matter of the obligation very clearly includes tribal lands and money. It also seems to include water rights and hunting and fishing rights. And it also includes the rights necessary for the exercise of at least hunting and fishing rights. I am referring here to such rights as the easements to facilitate access to fishing places.

The exercise of discretion by the government in carrying out its fiduciary obligations to the Indians can be checked for its adequacy. The decision maker is under a duty to act positively to fulfil the obligation and must justify any decision made. The historical background is relevant when checking the exercise of governmental discretion. Finally, the federal government might be held responsible for obligations arising from action by a state government.

v Analysis

The trust obligation, with its origins in the earliest days of colonisation, has become a complex obligation, part moral and part legal. The moral obligation is very clearly laid out by Marshall in his series of cases from the early 19th century. That obligation is in the nature of a guardianship. But without acknowledgement by the Executive, Congress, or a state government, that guardianship is not a legally enforceable one.

The necessity of recognition by the government before the guardianship has any legal force is of crucial importance. Even uninterrupted aboriginal possession is not compensable without it. In Tee Hit Ton, this was stated in no uncertain terms:

Indian occupation of land without government recognition of ownership creates no right against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law.²⁷⁶

Yet the Court continues to speak of the "unique obligations" owed to the Indian peoples, and to speak of these obligations as a trust.

It must be concluded that the unique obligation is at root only a political or moral one. If the Indian land is not the subject of legal obligations, then it is difficult to imagine any obligations to the Indians, outside of statutory ones, which might be. Barber v. Harvey is instructive on this point and bears repeating:

[I]t is said that the Indians ... [are] the wards of this government; that therefore the United States are bound to protect their interests, and that all administration, if not all legislation, must be held to be interpreted by, if not subordinate to, this duty of protecting the interests of the wards. It is undoubtedly true that this government has always recognized the fact that the Indians were its wards, and entitled to be protected as such, and this court has uniformly construed all legislation in light of this recognized obligation. But the obligation is one which rests upon the political department of the government, and this court has never assumed, in the absence of Congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though legislation had been had.²⁷⁷

In other words, the courts will not act unless Congress has.

This is, I suggest, the distinctive feature of the obligations of the government to the Indians. The trust obligation is a moral or political obligation underlying all the dealings with the Indians. It is an obligation which originates, as Marshall had

said, in the dealings of both the United States and pre-revolutionary governments with the Indians. While Marshall seemed to be suggesting that the surrender requirement had become a fundamental principle of United States law, he did not do so as regards the responsibilities growing out of the guardianship. That was in fact, only a moral or political obligation. Recognition of the moral obligation as binding is an absolute pre-requisite to its enforcement. Without it, the courts will not enter.

Delaware v. Weeks²⁷⁸ is an informative illustration of this point. The facts, as noted above, showed that Congress in excluding the Kansas Delaware from the award, had not been advised of the interest of that group in the funds the misuse of which was the basis of the award. They had not even been advised of the existence of the group. The court merely read the statute making the award and interpreted it as a valid exercise of the trust obligation. Had this been review of an administrative act, it is not difficult to see that it would have been held that the decision maker had failed to consider relevant facts and, therefore, would have to reconsider his decision. In fact, as Stevens J. points out in his dissent, Congress had not even made a decision on the point.²⁷⁹ It had made a mistake. And the Court followed the mistake.

It is almost as if the Court, in this case, has taken the statute making the award as a statement by Congress on the parameters of the trust obligation. This is, of course, what one would expect of the judicial system: it leaves decisions of policy to be made by the legislature. In this case it is to be regretted because in fact

Congress had made a mistake which subsequently the judiciary legitimized. As Haught says:

[This] case is an example of what happens when Congress makes a mistake in regard to Indian claims policy, and the United States Supreme Court ratifies that error with a statement about Congress' unique obligation toward the Indians.²⁸⁰ (authorities omitted)

It is this sort of poor judgment that has caused the erosion of the Indian's land and other rights. And in this case it could legitimately have been avoided because Marshall's underlying guardianship could have permitted the courts to have checked the policy decision without violating the constitutional separation of powers.

It is open to the courts to maintain that once the trust obligation has been recognized, whether by treaty, jurisdictional, or other act, it must be applied as if it were law. In Delaware v. Weeks, the obligation had been recognized by treaty.²⁸¹ Had the Court required the actions of Congress to meet the guardianship obligation, then not only would justice have been done, but perhaps too, the law relating to Indian people might have become more consistent.

If the trust obligation in American native law is as I am suggesting, the question must be asked whether it is helpful, for the legal system to refer to it as a trust. If it is a unique political and moral obligation which underlies all the dealings of the government with the Indians then, obviously, it can take many different forms when it is given to legal status. And it is to be remembered that it is the legal form that will be enforceable, not the underlying trust itself.

Sometimes recognition might produce a true trust with all the power of a private law trust. We have seen this in Manchester Pomo Band of Indians v. U.S.,²⁸²

where it was held that the government had all the responsibilities of a true trustee in relation to band funds.

At other times the relationship will be of a completely different order resembling at times a guardianship and at other times something more akin to the international law trusteeship. Perhaps the Pyramid Lake cases²⁸³ are the best example of this.

In these cases the courts held initially, in Pyramid Lake Paiute,²⁸⁴ that the government had to live up to its trust obligation. Ultimately it was found permissible, in Nevada,²⁸⁵ for the obligation to be breached. Like the international law trusteeship, the obligation, ultimately, would be enforceable only through the political process.

Occasionally, the legally recognized form will be based only upon the practice of the parties. In Cramer,²⁸⁶ a tribe which had not signed treaty but which had given up its nomadic way of life, was awarded a right of occupancy against attempts of the Secretary of the Interior to grant the land to a railway company. The Court held:

[These Indians in settling and giving up their nomadic way of life were acting] in harmony with the well-understood desire of the government. To hold that by so doing they acquired no possessory rights to which the government would afford protection would be contrary to the whole spirit of the traditional American policy towards these dependent wards of the Nation.²⁸⁷

It was not important that the right to the land had not been recognized in statute.

They noted:

The right, under the circumstances here disclosed, flows from a settled governmental policy.²⁸⁸

It is easy to see that the trust analogy is rather strained if it is to apply to

rights which arise out of "settled governmental policy". All this makes the relationship very hard to predict. When it is realized that the subject matter can consist of less tangible things such as the right to hunt and fish,²⁸⁹ the problems of using trust terminology are more readily apparent. With some even less tangible subject matter, such as the protection of self-government mentioned by Marshall at the birth of the relationship,²⁹⁰ use of trust terminology is only confusing. It is difficult to imagine the rights to self-government being considered capable of constituting a trust corpus. Overall, it appears to this writer that the use of the term trust for the relationship between the government and the Indians is unwise and confusing.

Most writers, however, like the trust analogy, although for the most part they admit to the confusion that exists. Some, indeed, have added to the confusion. For example, in 1934 the following comment was made:

The legal title of ... reservation lands is either in the government (in moral trust for the tribe) or in the tribe as a legal group, but under the guardianship of the government.²⁹¹

This manages to mix up all the confusion. The comment sheds little light upon the legal status of reservation land. It is, of course, rather unfair to use an article of such a vintage in this way since, clearly, things were much more confused then even than now. Nevertheless, the comment does serve to illustrate my point.

Writing more recently, McNeill has argued for the development of a trust remedy for breaches of the government's obligations. He is well aware of the difficulties that stand in his way. He notes:

The Supreme Court has never recognized an Indian cause of action under

general jurisdiction for breach of trust. Moreover the Court has never articulated more than the shadow of a specific legal structure for the trust relationship, and few, if any, commentators have attempted to supply one. Lacking such a structure, the trust has tended to become a vaporous entity, whose shifting uncertain contours have lent themselves to diverse and contradictory interpretations by different courts.²⁹²

For McNeill the solution is to give structure to a trust remedy by "imputing some goal to the trust itself."²⁹³ He comments:

The relation can be cast into trust terms that not only impose a reliable structure on the field but also take the uniqueness of the relation into account.²⁹⁴

He suggests five different models for consideration.

The first, which he calls the model of plenary power, he recognizes as already out of date.²⁹⁵ It is based on Lone Wolf and, as he comments, has the subjugation of the Indian people as its purpose.²⁹⁶ The second he calls the model of partial responsibility.²⁹⁷ This he describes as "roughly the current situation," designed to maintain the Indians at subsistence level.²⁹⁸ The third example is the model of general responsibility.²⁹⁹ This seems to correspond to an enforceable guardianship designed to allow the Indians to maintain their separation from non-Indian society.

The model of restitution would allow the Indians to recover the land and money taken by fraudulent means.³⁰⁰ Its intent seems to be to restore the Indians as much as possible to the position they would have been in had the treaties not been broken. Finally, the model of Indian expectations would attempt to interpret governmental obligations as the Indians would have had they been able to write out the terms of the relationship upon signing the treaties with benefit of the hindsight

gained through the years since.³⁰¹

McNeill is not optimistic about the courts' ability to resolve the problems over the function of the relationship. He comments:

This Court probably will, if pressed, find an Indian remedy for breach of trust. But it will also likely limit it, through devices like the legislative intent test.³⁰² Justice will receive a nod, and the problems of the reservation will persist.³⁰³

There is an implicit suggestion that for McNeill, the real fault lies outside the sphere of the courts. If this is so, he is very likely correct. And, indeed, his paper points to a possible reason.

McNeill himself recognizes that some of his trust remedies are not actually trusts.³⁰⁴ His paper is intended as an heuristic device and as such it is useful. Certainly it illustrates the problems associated with using the term trust. But it also demonstrates something else. The root of the problem is not judicial interpretation of the Indian/government relationship, it is that the Indians want different things from the relationship than does the government. Clearly the model of Indian expectations would find support among many Indian groups. Equally clearly a government intent on cutting back social programs would favour the plenary power model. Different visions of the future produce different visions of the law.

Chambers has something to add to this. He says:

The underlying purposes of the trust relationship ... are probably determinative of the proper extent of judicial review. If it is a short-term "guardianship" designed to last until the wards become competent-i.e., acclimated to the ways of the dominant culture and/or assimilated into it -then specific performance of trust obligations seems less important and property can be more readily transmuted into money. Even if the trust relationship were seen as permanent, its purposes could be limited to providing financial support for Indians and to ensuring that their lands and resources were not sold for an unconscionable consideration; in this event,

judicial remedies limited to money damages for breach of trust would seem adequate. A more expansive reading of the trust relationship, however, would suggest that preservation of the trust corpus in a particular form- land and natural resources instead of money -is itself a critical value. If, as the Cherokee cases suggest, a chief objective of the trust responsibility is to protect tribal status as self-governing entities, the executive extinguishment of the tribal land base diminishes the territory over which the tribal authority is exercised and thereby imperils fulfilment of the guarantee of tribal political and cultural autonomy.³⁰⁵

In short, is the trust responsibility to prevent excessive abuses or is it to protect Indian lifestyles?

Analyzing the cases, Chambers discerns three "identifiable lines of cases."³⁰⁶ The first, the Marshall doctrine, protects the integrity of the Indians as self-governing tribes. The second, the Lone Wolf line, emphasizes the power derived from the trust obligation. The third, a line which follows Lane,³⁰⁷ Cramer,³⁰⁸ Pyramid Lake Paiute³⁰⁹ and Manchester Pomo,³¹⁰ prevents federal officials from acting contrary to the trust obligation even if their action is not contrary to statute, treaty or agreement.³¹¹

The conclusion his analysis leads him to is this:

[T]he different approaches to the purposes of the trust responsibility can be reconciled to permit judicial enforcement as long as a distinction is observed between executive and congressional action. Reading all the cases together, the principle that emerges is that Congress intends specific adherence to the trust responsibility by executive officials unless it has provided otherwise. Such a formulation preserves the role of Congress as the ultimate umpire of the purposes of the trust relationship while requiring strict executive compliance with the terms of the trust.³¹²

While this has simplicity to recommend it, it does have problems.

Chamber's analysis, like any other analysis, is based upon the jurisprudence of Marshall. But he has given no constitutional role to the judiciary in delimiting the trust even though for Marshall the trust seems to have been deliberately

intended to have given them such a role. For Chambers the judicial role is strictly the interpretation of the legislative instruments issued by Congress. This relegates the trust to being merely a tool of statutory interpretation. This would appear to be the role envisioned by Mr. Justice Rehnquist in some recent decisions.³¹³

Oliphant, for example, concerns the criminal jurisdiction over non-Indian defendants on the reservation. In holding that Indian jurisdiction requires "affirmative delegation of such power by Congress,"³¹⁴ Rehnquist said:

By themselves, these treaty provisions would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction.³¹⁵

The clear words of the treaty were not considered sufficient for a proper reading of the situation.

Rehnquist felt it necessary to interpret the clear meaning. To do so he stood the trust obligation on its head. He stated:

"Indian law" draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.³¹⁶

It would appear that for Rehnquist, the trust obligation is nothing more than the policy which is apparent in the legislation and in the executive instruments. And this policy can be used to interpret even apparently unambiguous instruments. As McNeill notes:

[This] method of construction would turn the 149 year old principle [Marshall's guardianship] inside out. In effect, statutory ambiguities would be resolved in favour of the government.³¹⁷

This, of course, because government practice could be used to decide what the government intended to write.

The guardianship would then have lost its place in the fundamental law of the United States. If Chambers and Rehnquist, or either one of them, are to be followed, there would be no trust at all: only a bleak rule of statutory interpretation would be left.

A second problem exists. Having been written in 1975, Chambers' article pre-dates the very important Sioux³¹⁸ decision which has granted a significant role to the courts in checking even congressional action. There is no sense in speculating how Chambers would have dealt with this case. What is clear is that the Court is prepared to carve out a role for itself checking the actions of Congress itself.

Rehnquist, in his dissent in Sioux,³¹⁹ lamented that the Court would "judge by the light of "revisionist" historians."³²⁰ This is, I think, a telling point. A different view is taken of treatment of the Indians by at least some members of today's Supreme Court than by those of former times. Indeed, the view has changed more than once since the days when Marshall formulated his view. As one writer has written:

The uniqueness of the federal/Indian relationship consists ... in a recognition of property rights evolving slowly within an extremely politicized context.³²¹

This comment also serves to highlight my point that the Indians and the government may have differing notions as to the purposes of the special relationship.

Something more needs be said about the trust relationship here. The Indians entered into the sphere of influence of the government of the United States with a

recognition by that government of their unique status. They were not citizens like any other but, as Marshall put it, domestic dependent nations. As such, much of their sovereignty was retained and is retained still. The guardianship originates in the trust that the Indians placed in the United States in accepting the sovereignty of that nation over them.

It is a fundamental mistake to suggest that this special constitutional position can be justifiably reduced into a rule of statutory interpretation uniquely applicable to the Indians. Perhaps Congress has the power to do so, but it would appear that the better argument for the courts to take is that until Congress explicitly says otherwise, that the trust obligation, whatever it might be, continues to underly the relationship between the Indians and the government. The holding in Sioux Nation would appear to support such an analysis.³²²

The alternative to such an analysis of the trust obligation would be one which embraces opinions such as those of Rehnquist. This would render the trust obligation merely a special rule of statutory interpretation, and a rather weak one at that. Indeed, under such an interpretation the obligations owed to the Indians would be less than those owed to non-Indians. Given the far greater power of the government over the Indians, this would be an abdication of duty by the courts.

It seems probable from this look at just three of the writers who have recently supported the notion of the trust relationship that what they have in mind, as a very minimum, is some sort of overarching moral obligation to the aboriginal inhabitants. It is worth noting that others agree with this position.³²³ What seems of concern is

the control of the power which the government has over the Indians and their property. So while the relationship is trust-like, it is not always a true legal trust.

They see the relationship as something other than a true trust. It does seem sensible, then, for the terminology to be altered to fit this fact. The use of the terminology of the legal trust is unnecessarily confusing and could lead to erroneous decisions. The courts have sometimes used the terminology of fiduciaries in place of that of trusts. This has a lot to recommend it. We shall see below a definition of fiduciary that might fit this situation well.³²⁴

The trust in United States native law appears to be largely moral or political; it is legal only where Congress has decided to make it so. The power Congress exercises over the Indians, by contrast, is constant. It covers education, health services, resource development as well as other subject matter. It has been suggested that these should be considered part of the trust obligation.³²⁵ Such things do not fit easily as the res for a legal trust though. The finding in Mitchell I³²⁶ that the trust enacted in the General Allotment Act³²⁷ did not entail active duties is illustrative of this fact.

In fact, when one looks really carefully at the relationship between the United States government and the Indians one comes to realise that it is not the fact that the formalities of a trust can be found that makes the Indians' position unique. One could, arguably, hold that the government holds public lands in the United States in trust for the population. Except for a very limited series of cases,³²⁸ such has not been the case. What emerges from a close consideration of the cases, is that it is

the power wielded by the government that sets the Indians apart. It is a power which should be controllable. Since the Indians numbers are too small to control the power of the government through the political process, and given the unique history of Indian/United States relations, it is a power which might properly fall to the courts to control.

When Mitchell I was argued before the Court of Claims, counsel for the government characterized the law of fiduciaries as "unanchored judge-created principles."³²⁹ When it reached the Supreme Court as Mitchell II, the Court was able to find a "fiduciary relationship" in the elaborate controls the government had established over the resource at issue.³³⁰ It was not the existence of the requirements of a trust that carried the day: it was the power exercised by the government. And this, we have seen was at the root of the trust obligation from the earliest days in Spanish law³³¹ as well as in Marshall's decisions in the early 19th century.³³²

The special position of the Indians in the law of the United States flows from their political weakness vis a vis the immigrant population, together with the last vestiges of their once sovereign power, which, in part, they retain within the confines of the reservation. Chambers, it would seem, had it right when he noted that one proper function of the obligation might be to prevent abuse. He may have limited it unnecessarily to acts of the administration. In theory at least, it could rightly extend to abuses by Congress: Sioux³³³ might have established that it does. Only time will tell.

d Conclusion.

This brings us to the end of this survey of the American influences on Canadian native law. That which appears most important in the American jurisprudence, is the Indian's lack of political power. This was originally the result of denial of subject status or citizenship to the Indians. Today it results from their lack of numbers. Certain legal consequences have arisen from this.

Since the earliest days the relationship of the Indians to the colonial governments has been characterized as one of trust. That description has been entrenched in the law of the United States. I have suggested that that characterization would appear to rest upon two main facts: the Indian's lack of political influence with the settlers and their governments, and the denial by the settler governments of full property rights in the Indians over their land. The legal consequences of the trust relationship which is at the heart of the United States Indian law are not yet completely worked out. Certainly, there is at least a special rule of judicial review of administrative action. Possibly it amounts to a restraint upon Congress and the Executive requiring, in the event of violation, compensation³³⁴ or even, perhaps, affirmative or corrective action.³³⁵

As we noted in Chapter One, Johnston suggests that the United States law "will be instructive in elaborating the nascent Canadian concept"³³⁶ and that it "could provide an equitable and coherent theory of Crown trust responsibility in relation to Canadian Indians."³³⁷ She concludes:

Through its legislation dealing with Indians, the Canadian government, has unilaterally undertaken to regulate almost every aspect of Indian existence. Under this comprehensive statutory scheme, the Minister of Indian Affairs is

accorded sweeping discretionary powers. The application of a control theory of trust responsibility would lead to the recognition of a fiduciary duty coextensive with the government's pervasive pattern of control. This approach would provide a guide for defining the contours of the federal Crown's fiduciary responsibilities that is both sensible and just. However wide the discretion granted by statute, the court would be able to ensure that is exercised correctly.³³⁸

I have no doubt that the then Mr. Justice Dickson intended just that. I suggest, however, that to stop there would be to fail the promise of the new Constitution. The law of the United States provides, and as we can see Johnston urges the adoption of, a fiduciary concept dependent on statute. That would mean a duty completely subject to the wishes of Parliament. That is precisely the species of power which has resulted in the whittling away of any meaningful special status in the Confederation.

Constitutionally protected rights must result in some sort of limitation of the powers of the legislative arm of the government. That surely is the whole purpose of entrenchment of rights in a Constitution: they are rights preventing the government from freely and fully exercising its legislative power. Constitutional rights are in a sense, rights against the government. A concept of constitutionally entrenched aboriginal rights which allows the full and free exercise by the government of its legislative power over the First Nations is a concept of rights which Bentham might have described as "nonsense upon stilts".³³⁹

I wish to suggest a theory which will go further than the American doctrine. I would urge the adoption of a reading of Guerin which is truly "coextensive with the government's pervasive pattern of control" and which fully recognizes that the

government has "unilaterally undertaken to regulate almost every aspect of Indian existence." It is my contention that Dickson's opinion Guerin supports the recognition of such a theory. The theory I suggest here is a minimal theory which suggests only a limited restriction on the powers of government. Justice would seem to require the recognition of an even stronger right in the Indian Nations against the government. That, however, is an argument for another day.

The United States law has had a significant influence on Canadian Native law. Indeed, the Guerin case would appear to import the concept of fiduciary developed by the United States Supreme Court in Mitchell into Canadian jurisprudence. One very significant difference stands to warn Canadian jurists against the wholesale importing of the United States law into Canada. In Canada aboriginal rights now receive constitutional protection. If the trust obligation is part of the set of protected rights, then it will be necessary to reassess the United States trust obligation. I shall suggest below that the entrenchment of aboriginal rights in Canada requires that the direction intimated by such cases as Sioux Nation and the dissent of Mr. Justice Stevens in Delaware must be heeded. I shall suggest, that if the courts are to act in a principled manner, the law of the trust obligation ineluctably points to a restriction on the governmental powers of the Canadian governments.

NOTES

1. Indian Act, R.S.C. 1985, C. I-5.
2. Sechelt Band Self-Government Act, S.C. 1986, c. 27.
3. Guerin v. The Queen, [1984] 2 S.C.R. 335; 13 D.L.R.(4th) 321; 55 N.R. 161; [1984] 6 W.W.R. 481; 59 B.C.L.R. 301; [1985] 1 C.N.L.R. 120, revg. [1983] 2 F.C. 656; 143 D.L.R.(3d) 416; 45 N.R. 181; [1983] 2 W.W.R. 686; 13 E.T.R. 145; [1983] 1 C.N.L.R. 20 (F.C.A.), which revd. [1982] 2 F.C. 385; 10 E.T.R. 61; [1982] 2 C.N.L.R. 83 (F.C.T.D.).
4. See, for example, P.Driben & P.S.Trudeau, When Freedom is Lost (Toronto: University of Toronto Press, 1983); A.M. Shkilnyk, A Poison Stronger than Love: the Destruction of an Objibwa Community (New Haven: Yale University Press, 1985). Driben and Trudeau discuss the attempts at economic development of the Fort Hope Band in Northern Ontario. They suggest that the failure of most of the projects is due to the excessive control exercised over the projects by the Department of Indian Affairs. Shkilnyk documents the problems experienced by the Grassy Narrows people following their removal from their old reserve to a new one on the highway from Kenora. The removal was ordered by the Department of Indian Affairs in an attempt to improve conditions on the reserve. The devastating problems which the people experienced are generally agreed to be at least in part due to the removal.
5. H.Herring, A History of Latin America, 3rd ed. (New York: Alfred A. Knopf, 1968), 186.
6. The closest thing in Spanish law which resembles the trust is the fideicomiso.
7. R.D. Hussey, "Text of the Laws of Burgos (1512-1513) Concerning the Treatment of the Indians" (1932) 12 *Hispanic American Historical Review* 301, 306. The text of the laws is contained at 306-323 and is followed by an abstract.
8. ibid., 312, Articulo XIII.
9. ibid., 311/3, Articulos VI, VII, X, XII.
10. ibid.
11. ibid.

12. M. Bataillon & André Saint-lu, El Padre Las Casas y la Defensa de los Indios, traducción J. Alfaya & B. McShane (Barcelona: Ariel, 1976), 73. (My translation).
13. F. deVitoria, De Indis et de Jure Belli: Relectiones, ed. E.Nys (New York: Oceana Publications Inc., 1964), Sect.1, pp.115-128.
14. ibid., 128.
15. For the text see, L.Hanke, All Mankind is One (DeKalb: Northern Illinois University Press, 1974) 21.
16. ibid.
17. ibid., 22.
18. Hanke, supra note 15, is the most accessible version of the debates.
19. A. Losado, "La <Apologia>, Obra Inedita de Fray Bartolome de Las Casas: Actualidad de su Contenido" (1968) 67 Boletín de la Real Academia de la Historia" 201, 201: «Uno de los acontecimientos decisivos en la Historia de España y de la Humanidad». (My translation)
20. ibid., 207. (My emphasis and translation).
21. For example, speaking of the practice of human sacrifice de Las Casas said, "Indians are not to be blamed because they do not come to their senses at the first words of a preacher of the gospel. For they do not understand the preacher. ... [These and other arguments prove that those who practice human sacrifice] labor under an excusable, invincible ignorance." (supra note 15, 94/5.)
22. supra note 15, 82.
23. ibid., part IV, in particular 115.
24. supra note 5, 187.
25. ibid., 186.
26. St Catharines Milling and Lumber v. The Queen (1887), 13 S.C.R. 577; 4 Cart. B.N.A. 127; 2 C.N.L.C. 441 (S.C.C.). All references are to S.C.R. For a history of French claims in North America see: B. Slattery, French Claims in North America, 1500-59 (Saskatoon: Native Law Centre, University of Saskatchewan, 1980). See also Slattery's thesis, infra note 28, c. 5, pp. 70-94.

27. ibid., 644.
28. B. Slattery, The Land Rights of Indigenous Canadian Peoples, Ph.D. thesis, Oxford, 1979, (Saskatoon: College of Law, University of Saskatchewan, 1979), 71/2.
29. ibid., 78-82.
30. ibid., 83.
31. ibid., note 59.
32. ibid., 84.
33. ibid., 91/2.
34. P.A. Cumming & N.H. Mickenburg, Native Rights in Canada, 2nd ed. (Toronto: The Indian-Eskimo Association of Canada, 1972), 77.
35. Marc Lescarbot, The History of New France 1618 ed., trans. W.L. Grant, (Toronto: The Champlain Society, 1907), cited in Cumming & Mickenburg, supra note 34, 77, note 9.
36. supra note 26, 645.
37. G.P. Gould & A. Semple, Our Land: The Maritimes (Fredericton: Saint Annes Point Press, 1980), 6.
38. ibid., 8.
39. ibid., 7-22.
40. Guerin et al. v. The Queen, [1984] S.C.R. 335, 13 D.L.R. (4th) 321, 55 N.R. 161, [1984] 6 W.W.R. 481, 495, 59 B.C.L.R. 301, [1985] 1 C.N.L.R. 120 (S.C.C.). All cites are to W.W.R.
41. See for example, Slattery, supra note 28, and G.S.Lester, The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument, (1981) (unpublished J.S.D. thesis, York University, Toronto).
42. The Royal Proclamation of 1763, R.S.C. 1985, Appendix II, No.1.
43. ibid.
44. There is a problem, not addressed here, of exactly how the Crown gained its title. See for example, Slattery's thesis, supra note 28, Lester's thesis, supra note 41, c. XIX. I do not intend to deal with this debate here. I am content,

by and large, to accept the holdings of the courts on the effect of Royal Proclamation. The debate concerns the legal effect of the Royal Proclamation at its promulgation. Arguing that the courts have fundamentally misconstrued this they argue, from various positions to various results, that the courts still have it wrong. See my discussion particularly in relation to Hurley, *infra* c. 1, part b. I am inclined to agree, but that is not the issue with which I am dealing here. I seek not a radical reassessment of the law of aboriginal title but only a reassessment, in the light of the Guerin decision, of the obligations of the government in its dealings with the aboriginal people. My less ambitious aims can be met even within a legal system which has fundamentally misconstrued the legal status of the aboriginal people's rights provided, of course, that it now offers a remedy for the wrongs which have heretofore been non-justiciable due to that or other misconceptions, or to any other cause or causes.

45. supra note 42.
46. supra note 40, 495.
47. R. Strickland, Chief ed. Felix S. Cohen's, Handbook of Federal Indian Law (Charlottesville, Virginia: Michie Bobbs-Merril, 1982), 1. Referred to hereinafter as Cohen.
48. At Fort Stanwix, 22nd October 1784, (7 Stat. 15). An earlier treaty of peace had been concluded with the Delaware Indians on 17th September 1778, (7 Stat. 13). In the earlier treaty no specific limits were established. The government merely guaranteed "all their teritoreal (*sic*) rights in the fullest and most ample manner." It was not a treaty ceding land rights as was that of the 22nd October.
49. 7 Stat. 15, art. III.
50. ibid., preamble.
51. See the list of treaty and other provisions published in G.L. Hall The Federal-Indian Trust Relationship 2nd ed., (Washington, D.C.: Institute for the Development of Indian Law, 1981), Appendix A.
52. 7 Stat. 18 (1785), art. IX. See also 7 Stat. 21; 7 Stat. 24, art. VIII, etc.
53. Northwest Ordinance, 1 Stat. 50 (1787), footnote a.
54. Indian Trade and Intercourse Act, 1 Stat. 137, (1790).
55. ibid., art. IV.

56. U.S. CONST. art. I, s. 8, cl. 3.
57. U.S. CONST. art. II, s. 2, cl. 2.
58. Indian Appropriations Act, 16 Stat. 544 (1871), codified 25 U.S.C. s. 71, preamble. After this date the agreements signed between the Government and the Indians are referred to as "treaty substitutes".
59. supra note 47, 62.
60. Fletcher v. Peck, 10 U.S. (6 Cranch.) 87 (1810). The dissent of Johnson J. in this case informs the later decision of Marshall in the cases below.
61. Johnson and Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823).
62. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831).
63. Worcester v. Georgia, 31 U.S. (6 Pet.) 535, 8 L.Ed. 483 (1832).
64. supra note 60, 140. A grant "made in the form of a bill passed by the legislature"(126) of Georgia to one John Gunn in 1795 was impugned on the grounds that the Indian title, protected by the Royal Proclamation of 1763, had not been extinguished. and could not be but by the government of the United States itself.
65. ibid., 141/2.
66. ibid., 142/3.
67. 7 Stat. 49.
68. supra note 61, 573.
69. ibid., 574.
70. ibid., 592.
71. ibid., 584/5.
72. ibid., 587/8.
73. For a complete discussion see Slattery, supra note 28, and Lester, supra note 41.

74. Sir William Blackstone, Commentaries on the Laws of England, reprint of 1783 ed. (New York & London: Garland Publishing Inc., 1978), vol. 1, Introduction, s. 2, p. 38ff.
75. supra note 61, 591.
76. Lester, supra note 41, 189.
77. supra note 61, 591.
78. ibid., 591/2.
79. supra note 74 and the text accompanying.
80. See, for example, L. Little Bear, "Aboriginal Rights and the Canadian "Grundnorm"" in J.R. Ponting, ed. Arduous Journey: canadian indians and decolonisation (Toronto: McClelland & Stewart Ltd., 1986), 243.
81. supra note 61, 590/1.
82. ibid., 596/7.
83. supra note 77, and the text accompanying.
84. supra note 62.
85. ibid., 4/5.
86. ibid., 15.
87. U.S. CONST. art III, s. 2, cl. 1.
88. supra note 62, 16.
89. ibid., 17.
90. supra note 87, and the text accompanying. Worcester was a citizen of the state of Vermont and his dispute was with the state of Georgia. Consequently he could apply directly to the United States Supreme Court for redress.
91. Others argue that Marshall has made a fundamental change in his position. The point, for my purposes is not important. Lester, for example, suggests that the position Marshall takes in Worcester is not compatible with that in Fletcher v. Peck. He suggests that Cherokee Nation and Worcester stand for the proposition that title is perfected when possession falls to the Crown. I believe that this is in error. Through all the four cases Marshall deliberately refers to the Indians as possessors, never as owners. In all the cases he holds

that the title claimed by the European crowns is full title, with only a temporary burden in favour of the Indians. The charters establishing the colonies, Marshall states in Worcester, were sufficient to "convey title." Certainly he has developed his proposition, but the cases, I suggest, are, in the main, consistent with one another. And it is inescapable that Marshall himself never retracted what he laid down in the earlier cases.

92. supra note 63, 542/3.
93. ibid., 543.
94. In Johnson v. McIntosh, supra notes 75-78 and the text accompanying.
95. supra note 63, 544/5.
96. supra notes 77 and 81 and the text accompanying.
97. supra note 63, 551/2. For the treaty see 7 Stat. 16.
98. ibid., 555.
99. Indian Trade and Intercourse Act, 2 Stat. 139 (1802); An Act for making provision for the civilization of the Indian tribes adjoining the frontier settlements, 3 Stat. 516 (1819).
100. supra note 63, 558.
101. ibid., 559.
102. He didn't. He languished in gaol for another year until settlement was reached between the federal and state governments. The Cherokee were subsequently to give up almost all of their lands east of the Mississippi. See: J.C. Burke, "The Cherokee Cases: A Study in Law, Politics and Morality" (1969) 21 Stan. L. Rev. 500; W.F. Swindler, "Politics as Law: The Cherokee Cases" (1975) 3 Am. Ind. L. Rev. 7.
103. supra notes 69, 77, 81 and the accompanying text.
104. supra notes 77 98, and the accompanying text. And see Worcester v. Georgia, supra note 63, 551/2, particularly where it is stated that certain practices "bound the (Indian) nation to the British crown as a dependent ally, claiming the protection of a powerful friend and neighbour." (552).
105. supra note 89 and the accompanying text.

106. supra note 77 and the accompanying text. This is also implied by the requirement that cession must be voluntary (supra note 89) and that the natives must be willing to sell. (supra note 95).
107. supra notes 51 & 52 for example.
108. supra notes 53, 54 and 99, for example.
109. supra note 89, and the accompanying text.
110. supra note 97, and the accompanying text.
111. ibid.
112. supra note 98 and 101, and the accompanying text.
113. supra note 98 and the accompanying text.
114. supra note 63, 552.
115. This argument is made by Cohen, supra note 47, Wilkinson infra note 148, and Chambers infra 298, for example. While they do have some differences as to when to date the transition from one period to another, those differences are of no significance to the argument advanced here.
116. supra note 47, 62.
117. ibid., 48.
118. 7 Stat. 156.
119. 4 Stat. 411.
120. supra notes 48 and 67 and the text accompanying.
121. 7 Stat. 156. With this treaty the United States government initiated the policy of removal of the eastern Indians to Indian territory. This was in contravention of the policy stated in the earlier treaties with the Cherokee, such as that mentioned at note 67, which guaranteed title to the reservations.
122. By the 1850 treaty the Wyandots gave up all their land and their Indian status: 9 Stat. 987. They later regained both status and some land: 15 Stat. 513 (1867).
123. See, for example, 7 Stat. 28 (1789); 11 Stat. 611 (1855); 11 Stat. 699 (1856).
124. supra note 47, 68/9.

125. ibid., 128.
126. General Allotment Act, 24 Stat. 388 (1887), codified 25 U.S.C. s. 348.
127. ibid., s.1.
128. supra note 47, 132, note 40. The first is from 1876, the second from 1838.
129. supra note 126, s.5.
130. ibid.
131. ibid.
132. ibid., s. 6.
133. 43 Stat. 253, codified 8 U.S.C. s.1401(b).
134. W.Canby Jr.,American Indian Law in a Nutshell(St.Paul:West Publishing Co.,1981),21/2.
135. cited in Cohen, supra note 47, 143, from 35 CONG. REC. 90.
136. supra note 47, 139.
137. ibid., 141.
138. 26 Stat. 794, s. 3.
139. see Cohen, supra note 47, 134-136.
140. ibid., 143.
141. Indian Reorganization Act, 48 Stat. 984, codified and amended 25 U.S.C. ss. 461 through 479.
142. H.R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B.132 (1953).
143. see Cohen, supra note 47, 170-177.
144. Indian Civil Rights Act, 82 Stat. 77, codified 25 U.S.C. s. 1301 et seq.
145. 92 Stat. 3069 (1978).
146. 88 Stat. 2203 (1975).

147. J.W. Zion, "The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New" (1985) 11 Am. Ind. L. Rev. 89. See particularly 109.
148. C.F. Wilkinson, American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy (New Haven & London: Yale University Press, 1987)
149. ibid., 14.
150. Ex parte Crow Dog, 109 U.S. 556 (1883)
151. Talton v. Mayes, 163 U.S. 376 (1896)
152. U.S. v. Kagama, 118 U.S. 375, 6 Sup.Ct. 1109, 30 L.Ed. 228 (1886).
153. 23 Stat. 362 (1885).
154. McBratney v. U.S., 104 U.S. 621 (1882)
155. Lone Wolf v. Hitchcock, 187 U.S. 553, 23 Sup.Ct. 216, 47 L.Ed. 299 (1903).
156. supra note 47, 182
157. supra note 134, 28-31.
158. supra note 144.
159. Indian Claims Commission Act, 60 Stat. 1049, codified 25 U.S.C. s. 70ff. The act created a Commission to address claims against the United States the jurisdiction of which was broad indeed. Many previously barred claims became justiciable. Section 2 set the parameters of the Commission's mandate:

The Commission shall hear and determine the following claims against the United States on behalf of the any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska:

- (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President;
- (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit;
- (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of

fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable in a court of equity;
 (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and,
 (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

...

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

By section 12 only five years were allowed to bring claims under the act, and section 23 limited the life of the Commission to 10 years, although this was later extended. Subsequent claims had to be brought to the Court of Claims which does not have the broad jurisdiction of the Indian Claims Commission. By 1978 when the Commission ended its work 670 claims had been adjudicated and \$774,222,906.64 had been awarded: See Wilcomb E. Washburn, "Land Claims in the Mainstream of Indian/White Land History" in I. Sutton, ed., Irredeemable America: The Indians' Estate and Land Claims, (Albuquerque, N.M.: University of New Mexico Press, 1985), 17 at 24.

160. Wilkinson, supra note 148, 1. Williams v. Lee, 358 U.S. 217 (1959).
161. ibid., 29.
162. Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976)
163. Oneida v. Oneida Indian Nation, 105 Sup.Ct 1245 (1985)
164. U.S. v. John, 437 U.S. 634 (1978)
165. Menominee v. U.S., 391 U.S. 404 (1968)
166. supra note 148, c. 4.
167. ibid., 122.
168. ibid., 81.
169. ibid., 85.
170. supra note 152, 383.

171. Beecher v. Wetherby, 95 U.S. 517, 525, 24 L.Ed. 440 (1877).
172. Barber v. Harvey, 181 U.S. 481, 492, 21 Sup.Ct. 690, 45 L.Ed. 963 (1900).
173. supra note 155.
174. ibid., 566.
175. ibid., 568.
176. ibid.
177. U.S. v. Winans, 198 U.S. 371, 25 Sup.Ct. 662, 49 L.Ed. 1089 (1905).
178. Jones v. Meehan, 175 U.S. 1, 20 Sup.Ct. 1, 44 L.Ed. 49 (1899). And see Choate v. Trapp, 224 U.S. 665, 32 Sup.Ct. 565, 56 L.Ed. 941 (1912).
179. supra note 177, 380/1.
180. Choctaw Nation v. U.S., 119 U.S. 1, 7, 7 Sup. Ct. 75, 30 L.Ed. 306 (1886).
181. See for example, U.S. v. Washington, 384 F.Supp. 312 (1974), usually referred to as the Boldt case. This case was influential in the recent decision, R. v. Sparrow (1986) 9 B.C.L.R. (2D) 300, [1987] 1 C.N.L.R. 145 (B.C.C.A.), at the British Columbia Court of Appeal, and, since the scheme laid out therein is similar, would appear to have been influential in the now important dissent of Dickson J., as he then was, in Jack et al. v. The Queen, [1980] 1 S.C.R. 294, [1979] 2 C.N.L.R. 25, see the discussion infra c. 5, part iii.a. See also F.G. Cohen, Treaties on Trial (Seattle: University of Washington Press, 1987). Dickson J. also confirmed the Jones v. Meehan standard as the Canadian standard for treaty interpretation in R. v. Nowegijick, [1983] 1 S.C.R. 29, [1983] 2 C.N.L.R. 89, and Simon v. The Queen, [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153.
182. For example, Choctaw Nation v. U.S., 318 U.S. 423, 431-32 (1943); Choate v. Trapp, 224 U.S. 665, 675 (1912); U.S. v. Walker River Irrigation District, 104 F.2d. 334, 337 (9th Cir. 1939). Cohen's footnote.
183. For example, McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Winters v. U.S., 207 U.S. 564, 576-577 (1908). Cohen's footnote.
184. For example, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); U.S. v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Jones v. Meehan, 175 U.S. 1, 11 (1899). This principle was first articulated in Worcester v. Georgia, 31 U.S. 515, 551-554, 582 (1832). Cohen's footnote.

185. supra note 47, 222.
186. ibid., 221.
187. infra note 210. And see the discussion below, part c.iii.
188. Menominee Tribe v. U.S., 391 U.S. 404, 88 Sup.Ct. 1705, 20 L.Ed. 2d 698 (1968).
189. 10 Stat. 1064 (1854).
190. supra note 187, 413.
191. Morton v. Mancari, 417 U.S. 535, 94 Sup.Ct. 2474, 41 L.Ed. 2d. 290 (1974).
192. supra note 141.
193. Equal Employment Opportunities Act, 68 Stat. 111 (1972).
194. supra note 191, 555.
195. ibid., 554.
196. ibid., 555.
197. Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 97 Sup.Ct. 911, 51 L.Ed. 2d. 173 (1977).
198. ibid., 83/4.
199. ibid., 79. And see Delaware Tribe of Indians v. U.S., 2 Ind. Cl. Comm. 253 (1952); Delaware Tribe of Indians v. U.S., 21 Ind. Cl. Comm. 344 (1969). The award was made through 86 Stat. 762 (1970).
200. ibid., 85.
201. ibid., 85/6, quoting Morton v. Mancari, supra note 191, 551/2, 555.
202. ibid., 86-90.
203. Opinion of Blackmun J., Warren C.J. concurring, 90-91. Dissent of Stevens J., 91ff.
204. ibid., 96.
205. ibid., 97/8.

206. supra note 159, s.2(5).
207. supra notes 191-196, and the text accompanying.
208. supra notes 173-176 and the text accompanying. See also Choctaw v. U.S., 396 F.2d. 578, cert.den. 393 U.S. 1048 (1969) which makes a similar point.
209. see for this point, S. Haught, "Due Process: Delaware Tribal Business Committee v. Weeks: The Participation of Kansas Delawares in Tribal Awards" (1977) 5 Am. Ind. L. Rev. 369,376.
210. U.S. v. Sioux Nation, 448 U.S. 371, 100 Sup.Ct. 2716, 65 L.Ed. 2d 844 (1980).
211. Treaty of Fort Laramie, 15 Stat. 635.
212. 19 Stat. 254(1877).
213. supra note 210, 382. See 19 Stat. 254, 256.
214. ibid., 423.
215. supra note 209, 376.
216. supra note 148, 83.
217. supra note 188.
218. Worcester v. Georgia, supra note 63, 17.
219. Navajo v. U.S., 624 F.2d 981 (1980).
220. ibid., 986/7.
221. Mitchell v. U.S., Mitchell II, infra note 237, Sup.Ct. 2972.
222. Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 39 Sup.Ct. 185, 63 L.Ed. 504 (1919).
223. ibid., 113.
224. In Menominee, supra note 188-190 and the text accompanying.
225. Winters v. U.S., 207 U.S. 564, 28 Sup.Ct. 207, 52 L.Ed. 340 (1908). See N. Hundley Jr., "The Winters' Decision and Indian Water Rights: A Mystery Re-Examined" (1982) 13 Western Historical Quarterly 17. For the relevance of this case to Canadian law see, R.H. Bartlett, "Indian Water Rights on the Prairies" (1980) 11 Man. L. J. 59, particularly 63-66. And see, R.H. Bartlett,

Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights (Calgary: Canadian Institute of Resources Law, 1988). See also Pyramid Lake Paiute v. Morton, *infra*, notes 267-270 and the accompanying text.

226. *supra* note 219, 989/90.
227. For the duties of fiduciaries see the discussion above in c. 4, part c.ii, and the authorities cited there.
228. Manchester Band of Pomo Indians, Inc. v. U.S., 363 F.Supp. 1238 (1973).
229. *ibid.*, 1245-1247.
230. *ibid.*, 1244, 1247.
231. *ibid.*, 1245.
232. *ibid.*, 1247.
233. *supra* note 219.
234. *ibid.*, 988.
235. *ibid.*
236. *ibid.*, 988/9.
237. U.S. v. Mitchell et al., 463 U.S. 206, 103 Sup.Ct. 2961, 77 L.Ed. 2d 580 (1983). Cited as Mitchell II. All references are to Sup.Ct.
238. General Allotment Act, *supra* note 126.
239. U.S. v. Mitchell et al., 445 U.S. 535, 100 Sup.Ct. 1349, 63 L.Ed. 2d 607 (1980). Cited as Mitchell I. All references are to Sup.Ct.
240. *ibid.*, 1353.
241. Mitchell et al. v. U.S., 664 F.2d 265 (1981).
242. *supra* note 237, Sup.Ct., 2972.
243. *ibid.*, Sup.Ct., 2969.
244. *ibid.*, Sup.Ct., 2972.
245. *supra* note 225.

246. Three Tribes of Fort Berthold Reservation v. U.S., 182 Ct.Cl. 543, 390 F.2d 686 (1968). Approved and applied at the U.S.S.C. in Sioux v. U.S., supra note 210. References are to F.2d.
247. supra notes 173-176 and the text accompanying.
248. Shoshone Tribe v. U.S., 299 U.S. 476, 57 Sup.Ct. 244, 81 L.Ed. 360 (1937). All cites are to U.S.
249. ibid., 489. 30 Stat. 62, 93, 94.
250. ibid., 496.
251. ibid., 498.
252. ibid., 496.
253. U.S. CONST. amend. V: No person shall ... be deprived of ... property without due process of the law; nor shall private property be taken for public use, without just compensation.
254. supra note 248, 497.
255. supra note 246, F.2d 690. It should be noted that this is an Indian Claims Commission case.
256. ibid., F.2d 691.
257. ibid., F.2d 693.
258. We have seen an aspect of this problem above in Morton v. Mancari, supra note 191. And see Delaware Tribal Business Committee, supra note 197.
259. Nevada v. U.S., 463 U.S. 110, 103 Sup.Ct. 2906, 77 L.Ed. 2d 509 (1983). All references are to Sup.Ct.
260. Pyramid Lake Paiute v. Morton, 354 F.Supp. 252 (1973).
261. ibid., 254.
262. ibid., 255.
263. supra note 259, Sup.Ct. 2917.
264. ibid., Sup.Ct. 2926.
265. ibid., Sup.Ct. 2925, note 16; 2926, note.

266. U.S. v. Washington, 384 F.Supp. 312 (1974).
267. ibid., 333, 402-404.
268. supra note 210.
269. ibid., 414.
270. supra note 260 and the text accompanying.
271. ibid., 256.
272. ibid., 256/7.
273. ibid., 256.
274. U.S. v. Oneida, 477 F.2d 939 (Ct.Cl. 1973).
275. ibid., 944.
276. Tee Hit Ton Indians v. U.S., 348 U.S. 272, 75 Sup.Ct. 313, 99 L.Ed. 314 (1954). And see Choate v. Trapp, supra note 178, 671 where the Court allows that legislation on Indian matters is public law and, therefore, "amendable and repealable at the will of Congress."
277. supra note 172, 492.
278. supra note 197.
279. ibid., 97-98: "[I]t is clear that the discrimination, far from evidencing actual discriminatory intent, is the consequence of legislative accident, [T]here is no reason to believe that the discrimination is the product of actual legislative chioce." Emphasis in the original.
280. supra note 209, 377.
281. 7 Stat. 188 (1818); 7 Stat. 329 (1829); 14 Stat. 793 (1866). 7 Stat. 327 established the Kansas reservation as the "permanent residence of the entire Delaware Nation" and states: "And the United States hereby pledges the faith of the government to guarantee to the said Delaware Nation forever, the quiet and peaceable possession and undisturbed enjoyment of the same, against the claims and assaults of all and every other people whatever."
282. supra note 228.
283. Pyramid Lake Paiute, supra note 260; Nevada v. U.S., supra note 259.

284. supra note 260.
285. supra note 259.
286. Cramer v. U.S., 261 U.S. 219, 43 Sup.Ct. 342, 86 L.Ed. 1480 (1942).
287. ibid., 228/229.
288. ibid.
289. Menominee v. U.S., supra note 188.
290. supra note 63, 560/1.
291. W.G.Rice "The Position of the American Indian in the Law of the United States" (1934) 16 J. of Comp. Leg. and Int. Law 78, 79.
292. D. McNeill "Trusts: Towards an Effective Indian Remedy for Breach of Trust" (1980) 8 Am. Ind. L. Rev. 429, 430.
293. ibid., 456.
294. ibid., 453.
295. ibid., 453.
296. ibid., 546/7.
297. ibid., 454/5.
298. ibid., 457.
299. ibid., 455.
300. ibid.
301. ibid., 456.
302. See his discussion of Mitchell v. U.S., supra notes 237 & 239, at ibid., 430ff. The legislative intent test refers to reading a document light of the legislative intent even where that document does not appear on its face to be ambiguous. See particularly at 443/4 and 449.
303. supra note 292, 457.
304. At ibid., 454 McNeill recognizes that the plenary power is not a trust.

305. R.P.Chambers "Judicial Enforcement of the Federal Trust Responsibility to Indians" (1975) 27 Stanford L. Rev. 1213, 1235/6. By the Cherokee cases Chambers means Cherokee Nation and Worcester v. Georgia.
306. ibid., 1246.
307. supra note 222.
308. supra note 286.
309. supra note 260.
310. supra note 228.
311. supra note 292, 1246/7.
312. ibid., 1248.
313. For example, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 Sup.Ct. 1361, 51 L.Ed. 2d 660 (1976); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 Sup.Ct. 1011, 55 L.Ed. 2d 209 (1978).
314. ibid., Oliphant, 208.
315. ibid.
316. ibid., 206.
317. supra note 292, 448.
318. U.S. v. Sioux, supra note 210. It is interesting to note that Rehnquist dissented in this decision though not on this point. He felt that Congress could not ask that the case be reheard. And see infra notes 319 and 320 and the text accompanying.
319. ibid., 424ff.
320. ibid., 435.
321. G.H.Lambert "Indian Breach of Trust Suits: Partial Justice in the Court of the Conqueror" (1980-81) 33 Rutgers L. Rev. 502, 533. And see 537.
322. supra note 210. Wilkinson also supports this suggestion.
323. Notably, N.J.Newton "Enforcing the Federal-Indian Trust Relationship after Mitchell" (1981/82) 31 Cath. U. L. Rev. 635. See also "Whom can the Indians Trust after Mitchell" (1981) 53 U. Colo. L. Rev. 179; American Indian

Policy Review Commission, Task Force One, Report on Trust Responsibilities and the Federal-Indian Relationship; including Treaty Review (Comm. Print 1976)(Washington: U.S. Government Printing Office, 1976).

324. infra c. 4, part c.iii.
325. See Trust Report, supra note , 323, ss. VII, II, c, d, pp. 177-181. See also the judgment of Nichols in Duncan v. U.S., 667 F.2d 36, 50ff (1981).
326. supra note 239.
327. supra note 126.
328. I refer to the public trust doctrine in the United States which has protected some public lands, usually shore lands, from improper alienation. See J. Sax "The Public Trust Doctrine in National Resource Law: Effective Judicial Intervention" (1970) 68 Mich. L. Rev. 471.
329. U.S. v. Mitchell, 391 F.2d 1300, 1302 (Ct.Cl.1979).
330. supra note 237, Sup.Ct.2972.
331. supra, c. 2, part a.i.
332. supra c. 2, part b.i.
333. supra note 210.
334. See, for example, Sioux Nation, supra note 210.
335. See, for example, Pyramid Lake Paiute, supra note 260, and Cramer, supra note 286.
336. D.M. Johnston, "A Theory of Crown Trust Towards Aboriginal Peoples" (1986) 18 Ottawa L. Rev. 307, 330.
337. ibid., 331.
338. ibid., 332.
339. J. Bentham, Anarchical Fallacies vol. 2, Col. W. Bowring ed. (New York: Russell & Russel Inc., 1962), 501.

CHAPTER 3

ABORIGINAL RIGHTS IN CANADA

There are many correspondences between aboriginal rights law in the United States and in Canada. In both countries, the recognition of Indian special status begins with acknowledgement of an interest in land, usually called aboriginal title. Consequently, the early colonial instruments including the Royal Proclamation of 1763¹ form the background to the law of aboriginal rights in both nations. Also, the Marshall cases are a seminal influence in Canada. And, as in the United States, the first truly important case, the one which established the basis of the Indian-government relationship, was, like Fletcher v. Peck in the United States, one in which the Indians were not represented. These and other correspondences have led to many similarities in the two bodies of law.

It is useful to examine Canadian aboriginal rights law using the same three part model as we used in our examination of the United States law. It is important, however, to keep in mind that Canadian aboriginal rights law is still in a stage of definition. There is in Canada no long tradition of Indian litigation. Also of importance is the passing of the aboriginal rights provisions in the new Constitution in 1982. Undoubtedly, the first and second principles in the model have been

affected by the Constitution Act, 1982. The discussion in the following pages addresses the pre-1982 situation for the most part. Where the new provisions might prove significant, I refer specifically to them.

The first and third principles are largely similar in the two countries but in Canada the boundaries of the first remain uncertain. For Chief Justice John Marshall, the recognition of land rights in the Indian Nations led to the acceptance of some residual power of self-government. In Canada, only the first step has been taken: Land rights, including hunting and fishing rights, have been recognized. Whether this first step will result in a right to some form of self-government remains to be decided. The lack of recognition of a right to self-government is striking. This is not to say that the problem is not controversial. The right has been the major topic in four First Ministers Conferences held since 1982 to clarify the rights entrenched by the Constitution Act, 1982, s. 35.² The conferences ended in failure and today the issue is today before the courts.³ For the present however, the issue is undecided.

In the following pages I shall review rather briefly the major Canadian caselaw using the scheme developed in the previous chapter. I shall deal first with the rights of the aboriginal peoples, following that with a discussion of the power of the federal government going on to a more substantial discussion of the trust obligation. I deal with Indian rights first only because that fits rather more comfortably with the content of the caselaw. It is true in Canada, as in the United States, that the major aspect of aboriginal rights law has been, at least until 1982,

the absolute power of the federal government.

a Indian Rights

Litigation over aboriginal rights in Canada has been restricted to a rather narrow range of interests. Consequently, the content of aboriginal rights in this country is more vague than in the United States. Some rights have been recognized by the courts. A possessory interest in land together with a right to hunt and fish are well established. Broader claims have been made. The Dorion Commission mooted in 1971 that the hunting and fishing right should be expanded to include other benefits of land ownership.⁴ Ponting suggests a right to retention of an aboriginal identity:

Aboriginal rights are held by the descendants of the original peoples of Canada by virtue of their ancestor's occupancy of the land since time immemorial. In the broadest contemporary usage of the term, those rights are multi-faceted. A crucial component of aboriginal rights is the right to retain one's aboriginal identity and culture rather than being subjected to forced assimilation. ... This implies not only certain educational rights, but also the right of the child to be raised in his/her aboriginal culture if placed in an adoptive or foster home. Included in aboriginal rights is the right to be free to choose between a non-aboriginal way of life and an aboriginal way of life.⁵
(Authorities omitted)

The First Nations themselves argue for a right to self-government. Plain, for example, writes:

[To the] Nishnawbe-Aski, the concept is basic, simple, and unambiguous. Our definition of aboriginal rights can be summed up in one phrase: "the right of independence through self-government". ... Aboriginal rights defined in this way include the right to develop our own life-style and our own economy, and to protect and encourage the practice of our sacred traditions as we know them. We, the Nishnawbe-Aski, have the inherent right to determine what our future will be.⁶

Even the Penner Report acknowledged that the First Nations may have an entrenched right of self-government by virtue of s. 35 of the Constitution Act, 1982.⁷

It is not my intention here to discuss the content of aboriginal rights. I shall confine the discussion to a consideration of how an aboriginal right might be established and how it might be extinguished. It is not necessary, for this thesis, to engage in an extended analysis of the content of aboriginal rights. I shall refer occasionally to the possibility of recognition of a right to self-government only because it represents the broadest possible aboriginal right.

The primary aboriginal rights precedent in Canada is the 1888 case, St. Catherine's Milling and Lumber v. The Queen.⁸ It, with help from Marshall, has resulted in certain land rights for the Indian Nations of Canada. It also recognized that the federal government was charged with a protective role over the Indian Nations. In as much as they have not been overridden, those principles are now entrenched in the Constitution and are, consequently, somewhat more secure. The case also provides the precedent for the absolute power of the federal government over the Indian Nations.

The St. Catherine's case was a dispute concerning jurisdiction over surrendered Indian land. The provincial government disputed the ability of the federal government to lease timber rights on the land to the St. Catherines Milling and Lumber Company. The court found for the provincial government on the basis of certain constitutional provisions. Neither the actual holding in the case, nor, for the most part, the reasoning need concern us here. In the course of their decision

the Law Lords of the Privy Council, speaking through Lord Watson, made some incidental comments on the nature of the Indian interest in their land and the relationship between the Indians and the government. These comments have defined the nature of the Indian interest in land in Canada.

It should be noted that this case came before the courts at the same time as did the Lone Wolf case in the United States when assimilation was the favoured policy. Marshall had preceded this era. The different political climate may have much to say about the attitude of the Canadian courts towards the Indian Nations. The Canadian government also wished to avoid the expensive Indian wars which had proved so disruptive in the settlement of the western United States and which were then drawing to a close.⁹

The Privy Council did not address the nature of aboriginal title in the abstract, but preferred to confine themselves to discussing the interest recognized by the Royal Proclamation of 1763.¹⁰ The Court described the Indian interest in their land in this way:

Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. ... [T]he tenure of the Indians was a personal and usufructuary right, dependent upon the goodwill of the Sovereign.¹¹

The Court further recognized that the terms of the Royal Proclamation protected also a "privilege of hunting and fishing".¹² The interest of the Crown in unsurrendered Indian land was said to be "substantial and paramount".¹³ In response to the argument that the Indians had owned their traditional territory, the Court responded:

The Crown has all along a present proprietary estate in the land, upon which the Indian title was a mere burden.¹⁴

This rather dense description has received much interpretation over the years but the comparison with the interest recognized by Chief Justice Marshall is readily apparent.

That the Indian right was described in St. Catherine's as "dependent upon the goodwill of the Sovereign" strongly suggests an unfettered power in the government to overrule Indian rights. We see also, stated rather mutely as only "protection", the recognition of some special obligation to the Indians. It does not appear to be an obligation enforceable through the courts however. There is no recognition of Indian sovereignty. The Privy Council, like Marshall before them, could have commented more broadly on the status of the then still powerful Indian governments. Johnson v. McIntosh, Cherokee Nation v. Georgia, and Worcester v. Georgia had all been cited in argument by counsel. The Court chose to ignore their broader ramifications: The method by which Great Britain came into its rights to the Indian land and any residual rights in the First Nations to self-government were not discussed. Perhaps one can lay on this Court, the blame for the fact that there is in Canada, no single coherent theory of aboriginal rights.

The case has engendered much criticism. Dissents were registered when the case had been heard in the Supreme Court of Canada urging recognition of a scheme similar to that of Chief Justice Marshall of the United States Supreme Court.¹⁵ Even though the Supreme Court of Canada has continued to cite St.

Catherine's with approval, the criticism is repeated today. Indeed, Hurley's paper on Guerin, to a large extent, hinges on the argument that St. Catherine's is wrongly decided and that it should be rejected by today's courts.¹⁶ Slattery and Lester, amongst others, lend support to such an argument.¹⁷

In 1921, the Privy Council returned to clarify the interest they had described in St. Catherine's. In Attorney General of Quebec v. Attorney General of Canada; Re Indian Lands,¹⁸ usually referred to as the Star Chrome case, the Court had this to say on the "personal and usufructuary right":

[T]heir Lordships think ... that the right recognised by the statute is a usufructuary right only and personal in the sense that it is in its nature inalienable except by surrender to the Crown.¹⁹ (emphasis added)

In 1983 the Supreme Court of Canada further clarified the phrase:

The right of the Indians to the lands in question was described by Lord Watson in St Catherine's at page 54 as "a personal and usufructuary right". The latter term is defined as follows:

Usufruct

1. Law. The right of temporary possession, use, or enjoyment of the advantages of property belonging to another, so far as may be had without causing damage or prejudice to it.
2. Use, enjoyment, or profitable possession (of something) 1811.

Usufructuary

1. Law. One who enjoys the usufruct of a property, etc.

The Shorter Oxford English Dictionary, 1959, p.2326.

The release, therefore, is of a personal right which by law must disappear upon surrender by the person holding it; such an ephemeral right cannot be transferred to a grantee, be it the Crown or an individual. The right disappears in the process of release, and a release couched in terms inferring a transfer cannot operate effectively in law on the personal right any more than an express transfer could. In either process the right disappears.²⁰

In Guerin, we have seen, Chief Justice Dickson quotes this definition with approval.

He adds that the interest is a legal one.

In these cases, the Indian interest in land has been defined essentially without reference to the method of acquisition by the Crown of its "substantial and paramount estate". The courts have not looked behind the "statutory scheme" established by Parliament to see if it represents a true version of the state of things. This is to be expected in a country such as Canada where the doctrine of the supremacy of Parliament has prevented the courts from second guessing the policy behind valid legislation. With the passing of the new Constitution, and in particular s. 35, the courts must now rethink the relationship of the government with the First Nations. In fact, the rethinking had begun somewhat earlier.

In 1973, in Calder v. Attorney General of British Columbia,²¹ aboriginal title to traditional lands arising out of the pre-contact relationship of the Indians to those lands, was recognized as a principle of Canadian common law. In that case the Nis'ga Nation of Northwest British Columbia, sought a declaration that they held an unextinguished aboriginal title to their traditional lands. On the issue the case was dismissed on a technicality but not before six of the seven justices recognized that aboriginal title did exist in Canadian law apart from the Royal Proclamation. In his minority dissenting opinion, Mr. Justice Hall, with the concurrence of two other justices, seemed to suggest, if the issue were to come before him, that he might be prepared to recognize the principle of residual sovereignty.

Hall J., whose opinion is the most detailed of the three delivered by the Court, relied on principles of British colonial law. He cited also with approval, Marshall's opinion in Johnson v. McIntosh.²² Hall J. noted that Marshall's opinion

was in part based upon the 18th century English case of Campbell v. Hall²³ which laid out the rules on the acquisition of English law in the colonies.²⁴ One of those rules, cited with emphasis by Hall, is that the laws of conquered nations continue in force until they are altered by the conqueror. Hall then states:

A fortiori the same [principles particularly the one noted above] ... must apply to lands which become subject to British sovereignty by discovery or declaration."²⁵

Earlier Hall had noted British colonial law also recognizes rights arising under aboriginal legal systems. In his opinion he emphasized the following quote from Re Southern Rhodesia:²⁶

[T]here are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law.²⁷

This framework allowed Hall to discuss the aboriginal title of the Nis'ga in a principled manner. The doctrine of aboriginal title, for Hall at least, is based upon a recognition of the legally enforceable pre-contact relationship of the First Nations with their land.

In Calder, the Nis'ga had led extensive evidence of their traditional customary practices. Having referred to this evidence, Hall commented:

What emerges from the foregoing evidence is the following: the Nishgas are in fact and were from time immemorial a distinctive cultural entity with concepts of ownership indigenous to their culture and capable of articulation under the common law ...²⁸

Given that under Anglo-Canadian law the existing laws of occupied territory would be left in force until changed by valid legislation, at the time of contact, the Nis'ga

had aboriginal title to their traditional lands. Failing to find any acts in the intervening years extinguishing the Nis'ga title, Hall concluded that it continued to exist.

The opinion of Judson J. while not referring to the colonial law, seems to agree with Hall's reasoning. Judson agreed that the recognition of aboriginal title was a principle of the common law. Having decided that the Royal Proclamation did not apply to British Columbia, he stated:

Although I think that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal and usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the goodwill of the Sovereign".²⁹

With this rather bald statement made, Judson passes on to the question of extinguishment.

The particular right at issue in Calder was an aboriginal right to hunt and fish. Such a right is now well-entrenched in Canadian law as both a treaty and an aboriginal right.³⁰ It has been one of the major aboriginal rights recognized in Canada. This does not detract from the import of the decision. The reasoning of Hall J., as well as the comment of Judson J., both support a much broader range of possible aboriginal rights. Indeed, the correspondences of the decision with the Marshall cases, suggest that the Canadian law could follow the American law.

In his decision, Hall J. refrained from discussing sovereignty. He did,

however, quote extensively from the Marshall decisions and emphasized Marshall's recognition that the Indians were distinct, independent peoples "having institutions of their own and governing themselves by their own laws."³¹ This suggests that Hall might have recognized the Indian Nations as self-governing. He did not however, unlike Marshall, go beyond what was necessary for the decision in the case at hand. The point, therefore, remained undecided and the opportunity passed. Hall J. has left, nevertheless, the basis for a principled account of the content of aboriginal rights.

In a more recent case, Mr Justice Mahoney of the Federal Court Trial Division, laid down the requirements for proof of an aboriginal title. He based his reasoning on the Calder decision. In Hamlet of Baker Lake v. Minister of Indian Affairs,³² Mahoney had this to say:

The elements which the plaintiffs must prove to establish an aboriginal title cognizable at common law are:

1. That they and their ancestors were members of an organized society.
2. That the organized society occupied a specific territory over which they assert the aboriginal title.
3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time sovereignty was asserted by England.³³

This scheme, it can be seen, also bases the present aboriginal right on the pre-contact relationship with land.

As it stands today, what rights the Indian nations do have against the government, have force only because of the existence of legislation and constitutional provisions. Only an aboriginal title of rather vague content is directly attributable to pre-contact circumstances. A broad reading of Calder might suggest substantial

rights beyond those of hunting and fishing, but the courts have not yet taken such a step. Chief Justice Dickson, whose opinion in Guerin forms the focus of this thesis, has chosen not to follow the broader ramifications of the Calder decision. And this observation is true not only in Guerin, but in other Indian caselaw in which he has written. He has dealt creatively with the concept of aboriginal rights, but his opinions deal with aboriginal rights which have been codified in legislation, regulation, or government directives, and he has made a point of noting the documented base of the rights he has proposed.

In the 1979 case Jack et al. v. The Queen,³⁴ Dickson alone in dissent on the issue at the Supreme Court of Canada, recognized a limitation on the regulatory power of the federal government over the fishery in British Columbia. This limitation, which took the form of a priority for Indian food fishery over all other demands on the salmon stock except conservation, was founded in the long-term practice of the government and entrenched in the British Columbia Terms of Union.³⁵ Aboriginal rights were not relevant to the argument, he noted:

It is not necessary for the appellants in this case to point to any underlying basis of "rights" for article 13, whether based upon aboriginal title or treaty. It is sufficient to detail the pre-Confederation policy of the colonial government. ... The appellants' argument rests not upon any "right" derived from treaty or aboriginal title that can be invoked against federal legislation, rather than upon a constitutional limitation of that very federal power to legislate in respect of Indians in British Columbia, a limitation imposed upon the federal government by the Terms of Union.³⁶

In another equally creative case, Nowegijick v. The Queen,³⁷ Dickson J., as he then was, speaking for the Court on the reach of the tax exemption offered by s. 87 of the Indian Act,³⁸ declared:

[T]reaties and statutes relating to the Indians should be liberally construed and doubtful expressions resolved in favour of the Indian.³⁹

These strong words do not recognize any special rights, it must be noted. They are merely an aid in interpreting a rather vague section of the Indian Act. Dickson J. stresses:

The prime task of the Court in this case is to construe the words [of s. 87 of the Indian Act].⁴⁰

As in Jack, there is no attempt to recognize any aboriginal or treaty rights basis for the tax exemption. There is only a rule for the interpretation of existing legislation. The right has its basis in legislation, and although the doctrine of aboriginal rights may be in the background, it plays no role in the reasoning.

This implied requirement of a recognition in legislation of aboriginal or treaty rights, means that the Court has been able to ignore the problem of their origin and the method of their extinguishment. It also makes it difficult to assess the reading that the Chief Justice will give to s. 35 of the Constitution Act, 1982. While he has been liberal on the interpretation of existing legislation, he has not given any indication that he might recognize the pre-contact laws of the First Nations as a basis for aboriginal rights. This point, perhaps, explains the range of the commentary on Guerin. The pessimists see the Dickson of the rules of interpretation of statutory provisions: the optimists see the possibility that the creative Dickson might give substantive content to s. 35.

b Federal Power

The power of Parliament over the Indian Nations has never been expressed as clearly in Canada as it has in the United States in Lone Wolf. This is because no right to residual self-government has been recognized. St. Catherine's, as we have seen, characterizes the Indian interest in land recognized by the Royal Proclamation as being "dependent upon the goodwill of the Sovereign". Judson in Calder, specifically approved this point.⁴¹ The broad reach of the Crown's power has also been implied in cases such as the 1959 case of Logan v. Styres⁴² which allowed that the creation of a Band Council pursuant to federal legislation overruled, without specifically so stating, and without consent, the traditional government of the Band.

The power of the federal government over Indians has been stated most clearly in relation to the extinguishment of aboriginal hunting and fishing rights. The six judges who wrote on the issue in Calder agree that Parliament had, in 1973, an unfettered right to abrogate aboriginal rights. They differed only in the standard by which that abrogation should be judged. Hall, following the United States' standard suggested that a "clear and plain intention" would be necessary before abrogation would be found.⁴³ He said of aboriginal title:

It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation.⁴⁴

This test is somewhat vague. It could require a specific provision in legislation noting that an aboriginal title has been extinguished. On the other hand, and this is more likely, it could require only the enactment of legislation which grants rights inconsistent with an aboriginal title.

For Mr. Justice Judson, also writing with the concurrence of two other judges, only legislative intent would be sufficient. That intent could be implied if the legislation was intended to have effect over Indian traditional lands. Of the Nis'ga claim Judson held:

In my opinion, ... the sovereign authority elected to exercise complete dominion over the lands in question adverse to any rights of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.⁴⁵

Since the court held that it lacked jurisdiction in the case, no clear position emerged on the issue.

The most complete pre-1982 word on extinguishment, is again, Hamlet of Baker Lake v. Minister of Indian Affairs.⁴⁶ Mr Justice Mahoney of the Federal Court, had been urged by the plaintiff Inuit, one of Canada's aboriginal peoples, to adopt an interpretation of Hall's opinion which would require specific language in order to effect extinguishment. Interpreting the conflicting Calder standards, he gave the following standard:

I cannot accept the plaintiffs' argument that Parliament's intention to extinguish an aboriginal title must be set forth explicitly in the pertinent legislation. I do not agree that Mr. Justice Hall went that far. Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the Courts must give it.⁴⁷

So for Mahoney, extinguishment might be implied if it was necessary in order to give effect to the statute. In its recent decision, Canadian Pacific Ltd. v. Paul⁴⁸, the Supreme Court of Canada adopts the "clear and plain" language of Mr. Justice Hall and appears to support Mr. Justice Mahoney's interpretation of the effect of

legislation.⁴⁹ In the present policy on comprehensive claims, the federal government adopts what appears to be a very broad application of the Baker Lake position. It states:

The purpose of settlement agreements is to provide certainty and clarity of rights to ownership and use of land and resources in those areas of Canada where aboriginal title has not been dealt with or superseded by law.⁵⁰
(my emphasis)

It would appear that the government takes the position that a grant issued under valid law would be sufficient to extinguish an aboriginal title. The point is the subject of litigation in British Columbia presently over the recent provincial grant of the university endowment lands for a provincial park.⁵¹ The lands are subject of an aboriginal rights claim and it is feared that the grant may be intended to place the lands beyond the reach of the comprehensive claims policy.

Like its United States' counterpart, the power as described in the pre-1982 cases appears to be unfettered. Since the entrenchment of "existing treaty and aboriginal rights" in s. 35 of the Constitution Act, 1982, that unfettered power has, in all probability, been restricted. It is generally agreed that abrogation without consent of an aboriginal right can only be effected by Constitutional amendment.⁵² Derogation is another matter. Some caselaw has addressed the problems of the variation of hunting and fishing rights since the coming into effect of the new Constitution in 1982. The issue has not yet been decided by the Supreme Court of Canada and the lower court decisions vary widely. While the point is not central to this thesis, some comment on one decision is worthwhile.

In a recent case, Sparrow v. The Queen,⁵³ the British Columbia Court of

Appeal suggests that the Constitution Act, 1982, entrenches a regulated right to hunt and fish.⁵⁴ The court allows that the level of permissible Indian fishing is capable of continued variation without contravention of s. 35. Any variation, however, must be in accord with the scheme laid out in the legislation in 1982.⁵⁵ This placed the Indian food fishery second in priority only to conservation. Any derogation from that scheme would have to be justified by the government. This apparent limitation on the legislative power of the government represents a major advance from the position in the United States. Such rights as do exist, while they are not as extensive, would appear now to be much better protected in Canada.

c Trust Obligation

The trust obligation in Canada, as in the United States, has been a vague doctrine. We have seen that in the United States it finds its origin in long practice of the governments, the Royal Proclamation and Marshall's guardian/ward relationship. The same is true in Canada. I shall suggest in this section that the trust obligation in Canada has three aspects. The central aspect, as in the United States, is the unenforceable trust: the wardship. Next in importance is what I have termed the trust obligation codified. For the most part, this is made up of statutory provisions which entrench aspects of the trust obligation and includes such provisions as s. 18(1) of the Indian Act. These provisions have only the appearance of a trust. They may, like s. 18(1) be phrased in trusts language, but are usually are enforced through statutory remedies which are not trusts remedies. Finally there is the true

trust. This has found very limited favour. The most recent example is Madame Justice Wilson's concurring opinion in Guerin. It seems unlikely to be followed.

In Guerin the present Chief Justice refers to both aspects in founding the liability of the Crown. The purpose of the specific and enforceable obligation found in the regime of the Indian Act is the protection which is the hallmark of the general and unenforceable obligation found in the Royal Proclamation. Perhaps, as with the dichotomy noted in relation to Indian rights above, this reference to the two aspects also helps explain the disagreement between the optimists and the pessimists amongst the commentators on Guerin. The pessimists see only the weakness of the fiduciary as opposed to the true trust remedy for breaches of duty in relation to Indian lands and money. The optimists see the possible strength in a trust obligation which may have, through s. 35 of the Constitution Act, 1982, become enforceable and so become the basis for real rights for the aboriginal peoples. Which group is right? It is impossible to say. I am concerned here to explore the possibilities of the optimists' view.

The trust relationship in Canada has not been the object of much study. Lowry commented in 1973:

The paucity of research, writing and case-law leads to the inescapable conclusion that this relationship has not been thoroughly analyzed.⁵⁶

The words remain true today. There is still no published study of the trust obligation in Canada. There are four studies, all of which predate the Constitution Act, 1982, to which the writer has had access.⁵⁷ All those studies conclude that a trust relationship might be found in the Indian Act, although they also recognize the

difficulties relating to enforcement. They have, of course, to a degree been superseded by the decision in Guerin.

It is central to this thesis that there is more than one type of trust and more than one basis for those types. Each type, I will suggest, although sharing a common origin, has its unique purpose and its unique obligations. Professor Sanders has suggested something along these lines:

It is the writer's view that the question of the legal or political character of the trusteeship obligation cannot be examined in isolation from the question of the precise obligations being considered. For example, it seems relatively clear that we can describe the federal governments (sic) responsibility to manage surrendered lands and band funds as a trust obligation, enforceable by the courts. In contrast, it is easy to describe the federal governments (sic) obligation to provide decent housing for Indians as a political responsibility, which the courts will not become involved in trying to enforce.⁵⁸

It should be remembered that Sanders wrote this before the passing of the Constitution Act, 1982. It is suggested that he might now feel that the second of his conclusions is not quite as clear as it was in 1977.

I shall suggest here that it is not particularly useful to focus on the codified aspects when attempting to interpret the trust obligation. A review of the judicial commentary on the nature of the codified trust shows it to have been somewhat chaotic and contradictory. Indeed, Native law as a whole can be chaotic and contradictory. I suggest that the better route to a sound interpretation of the relationship of the government to the First Nations, and a consistent Native law is through a sound understanding of the unenforceable trust obligation: the wardship. I have preferred to describe the obligation as a wardship because it better describes the relationship. The duty is not simply in relation to land: it covers a much wider

range of objects. The Indian Act is a witness to that.

It is suggested that using the term "trust" contributes to the confusion surrounding the obligations of the Crown to the First Nations because it invites the analogy to the property-centered true trust. That very technical body of law is of limited use in describing the broad policies involved in Indian law. The Crown took on a special duty to the First Nations from the earliest days of colonisation. The resulting relationship, even if unenforceable, more closely resembles the wardship. The focus, it is suggested, should be on the unenforceable background obligation because it is that relationship which colours the codified trust. It is the origin of the codified obligation. Judicial creativity has been most effective in Native law when it has kept a close eye on wardship. That, it is suggested, what has occurred in Guerin. The Indian Act provision has been interpreted in light of the trust obligation, not simply as an ordinary statute.

In the Native law trust relationship, in the scheme of things suggested here, there are three different species of trust. There is the unenforceable guardian/ward relationship recognized by Marshall. There is also an enforceable version of the trust obligation codified in various pieces of legislation. This second version is not enforceable as a trust but rather is enforced through the provisions of the codifying legislation. We have seen this in the Mitchell case in the United States.⁵⁹ It has some aspects of a rule of judicial review of administrative action. There is finally, a true trust, fully enforceable as a private law trust. This we have seen in Manchester Band of Pomo Indians, Inc. v. U.S.⁶⁰

i The Unenforceable Trust: The Guardian/Ward Relationship

The protective role of the Crown originates in the earliest colonial practice of the European Nations in North America. We have seen above the Laws of Burgos and the debates at Valladolid. The protective role was embraced by the British Crown. The Instructions to Captain Endicott of the Massachusetts Bay Company in 1629 included:

Above all, we pray you to be careful that there be none in our precincts permitted to do any injury in the least kind to the heathen people.⁶¹

The 1670 Instructions to the Governors of the American colonies contain a similar policy:

Forasmuch as most of our Colonies do border upon the Indians, and peace is not to be expected without the due observance of and preservation of justice to them, you are in Our name to command all the Governors that they at no time give any just provocation to any of the said Indians that are at peace with us.⁶²

This policy made its way into law in the Royal Proclamation of 1763.⁶³ That instrument speaks of the "several Nations or Tribes of Indians who live under our Protection" and entrenches the practice of only allowing the purchase of the Indian interest in land by treaty with the Crown "to the end that the Indians may be convinced of our Justice and determined Resolution to remove any cause of discontent". These, and other similar provisions, we have seen, brought Chief Justice Marshall, in Cherokee Nation v. Georgia⁶⁴ to say of the Indian Nations, the "domestic dependent nations" as he called them:

[T]hey are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for

protection; rely on its kindness and its power; appeal to it for relief for their wants; and address the President as their great father.⁶⁵

This same position has been adopted in Canada. In the influential St Catherine's case, Chancellor Boyd writing the trial decision, said of the Royal Proclamation:

This proclamation has frequently been referred to, and by the Indians themselves, as the charter of their rights.⁶⁶

In 1931, D.C. Scott, a long serving Deputy Superintendent of Indian Affairs, called the Royal Proclamation the "Magna Carta of all the Indians".⁶⁷ In 1973, Mr Justice Hall in the Supreme Court of Canada commented:

This Proclamation was an Executive Order having the force and effect of an Act of Parliament and was described by Gwynne in St. Catherine's Milling case at [S.C.R.] p. 652 as the "Indian Bill of Rights": see also Campbell v. Hall (1774), 1 Cowp. 204, 98 E.R. 1045. Its force as a statute is analogous to the status of Magna Carta which has always been considered law throughout the Empire.⁶⁸

The policy was followed by the British government as late as 1858. The Instructions to Governor Douglas of the colony of British Columbia, included this admonition:

I have to enjoin you to consider the best and most humane means of dealing with the Native Indians. The feelings of this country would be strongly opposed to the adoption of any arbitrary or oppressive measures towards them. ... I commit [the problem of Indian/immigrant relations] to you, in the full persuasion that you will pay every regard to the interests of the Natives which an enlightened humanity can suggest.⁶⁹

The colony of British Columbia accepted the policy and continued to observe it in 1870 on the eve of its entry into Confederation. In a Letter to the Colonial Office, Governor Musgrave stated:

The Indians have, in fact, been the special wards of the Crown, and in the exercise of this guardianship the Government has, in all cases where it has been desirable for the interests of the Indians, set aside Crown lands [for the

requirements of each tribe.]⁷⁰

The policy found its way into the government of Canada after confederation. In 1873, the Department of the Interior was created and given jurisdiction over the Indian Nations.⁷¹ In the 1876 Annual Report of the Department of the Interior, similar sentiments are expressed:

[Our] Indian legislation generally rests on the principle, that the aborigines are to be kept in a condition of tutelage and treated as wards or children of the State.⁷²

One can observe in the brief outline above, a transition in the terminology used to describe the Indian/government relationship. First described as "protection", the language increasingly takes on the terminology of the wardship.

The wardship obtained added strength through the work of the Aborigines Protection Society. This group, originally part of the British and Foreign Anti-Slavery Society, was formed in 1835 and was active in promoting better conditions for aboriginal peoples in Canada and throughout the empire. The letter of Governor Musgrave quoted above was written in response to inquiries from the Colonial Office provoked by the work of the Aborigines Protection Society in London. Through the agitation of the Society, the British Parliament created a Select Committee to look into the condition of aboriginal peoples. Their Report, issued in 1837 contained the following:

[W]e are bound by two considerations with regard to the uncivilized: First, that the ability we possess to confer upon them the most important benefits; and secondly, that of their inability to resist any encroachments, however unjust, however mischievous, which we may be disposed to make. The disparity of the parties, the strength of the one and the incapacity of the other to enforce the observance of their rights, constitutes a new and irresistible appeal to our compassionate protection.⁷³

Their recommendations included:

The protection of the aborigines should be considered as a duty particularly belonging and appropriate to the executive government as administered either in this country or by the governors of the respective colonies. This is not a trust which could be conveniently confided to the local legislatures. ... The settlers in almost every colony, having either disputes to adjust with the native tribes, or claims to urge against them, the representative body is virtually a party, and therefore ought not to be a judge in such controversies. ... Whatever may be the legislative system of any colony, we therefore advise that, as far as possible, the aborigines be withdrawn from its control.⁷⁴

In 1847, the Bagot Commission established by the Province of Canada to look into Indian policy, discussed this Report and made a similar recommendation suggesting that the Indians should not come under provincial jurisdiction, but should "remain under the immediate control of the representative of the Crown".⁷⁵ Sanders suggests that this recommendation was influential in placing the Indians in the federal jurisdiction in 1867 at the creation of the new Canadian nation.⁷⁶ He comments:

It seems clear that the 19th century notions of humanitarianism and protection, articulated in these reports, lay behind the decision in the British North America Act of 1867 to give legislative authority over "Indians and Lands reserved for the Indians" to the federal Parliament. The decision to give responsibility to the more distant level of government, removed Indian policy from direct competition with local interests. Formally, Great Britain had retained jurisdiction over Indian policy until 1860. That policy of centralized authority in relation to Indians was re-established with the British North America Act of 1867 and has been a fundamental part of Canadian Indian law since that time.⁷⁷

It is apparent that the policy of "protection" is of long duration in Canada .

The courts have also seen the protective role of the trust obligation as an aspect of the relationship between the government and the Indian Nations of

Canada. The cases in which one finds these early references are concerned with rights to land rather than the obligations of government. As regards the wardship, the comments are therefore obiter. Nevertheless, the comments taken as a whole demonstrate an awareness that the government recognized some special obligations when legislating in respect of the First Nations.

The comments seem first to appear in legislation under the Province of Canada. In 1846 Robinson C.J., commented in Bown v. West, a case concerned with the purchase of reserve land:

The government, we know, always made it their care to protect the Indians, so far as they could, in the enjoyment of their property, and to guard them against being imposed upon and dispossessed by the white inhabitants.⁷⁸

In 1852 Burns J., referred to the relationship between the Indians and the government in this way:

[T]he crown [is] in fact acting in the light of a parent and guardian for them, as it were, for these tribes.⁷⁹

Neither judge explored the rationale for their characterization of the relationship.

Apparently the first Canadian case which explores in any depth, the policy of the government towards the Indian Nations is the St. Catherine's case. In the trial decision in 1885, Chancellor Boyd had this to say of the early British policy:

The colonial policy of Great Britain as it regards the claims and treatment of the aboriginal populations in America, has been from the first uniform and well-defined. Indian peoples were found scattered wide-cast over the continent, having, as a characteristic, no fixed abodes, but moving as the exigencies of living demanded. As heathens and barbarians it was not thought that they had any proprietary title to the soil, nor any such claim thereto as to interfere with the plantations, and the general prosecution of colonization. They were treated "justly and graciously" as Lord Bacon advised, but no legal

ownership of the land was ever attributed to them.⁸⁰

He then referred to the Province of Canada reports referred to above and having discussed the terms of Treaty 3, the treaty through which the land at issue had been surrendered, he continued:

The liberal treatment of the Indians, and the solicitude for their well-being everywhere manifested throughout this treaty, are the outgrowth of that benevolent policy which before Confederation attained its highest excellence in Upper Canada.⁸¹

The effect on Indian/government relations of signing treaty, Boyd observed, is the following:

If ... [the Indians] elect to treat they then become, in a special sense, wards of the State, are surrounded by its protection while under pupillage, and have their rights assured in perpetuity to the usual land reserve.⁸²

None of the higher courts hearing the case gave as detailed an interpretation of the purpose of the protection of the Indian interest in land. We have seen the comment of Gwynne J. in his dissent at the Supreme Court of Canada. Also, the Privy Council did acknowledge that the Indians lived under the "sovereignty and protection of the British Crown".⁸³

In 1916, the Supreme Court of Canada used similar language to the Report of 1844. In A.G. Canada v. Giroux,⁸⁴ Mr. Justice Duff discussed the legislation of Lower Canada under which the reserve at issue had been set up. The legislation of the relevant time allowed the Governor of the Province of Canada to appoint a Commissioner of Indian Lands in whom reserve land would be vested.⁸⁵ Duff described the power of the Commissioner over the Indians as being intended to be exercised by him as between "tutor and pupil".⁸⁶ Of the power the Commissioner

exercised over the reserve land, Duff stated:

[I]n the administration of the property the Commissioner is accountable to the Governor. The Governor in this respect does not represent the Crown as proprietor but as a parens patriæ.⁸⁷

In 1897, the Queen's Bench of the province of Quebec spoke of the King as "the guardian of the Indians".⁸⁸ In another case in 1901, the Quebec Court Superior had described the relationship in much the same way:

[D]e l'ensemble de cette loi, il résulte clairement que le législateur a voulu traiter les sauvages comme des mineurs dont le commissaire des sauvages est le tuteur. ... La conséquence à tirer de cela, ... c'est une faculté ... qu'elle édicte en faveur des sauvages pour les protéger contre leur inexpérience ou leur imprévoyance.⁸⁹

Again in 1914 the Quebec Superior Court spoke of the Indian as living under "tutelle" (guardianship).⁹⁰

In a 1918 case, Re Caledonia Milling, an Ontario case concerned with the imprisonment of Indians for non-payment of debt, Mr. Justice Middleton stated:

[T]he Indian is ... a ward of the of the Dominion government and cannot be taken under the laws of the province.⁹¹

In 1924 Mr. Justice McPhillips of the British Columbia Court of Appeal gave as the rationale for the exemption from attachment for debt:

The Indians are wards of the National government (the Government of Canada).⁹²

In 1929 in Exchequer Court in a case for the recovery of unsurrendered lands at the Akwesasne Reserve, Audette J. said:

The Crown is making no claim for the fee in these lands but claims on behalf of the indians, the wards of the nation, the use and benefit of these lands for the indians themselves.⁹³

In 1931 the New Brunswick Court of Appeal repeated the holding in the Caledonia Milling case when denying to the province the power to pass legislation allowing imprisonment of an Indian for debt.⁹⁴ In the same year, in a case upholding the power of the provincial law to prevent non-Indians from hunting on reserve, the British Columbia Court of Appeal spoke of the need to "protect the welfare of these aboriginal wards of the Crown."⁹⁵ In 1943, in a case from Manitoba, the Exchequer Court once again spoke of the need to protect the land held by the Crown for its "wards".⁹⁶ In 1940 the Nova Scotia County Court disallowed a poll tax on Mohawk steelworkers from the Kahnawake reserve in Quebec.⁹⁷ Judge McArthur said:

For reasons which are quite apparent, the Indian has been placed under guardianship of the Dominion Government. He is its ward, so long as he remains unenfranchised. ... [The Indians] are looked upon and treated as requiring the friendly care and directing hand of the Government in their affairs. They and their property are, so to speak, under the protecting wing of the Dominion Government, ...⁹⁸

In 1948 the Exchequer Court again called the Indians the wards of the Crown.⁹⁹

In 1950 in an opinion by the then Mr. Justice Rand at the Supreme Court of Canada, the wardship received perhaps its most positive affirmation. The case was another concerning illegally leased land at the Akwesasne reserve. Rand declared of the Indian Act:

The language of the statute embodies the accepted view that these aborigines are, in effect, wards of the state, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing with their privileges must bear the imprint of Governmental approval, and it would be beyond the power of the Governor in Council to transfer that responsibility to the Superintendent General.¹⁰⁰

In 1973 in the Calder case, the Supreme Court echoed the characterization by citing

the letters of the Governors of the colony of British Columbia referred to above.¹⁰¹ In Guerin, we have seen, the Court once again refers to the protective role of the Crown in relation to the First Nations.¹⁰²

The characterization of the Indian/government relationship in terms of guardian/ward has a long history of acceptance in Canada, both in the administration of Indian matters and in the courts. It is found in statements of policy by governmental officers and in obiter in the courts when the background to legislation is being referred to. It is an obligation the government has taken upon itself to act with sensitivity towards the Indian Nations. It is rooted in the belief that, in the early days of colonisation, the Indian Nations would not be able to protect their own interests. The government, consequently, placed itself as an intermediary and protector between the Indian Nations and the settler populations and their local governments. The rhetoric, at least, was not so as to defeat the Indian interests, it was rather to promote them. **F**

language has not been applied in a rigorous fashion. Sometimes called protection, sometimes described in terms of wardship and sometimes simply as a trust. And the word trust itself has been used in its many meanings: sometimes in its generic sense, sometimes in a descriptive manner and sometimes in a legal sense. Rand, in the St Ann's case typifies this fact, describing the wardship as a political trust. The wardship, at least before 1982, could only give rise to rights when given force through legislation. It is to this codified wardship that we now turn our attention.

ii The Enforceable Trust: The Wardship Codified

The wardship has found its way into law both through constitutional and through ordinary legislative instruments. Legislative provisions relating to the Indian Nations, constitutional and statutory, have invariably had trust-like aspects. Some use trusts language, while others establish relationships typically found in the various types of trust. The Royal Proclamation is of course the first of these legislative instruments and speaks of the "several Nations or Tribes of Indians ... who live under our Protection". The Indian Act¹⁰³ is probably the major codification of the wardship. Certainly it is the one which has the closest appearance to a trust. It is the presence of trust-like elements in the legislative scheme governing Indian matters that has caused the legislators, administrators, courts, commentators as well as the First Nations themselves, to conclude that the relationship between the Indians and the government is a legal trust. It is not, however, the origin of the trust relationship. That, it is suggested, is the wardship.

The hallmark of a trust relationship is the separation of control and benefit. In the constitutional provisions and legislation governing the First Nations we frequently see a separation of control and benefit. In fact the separation of benefit and control is an essential element of the implementation of the wardship. From the earliest times the British government separated the responsibility over the Indians from the governing apparatus in the colonies. While there is very little Indian legislation in the early period, we see, as the quantity increases through years, in the trust-like content the implementation by the Crown of its wardship over the

Indians.

Viewing the Indian Act as a codification of the wardship allows one to interpret policy implemented by the Crown. The lands and moneys provisions clearly evince an intention to protect Indian interests. It is possible, I would suggest, to go further. The lands and moneys provisions are not the major provisions of the Indian Act. They are coloured with the intent of the Act as a whole and also by the context of the policies carried out by the government through the Department of Indian Affairs.¹⁰⁴ If we look at the policy of the Act as a whole, it demonstrates, I suggest, the implementation by the federal government of the wardship and, if we view the equivocal wording of the lands and moneys sections in light of that objective, we might be less inclined to opt for the true trust. The Act as a whole, it is suggested, reveals the influence of the positive duties of the wardship shouldered by the Crown. Education, economic development, and a distinct form of local government are all suggestive of a broader wardship role.

a Codification in the Pre-Confederation Period

The governance of pre-Confederation Canada reveals that the power over the Indian nations was for the most part denied to the colonists. Although the Imperial government gave up most of the day to day control over life in the colonies from the earliest times, it retained its responsibility over Indians in Canada until 1860. Until that time control was entrusted to a series of colonial officers. As noted above, in 1670, Indian matters became the responsibility of the governors of the

colonies.¹⁰⁵

In 1755, an Indian Department was created for North America, with Northern and Southern sections, the officers of which reported to the Commander of the British forces in North America. In 1796, control over Indian matters in Upper Canada passed to the Lieutenant-Governor, while in Lower Canada it remained with the Commander-in-Chief of the armed forces until 1800 after which it became the responsibility of the Governor-General. For the short period until 1816, control remained with the civil authorities. In 1816, the responsibility returned to the Commander-in-Chief of the armed forces, perhaps because of the importance of military alliances in the wake of the War of 1812.¹⁰⁶ In 1830, another change resulted in the creation of two separate departments: one for Upper Canada and one for Lower Canada. In 1841, with the Union of the two Canadas into the Province of Canada, a single department was created under the authority of the Governor-General. This arrangement was to last until 1860.

Throughout this period, responsibility for Indian matters lay with an officer responsible to the Imperial Crown acting through its prerogative powers. Both war and the colonies came within the prerogative. The Instructions to the Governors as well as the general policy of the Crown which we explored above resulted, we shall see, resulted in increasingly comprehensive legislation over Indians and their lands.

In 1860, responsibility for Indian matters was transferred from the Imperial control to the Province of Canada.¹⁰⁷ The legislation allowed the Commissioner of Crown Lands to exercise all the powers established under the previous Acts. This

arrangement lasted until Confederation. For virtually the whole of the pre-Confederation period, control over Indian matters was retained by the Imperial Crown. This special relationship is a manifestation of the wardship. The trust obligation also colours the policy pursued through the Indian legislation. The concern was always to assist the Indian in adjusting to "civilization". Trust-like language is also found consistently in the legislation. It is telling, however, that no trusts remedies were codified.

In 1839 Upper Canada passed legislation conferring on the Commissioners a power to protect Indian lands from trespass preventing squatters, poachers, and the illegal cutting of timber.¹⁰⁸ This legislation did not contain elements suggestive of trust beyond the merely protective role assumed by the Commissioners. The 1849 amendment spoke of Indian lands "held in trust or in the nature of a trust for the use of the Indians".

In 1850 legislation was passed which was much broader in its reach. The preamble reads:

Whereas it is expedient to make provision for the protection of the Indians in Upper Canada, who, in their intercourse with the other inhabitants thereof, are exposed to be imposed upon by the designing and unprincipled, as well as to provide more summary and effectual means for the protection of such Indians in the unmolested possession and enjoyment of the lands and other property in their use or occupation.¹⁰⁹

The statute covered, in addition to protection of Indian lands, protection from some laws of contract etc, tax exemptions, prohibition of alcohol and provisions covering statute labour on public roads which pass through Indian lands.¹¹⁰

The statute in force in Lower Canada spoke in the language of trusts. It

began:

Whereas it is expedient to make better provision for preventing encroachments upon and injury to the lands appropriated to the use of the several Tribes and Bodies of Indians in Lower Canada, and for the defence of their rights and privileges.¹¹¹

Its provisions included:

That it shall be lawful for the Governor to appoint from time to time a Commissioner of Indian Lands for Lower Canada in whom and in whose successors by name aforesaid, all lands or property in Lower Canada which are, or shall be set apart or appropriated to or for the use of any Tribe or Body of Indians, shall be and are hereby vested, in trust for such Tribe or Body.¹¹² (my emphasis)

This provision would appear to be strong support for the existence of a true trust.

However, although the lands as well as the power to enforce the Act were vested in the Commissioner, he remained responsible to the Crown:

[T]he Commissioner ... shall be subject in all things to the instructions he may from time to time receive from the Governor, and shall be personally responsible to the Crown for all his acts, and more especially for any act done contrary to such instructions.¹¹³

That control remains with the Governor lends support to the argument forwarded here that the trust-like language in the Act is a result of the wardship which it codifies rather than an intent to actually create a trust of which the Indians were to be beneficiaries.

In 1851, the Lower Canada legislation was again amended and the specific use of the word "trust" was dropped. The appearance is one of trust. The arrangement, it is suggested, is much more like a wardship. Nevertheless, trust-like language remained in use. The statute allowed that "tracts of Land shall be ... set apart and appropriated to and for the use of the several Indian Tribes in Lower

Canada".¹¹⁴ A strong assimilationist policy can be seen in the legislation of 1857.¹¹⁵ The Act for the Gradual Civilization of the Indian tribes in the Canadas offered inducements such as land and money to any Indian who would enfranchise and laid out the conditions under which enfranchisement could be successfully sought.¹¹⁶ This legislation with its strong emphasis on economic development is further proof that the government actively pursued its duty to promote the Indian.¹¹⁷

In 1860, the Imperial government gave up all control over Indian matters to the Province of Canada and legislation was passed to cover Indian lands throughout the province. The legislation had little to say on the nature of the Indian interest in lands or the obligations of the government. Generally speaking, it merely continued the status quo. The provision describing reserve lands is as follows:

s.2 All lands reserved for the Indians or for any tribe or band of Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as before the passing of this Act but subject to this provision.¹¹⁸

This provision, and the accompanying provisions covering Indian moneys, continued essentially unchanged until 1951. The statute also codified the surrender requirement, perhaps the sine qua non of the wardship role of the Crown.¹¹⁹

The majority of the Indian legislation of the period spoke in a manner which strongly suggests implementation of the wardship role of the Crown. The word "trust" is frequently used and the protective role of the responsible officer stressed. In addition, the legislative scheme established to govern the Indian lands sets up a legal relationship which is somewhat suggestive of the true trust. In the early days in what are now Ontario and Quebec, the legal status of Indian lands was uncertain.

The Crown apparently had not turned its mind to the entrenchment in law of the reserve system.¹²⁰

When in 1850 legislative controls governing reserve title were established, the Lower Canada provisions described the lands as "in trust" for the Indians and gave control over the "rents, issues and profits" realized from them. In Upper Canada the legislation required Crown approval of sales of Indian lands evidenced by an "Instrument under the Great Seal of the Province, or under the Privy Seal of the Governor."¹²¹ Such language is strongly suggestive of a true trust. Bartlett, in 1979, commented:

It is suggested that the early pre-Confederation legislation applicable to Upper and Lower Canada expressly declared a trust relationship in respect of Indian lands.¹²²

Such a conclusion would seem to be warranted.

Nevertheless, however trust-like the relationship appeared, the enforcement of the wardship was not through trust remedies. Specific powers of enforcement and remedies were included in the legislation. Throughout the period, it is the Commissioners or other representative of the Crown, not the Indian "beneficiaries", who enforce the legislation and the enforcement is in the nature of public law rather than the protection of rights of private property. The 1839 Act gave the Commissioners power to enforce the trespass provisions. It also covered procedure, penalties, and remedies. The Indians appear to have no powers of enforcement. The Lower Canada provisions of 1850 also gave the power of enforcement to the Commissioners and even went so far as to define who could be considered a

beneficiary of the special provisions. The definition section of this statute is the precursor of the definition sections of the Indian Act which continue to provoke litigation today.¹²³

There was little litigation during this period. Consequently, the courts did not develop very much of an understanding of the purpose of the provisions governing Indians. In 1842 a conviction for trespass contrary to the 1839 legislation was successfully appealed on the grounds that the Commissioners had not proved that the lands were Indian lands.¹²⁴ Such a holding suggests that the Queen's Bench, concerned for the rights of an accused, felt that criminal law standards of proof should apply. It is suggested that had the bench been more aware of the wardship role, they would have reached a better decision. Ultimately, they do seem to have recognized its protective intent.

In two cases in 1850 the Court of Chancery of Upper Canada discussed the scope of the 1839 legislation. In R. v. Strong, the court allowed a broad discretion in the Commissioners in the enforcement of the Act.¹²⁵ Strong, convicted of trespass on Indian lands, appealed on a number of grounds including an allegation that, since the statute was a penal one, the Crown should prove all the elements of the charge.¹²⁶ Evidence as to the status of the lands had been through the oral testimony of a single witness, asserting that no surrender had taken place.

The Court, dismissing the appeal, reviewed the legislation and said:

The bare recital of the jurisdiction conferred upon us, is sufficient to establish the inapplicability of the [arguments of the appellant]. Possibly the clearest refutation of many, if not all, of the arguments adduced, would be found in a careful perusal of the clause granting the appeal. One thing is apparent; that the legislature did not intend that the judgments of the commissioners

should be annulled or reversed on merely technical grounds. We are authorized to alter and amend.¹²⁷

One ground for attacking the conviction, was that no penalty had been imposed at trial. Chancellor Blake, speaking for the Court, explained that the statute only required a conviction to be registered and continued:

The warrant of removal is in the nature of an execution upon this judgment; it may or may not be required according to the circumstances; the power to issue such warrant, as well as the period at which it shall be issued, are left with the commissioners.¹²⁸

Vice Chancellor Esten, in a case heard at the same time as Strong, suggested that Indian legislation was remedial rather than criminal and should receive "a liberal construction".¹²⁹ Had they mentioned the wardship role, the reasoning would have been more complete.

The disability of the Indians to sell or lease their lands without the consent of the Commissioners is, it has been suggested, an example of the protective role of the Crown. The disability was confirmed in cases in 1855, 1857 and 1865. In the first of these cases, R. v. Baby, the Upper Canada Court of Queen's Bench went as far as to declare, obiter, that the protective intent of the statute would even prevent the enforcement of a contract with the Indians even where there was an intent to obtain the permission of the Commissioners afterwards.¹³⁰ Such a ruling is strong inducement to citizens to accept the Crown's role as intermediary.

In 1857, the Court of Common Pleas of Upper Canada relied upon the 1851 statute in founding a conviction for entering into a verbal lease of Indian lands.¹³¹ In 1865, in Commissioner of Indian Lands v. Jannel, the defendant argued that his

purchase of Indian lands could not be impeached since the land was situated outside the village of the Indians from whom he purchased and consequently were not Indian lands. The Lower Canada Court noted that the statute did not draw such a distinction and upheld the conviction saying:

The statute is precise; and therefore the judgment of the court below must be confirmed.¹³²

Such technical arguments were not to be allowed to defeat the protective intent of the legislation.

The remedies allowed are generally those written into the statute. One case offers weak authority for the argument that trust remedies might be obtained by the Commissioners. The 1856 case from Lower Canada, a case was argued on an agreed statement of facts. In Commissioner of Indian Lands v. Payant, the Commissioners attempted to repossess timber cut by an Indian on Indian lands and sold, illegally, by the Indian to a non-Indian.¹³³ The admissions agreed to by the parties included that the Commissioner held the lands in trust for the Indians. With no reference to the governing legislation, the court declared the timber to be the property of the Commissioner and ordered it delivered up to him "in his said capacity".¹³⁴ This last phrase would seem to be a reference to the Commissioner's capacity as trustee. Even though it is acknowledged that the legislation in force at the time referred to the lands as being held in trust, it is suggested that the fact that the case was argued on an agreed statement of facts, considerably weakens its strength.

On a similar point the Upper Canada Queen's Bench reached a very different

result. In Vanvleck v. Stewart, the plaintiffs had either cut timber with permission of the Indians or had purchased it from the Indians. The Commissioners had seized the lumber and sold it to the defendants. The court looked at the legislation and commented, obiter:

[U]pon a consideration of the statutes ... I do not see that saw logs cut on Indian lands by the Indians themselves, or cut by white people by the consent of the Indian occupants, are liable to be seized and sold by the Commissioners for restraining trespasses upon the lands under any of the statutes referred to; but further consideration of the question might lead me to a different opinion.¹³⁵

Although the Court does not rule out a trust remedy, it is clear that their predilection is for the statutory remedy. In fact, it is clear that for the Courts of Lower Canada also the statute is paramount. In 1867, the Court of Queen's Bench of Lower Canada, after reviewing the legislative provisions governing Indian lands, commented:

It is therefore clear that, since the passing of this law (C.S.L.C., c. 14), all rights of action, whether founded upon ownership or occupancy, are vested in the Commissioner of Indian Lands.¹³⁶

Although not conclusive, the evidence is compelling, not only that the courts, in keeping with the concept of the wardship, gave a broad pro-Indian reading to the statutes, but also that they preferred the statutory remedies. In only one case, and that one where the trust appears not to have been argued, did the courts apply a trust remedy.

It is suggested that the pre-Confederation Indian law is supportive of the argument that the presence of trusts-like language is due to the wardship rather than the intent to create true trusts interests in the Indian nations. The policy and the

judicial commentary are too contradictory to draw any hard conclusions. With Confederation in 1867, centralisation of Indian matters into a single department made possible the development and implementation, by the Crown, of a much more consistent Indian policy. The several pre-Confederation Acts were quickly consolidated into a single Act, an Act which has persisted virtually unchanged up to today. Certainly, the policy pursued by the Department showed remarkable consistency at least until 1969. Furthermore, the opinions of the courts rapidly became more consistent.

b Codification after Confederation

Under the terms of the Constitution Act, 1867, the responsibility for fulfilling the wardship role fell to the federal government. The Indians are unique in coming under federal jurisdiction. We have seen that in 1844 the Bagot Commission recommended that responsibility for the Indian Nations should be vested in the Crown rather than the provincial authorities. The Commission recommended:

That as long as the Indian Tribes continue to require the special protection and guidance of the Government they should remain under the immediate control of the representative of the Crown within the Province, and not under that of the Provincial Authorities.¹³⁷

At Confederation some 23 years later, this recommendation seems to have been heeded.

Under the terms of the Constitution Act, 1867, s. 91(24), legislative power over "Indians and the Lands reserved for the Indians" was placed in the federal government. Section 92(13) placed legislative power over "Property and Civil Rights"

in the provincial legislatures and by the terms of s. 109, "All Lands, Mines, Minerals and Royalties" belonging to the provinces at confederation were to be retained by the provinces.

It is not possible now to ascertain the purpose for this legislative scheme. However, it seems justifiable to conclude, as Sanders does, that Indian lands were placed under a different jurisdiction from that governing the rest of the lands in the nation, in order to protect the Indian Nations and their lands from the provinces.¹³⁸ If this is in fact the case, then it is unquestionably an example of the codification of the wardship relationship and clearly places the responsibility for the enforcement of the duties on the federal Crown.

Other constitutional provisions support this conclusion. The Rupert's Land and Northwest Territory Order admitting Rupert's Land into Confederation in 1870 contains the following acceptance of the wardship:

[U]pon transference of the territories in question to the Canadian Government, it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer.¹³⁹

Upon the admittance of British Columbia into Confederation in 1871, the Indians of that colony became a federal responsibility:

The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.¹⁴⁰

In 1930 through the Natural Resources Transfer Agreement, the federal government gave up control over the lands in the prairie provinces.¹⁴¹ Legislative power over

Indians and their lands, however, remained with the federal government. These provisions with their language and/or inference of protection from provincial interference suggest a transfer of the wardship from the Crown in right of the colonies and from the Hudson's Bay Company, to the Crown in Right of Canada.

It is clear that the Canadian Government actively took up its role as protector. In the treaty process as pursued by the Dominion government, we see frequent promises reminiscent of the wardship. During the negotiation of Treaty 1, for example, we see this promise:

Your Great Mother, the Queen, wishes to do justice to all her children alike. She will deal fairly with those of the setting sun, just as she would with those of the rising sun. She wishes peace and order to reign through all her country, and whilst her arm is strong to punish the wicked man, her hand is also open to reward the good man everywhere in her Dominions.

Your Great Mother wishes the good of all races under her sway. She wishes her red children to be happy and contented. She wishes them to live in comfort. She would like them to adopt the habits of the whites, to till the land and raise food, and store it up against a time of want. She thinks this would be the best thing for her red children to do, that it would make them safer from famine and distress, and make their homes more comfortable.

But the Queen, though she may think it good for you to adopt civilized habits, has no idea of compelling you to do so. This she leaves to your choice, and you need not live like the white man unless you can be persuaded to do so of your own choice.¹⁴²

In the Treaty 4 negotiations we see a further assurance which relates the treaties of the late 19th century to earlier treaties:

The Queen knows that her red children often find it hard to live. She knows that her red children, their wives and their children, are often hungry, that the buffalo will not last forever and she desires to do something for them. More than a hundred years ago, the Queen's father said to the red men living in Quebec and Ontario, I will give you land and cattle and set aside Reserves for you, and will teach you. What has been the result? There the red men are happy; instead of getting fewer in number by sickness they are growing in number; their children have plenty. The Queen wishes you to enjoy the same blessings.¹⁴³

The wardship implicit in these promises, is much more than merely the protection of lands. There would appear to be also a commitment to promote the best interests of the Indians. The treaties themselves are fairly neutral in regard to the wardship although there are provisions promising schools, medicine, welfare when necessary, as well as farm implements and seeds. Taken together, the content of the negotiations and the treaties themselves, the totality is suggests that the federal government actively assumed the wardship role.

c Codification in the Indian Acts

The scope of the wardship taken up by the federal government is evident in the broadness of the legislation under which the lives of the Indians have been governed since Confederation. 1876 saw the enactment by the federal government of the first consolidated Indian Act. In the years between Confederation and the passing of this Act, great changes had occurred in Canada. The Northwest Territories, British Columbia and Prince Edward Island had been admitted to Canada, with, in the case of the Northwest Territories and British Columbia, an overt acknowledgement of the special responsibilities to, and not just legislative jurisdiction over, the Indians. Indian affairs had been centralized into a single department for the whole nation. The charge of the Indians, first given in 1868 to the Secretary of State,¹⁴⁴ in 1873 was given to the newly created Department of the Interior.¹⁴⁵

The 1868 legislation covered all the four confederating provinces and gave to

the Secretary of State, many of the powers we have seen in earlier legislation.¹⁴⁶ In 1869, an amendment extended the scope of the earlier Act to include the enfranchisement.¹⁴⁷ This Act also extended many pre-existing provisions and added controls on the descent of property and included provisions establishing elections for Band Chiefs.¹⁴⁸ The Chiefs were to be given powers to pass by-laws, subject to confirmation by the Governor in Council, over a narrow range of local matters.¹⁴⁹ It also made possible the granting of life estates in reserve lands to individual Indians who "from the degree of civilization to which he has attained, and the character for integrity and sobriety which he bears, appears to be a safe and suitable person for becoming a proprietor of land."¹⁵⁰

It is obvious from the scope of the later statute in particular, that the federal government intended to take up the responsibility of the wardship and its implementation into legislation. The controls on the alienation of land, on the consumption of liquor, on trespass and the selling of timber, are examples of the codification of the wardship of some vintage. The creation of Band Councils with their powers controlled by the Governor in Council, can be seen as a further example of the government implementing its wardship. One commentary has suggested:

[T]he Act of 1868 consolidated much of the legislation passed in the previous decade regarding protection and management of Indian interests. It continued the "guardianship policy" of Indian Affairs officials.¹⁵¹

The enfranchisement provisions of the 1869 Act, which remained in force in some form until 1985, suggest another aspect of the guardianship. These provisions

perhaps indicate that the wardship was intended to protect the Indians only until they were able to govern their own affairs. The fact that native women marrying non-natives lost their status also indicates a discrete purpose to the wardship. These were, after all, times in which women were very much "wards" of their husbands. In 1871 Spragge, the Deputy Superintendent of Indian Branch, explained:

The Acts framed in the years 1868 and 1869, relating to Indian affairs, were designed to lead the Indian people by degrees to mingle with the white race in the ordinary avocations of life.¹⁵²

The objects of the legislation remained, as they had always been, threefold: Protection of the Indians from unscrupulous settlers and traders; an intent to civilize the Indians; and, an active role for the Crown as protector of the Indians.¹⁵³

In 1874, provisions were added that governed the taking of evidence from Indians,¹⁵⁴ and the operation of the 1868 Act as amended was extended to be in force in Manitoba and British Columbia.¹⁵⁵ In 1876, the existing Indian legislation was consolidated into the form which, to a large degree, it takes today.¹⁵⁶ **T** consolidation had been preceded by some discussion within the fledgling department of its role vis-a-vis the Indians.

The Indian Act, as it now became known, extended the reach of the Indian legislation, with the exception of the enfranchisement sections, to include all the territories under the jurisdiction of the federal government.¹⁵⁷ The enfranchisement sections were to come into force in the recently acquired territory by proclamation. The wardship aspects of the previous Acts were continued and extended. Certain other sections, suggestive of a true trust, appeared for the first time. Overall, the

Act demonstrates, it is suggested, an increasing sophistication in the implementation of the wardship role. It is further suggested that the wardship, though codified in trust-like terms, is not necessarily intended to give rise to trust remedies. A review of some of the provisions supports this answer.

i The Definition of Reserves

Section 3(6) of the 1876 Act, gives the following definition for the term "reserve" as used in the Act:

The term "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered and includes all the trees, wood, timber, soil, stone, minerals, metals, or other valuables thereon or therein.¹⁵⁸

Special reserves were defined in the following way:

The term "special reserve" means any tract or tracts of land and everything belonging thereto set apart for the use or benefit of any band or irregular band of Indians, the title of which is vested in a society, corporation or community legally established, and capable of suing and being sued, or in a person or persons of European descent, but which land is held in trust for, or benevolently allowed to be used by, such band or irregular band of Indians.¹⁵⁹

The use of the phrase "use or benefit" together with the announcement that legal title rests in a second party, either the Crown or another, evidences the separation of benefit and control. Such separation is suggestive of a true trust.

In 1951, the definition of reserve was amended:

"reserve" means a tract of land, the legal title of which is vested in His Majesty for the use and benefit of a band.¹⁶⁰

While continuing the separation of control and benefit, this provision uses the

terminology of the true trust. For Sanders this supports the argument that reserve lands are held in a true trust.¹⁶¹

Also in 1951, the separate definition of special reserves was dropped and s. 36 appears. S. 36 provides:

Where lands have been set apart for the use and benefit of a band and the legal title thereto is not vested in His Majesty, this Act applies as though the lands were a reserve within the meaning of this Act.¹⁶²

Through s. 36, special reserves came under the general definition. By the terms of s. 3(6) of the 1876 Act, special reserves included lands held "in trust" for the use or benefit of a band. S. 22 of the 1876 Act provides:

If by the violation of any such trust as aforesaid, or by the breaking up of any society, corporation, or community, or if by the death of any person or persons without a legal succession of trusteeship, in whom the title to a special reserve is held in trust, the said title lapses or becomes void in law, then the legal title shall become vested in the crown in trust, and the property shall be managed for the band or irregular band previously interested therein, as an ordinary reserve.¹⁶³

Bartlett, who is not convinced that ordinary reserves are held in trust, suggests that these sections taken together suggest the existence of a true trust in relation to special reserves. He comments:

Upon such lapse or avoidance title to the reserve [under the 1876 Act] is "vested in the Crown in trust as an ordinary reserve". ... Special reserves are today defined in terms of "use and benefit" rather than "trust". It is suggested that the 1951 revision cannot have abrogated the trust status of the special reserves and accordingly the 1951 terminology may be regarded as an indication of the equation to be properly made between a "trust" and lands set apart for the "use and benefit of a band."¹⁶⁴

The arguments of both Sanders and Bartlett demonstrate the possibilities of the Indian Act as a trust instrument.

As both of these writers are aware, arguments to the contrary also show plausibility. Indeed, Sanders, ultimately seems uncertain about the existence of such a trust.¹⁶⁵ And the elimination of trust terminology from the Act could be seen as a deliberate attempt to avoid a trust obligation. Sanders comments on this:

[T]here is an evolution in the use of the term "trust" in Canadian Indian legislation. Pre-confederation legislation uses the term as a regular part of the statutory language. After confederation, in the federal Indian legislation of 1876 and 1880, the use of the term is confined to the problem of special reserves (where title to the reserve in is a person or body other than the Crown). With the Indian Act of 1951, the term is dropped even from the special reserves section.¹⁶⁶

In the end, the evidence as to the existence of a true trust remains equivocal. And indeed, since Madame Justice Wilson and two other Justices of the Supreme Court favour the true trust, even Guerin has not completely cleared up the matter. But even if there is no true trust vis a vis Indian lands, at the very least, the trust-like aspect of these provisions indicates codification one element of the wardship.

ii Control over Band Moneys

Indian moneys, as part of the "property of Indians" have been under the same broad controls and management as Indian lands. In the 1876 Indian Act, the following provisions appear:

s.58 All moneys and securities of any kind applicable to the support or benefit of Indians, ... and all moneys accrued and hereafter to accrue from the sale of any Indian lands, [etc], shall, subject to the provisions of this Act, be applicable to the same purposes, and be dealt with in the same manner as they might have before the passing of this Act.

s.59 The Governor in Council may, subject to this Act, direct how, and in what manner, and by whom the moneys arising from the sales of Indian lands, and the property held or to be held in trust for the Indians or from any

timber on Indian lands or reserves, or from any other source for the benefit of Indians, ... shall be invested from time to time, and how the payments or assistance to which the Indians may be entitled shall be made or given, and may direct what percentage or proportion thereof shall be set apart from time to time, to cover the cost of and attendant upon the management of reserves, lands, property and moneys under the provisions of this Act, and for the construction and repair of roads passing through such reserves or lands, and by way of contribution to schools frequented by such Indians.

s.60 The proceeds arising from the sale or lease of any Indian lands, or from the timber, hay, stone, minerals or other valuables thereon, or on a reserve, shall be paid to the Receiver General to the credit of the Indian fund.¹⁶⁷

These provisions have become increasingly complex and detailed over the years. In 1951, the sections included words of trust. Section 61 states:

61(1) Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are to be received or held, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which Indian moneys are used or are to be used is for the use and benefit of the band.¹⁶⁸

These provisions remain in force today. The powers of the Minister are enumerated in a number of detailed provisions. The arguments as to whether these provisions constitute the delineation of a true trust relationship are similar to those relating to the land provisions above. Certainly, as with those sections, the influence of the wardship role is obvious.

iii The Powers of Management of Indian Lands and Property and Lives

Until 1883, "control and management of Indian lands and property" was exercised by first the Secretary of State, and from 1874, the Minister of the Interior. In an 1883 amendment, the provision which would remain in the Act until 1951

appears. It states:

The Minister of the Interior or the Head of any other Department appointed for that purpose by order of the Governor in Council shall be the Superintendent General of Indian Affairs and shall, as such, have the control and management of the lands and property of the Indians of Canada.¹⁶⁹

In 1951, the section was dropped and the following appears:

This Act shall be administered by the Minister of Citizenship and Immigration who shall be the superintendent general of Indian affairs.¹⁷⁰

Apart from changes covering which Department head shall be the superintendent general, the provision remains the same today.¹⁷¹ Since the 1951 Act, the powers and mechanisms of management and control are to be found dispersed throughout the Act. They remain substantial.

It is suggested that these controls demonstrate an intent to take up some of the positive duties which are included in the wardship. The reserve land, it is noted, was to provide the basis of the economy with which the Crown intended to replace the traditional economy. The Act grants to the Governor in Council and to the Minister responsible for Indian matters such powers which are to oversee the introduction of the Indian to the European economy.

The powers are particularized throughout the Acts. Some powers are reserved to be exercised by the Governor in Council, some by the Minister, and some even by the band themselves. Specific provisions governed under the terms of the 1876 Act for example, include powers over reserves,¹⁷² surveys and allocations of lands,¹⁷³ descent of property,¹⁷⁴ removal of trespassers,¹⁷⁵ control of timber resources,¹⁷⁶ arbitration where railways and other public purposes require reserve

lands,¹⁷⁷ the maintenance of roads,¹⁷⁸ control over the surrender process,¹⁷⁹ elections,¹⁸⁰ trade,¹⁸¹ enfranchisement and the swearing of affidavits.¹⁸² The Governor in Council is granted control over surrendered lands,¹⁸³ the granting of patents to enfranchised Indians¹⁸⁴ and the power to exempt Indians or bands from the provisions of the Act.¹⁸⁵

The Act today, as well as continuing the large majority of the 1876 provisions and some added through the intervening years, includes powers over the creation of new bands¹⁸⁶ and the operation of farms¹⁸⁷ and schools.¹⁸⁸ Noteworthy throughout the Indian legislation is the existence of substantial discretionary powers in the Minister and the Governor in Council. Typical are the powers given over Indian moneys in s. 61 of the 1951 Act.¹⁸⁹ A similar power over Indian lands, which also first appeared in the 1951 Act, exists in today's s.18. It reads:

Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they are set apart; and subject to this Act and the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.¹⁹⁰

Equally powerful, though not expressed in such strong language, is the power of disallowal the Minister exercises over the Band Council by-laws.¹⁹¹

The Acts as a whole evidence a separation of control from the Indians who live on the reserves. This, again, has trust-like appearances, but not those of a property centered trust. Lowry argues that this in fact means that the Indian Act creates an express trust in relation to at least reserve lands and Indian moneys.¹⁹² Bartlett, while he has some sympathy with this argument, notes that the broad discretion given to the Minister and to the Governor in Council may refute the

argument. He comments:

The language and substance of these provisions in no way deny the existence of a trust relationship but particularize features of the trust and go a long way in resembling a trust instrument describing the powers of the trustees and the object of a trust. Throughout the history of Indian legislation management of Indian property has been a matter of ministerial or Governor in Council discretion. This discretion might be considered to deny a trust relationship or breach of trust action.¹⁹³

The difficulty of assessing the equivocal terminology of the Indian Act is reflected in the case law. The courts rarely grant trusts remedies but frequently refer to the existence of special obligations to the First Nations.

It is clear that the Indian Act can be viewed as an entrenchment of the wardship relationship between the government and the Indians. The fact that these provisions cover more than just land and money and extend to cover the daily lives of Indians suggests a very broad conception of the wardship. A consequence of this, it is suggested, is that even the provisions relating to the governance of Indians tend to take on the appearance of a trust. It is not surprising, then, that the trust argument has been taken up in litigation.

d Codification: The Views of the Courts

Many of the cases reviewed above in the section on the wardship were an attempt to obtain a trust remedy for an alleged breach of an Indian Act duty. In Payant we saw that the court assumed the existence of a trust apparently without the point having been argued.¹⁹⁴ For this reason it is a weak authority for finding a trust in the terms of the Indian Act. It has in fact not been easy to place

enforceable trust duties upon the Crown. By contrast, the courts have repeatedly referred to the special obligations of the Crown.

i The Crown as Trustee

Despite some early problems,¹⁹⁵ it is now clear that it is possible for the Crown to be a trustee.¹⁹⁶ In Walsh v. The Secretary of State for India in Council in 1863, the House of Lords had no trouble holding the Secretary of State for India in Council to be a trustee.¹⁹⁷ In that case the trusteeship was clearly evident in the statute. Indeed, it would seem to be required in England that such be the case. In 1932, the House of Lords, in Civilian War Claimants v. The King, said:

There is nothing, as far as I know, to prevent the Crown from acting as agent or trustee if it chooses deliberately to do so.¹⁹⁸

Furthermore, the Crown will not be found to be a trustee in matters of state. In Rustomjee v. The Queen, Lord Coleridge said:

We do not say that under no circumstances can the Crown be a trustee; ... but it seems clear to us that in all that relates to the making and performance of a treaty with another sovereign the Crown is not, and cannot be, either a trustee or an agent for the any subject whatever.¹⁹⁹

In Kinloch v. The Secretary of State for India in Council,²⁰⁰ the House of Lords was asked to find a trust binding the Crown to distribute booty. The Order in Council ordering distribution of booty gathered during a war, spoke in terms of trust. The court denied the trust saying:

Now the words "in trust for" are quite consistent with, and indeed are the proper manner of expressing, every species of trust - a trust not only as regards those matters which are the proper subjects of an equitable jurisdiction to administer, but as respects higher matters such as might take place the Crown and public officers discharging, under the directions of the

Crown, duties or functions belonging to the prerogative and to the authority of the Crown. In the lower sense they are matters within the jurisdiction of, and to be administered by, the Courts of Equity: in the higher sense they are not.²⁰¹

In both of the above cases the existence of a trust was denied on the grounds that by the instruments alleged to have created the trusts, the Crown had reserved to itself a prerogative right to decide.

A rule can be drawn from these cases. The courts will not venture to check the operations of the Crown in matters regarding treaties, (unless of course there has been implementation through statute), or matters within the prerogative and within the authority of the Crown. Once rendered enforceable through statute, the courts will exercise jurisdiction, including, should the Crown impose trust obligations upon itself, enforcing the duties of trustee.

In Canada similar rules can be found. In Central Canadian Railway v. The Queen, the Exchequer Court noted:

That the Crown may be a trustee seems clear, the only question having been as to the mode of enforcing the trust, which, it determined, could not be done, ... ; but it is laid down by the highest authority that, by a Petition of Right, a trust as well as a contract, may be enforced against the Crown.²⁰²

The procedural problems have since been eliminated by the Federal Court Act.²⁰³

In McQueen v. The Queen, the Exchequer Court commented obiter that the Crown could not become a trustee by implication. Mr Justice Gwynne noted:

Her Majesty never could be placed in [the position of trustee] unless by the express provisions of an Act of Parliament.²⁰⁴

The case was affirmed by the Supreme Court of Canada without comment on the point.

More recently the courts have not been so categorical. In 1934, the Exchequer Court expanded the methods by which the Crown might become a trustee. In Chipman v. The King, Angers J. said:

I do not think that the Crown can be placed in the position of trustee by implication; the Crown can only be constituted trustee by express provisions of an Act of Parliament or a contract to which the Crown is a party.²⁰⁵

This recognizes that by the 1930's, governments were frequently contracting with the public or with private industry. Clearly, if the government accepts a trust obligation within such a contract, the courts would be entitled to enforce it.

The most startling of the cases must be Gardner et al. v. The Queen in Right of Ontario in 1984.²⁰⁶ The Eagle Lake Band sought a declaration that certain disputed lands were part of their reserve. In the alternative they argued, *inter alia*, if the lands were found not to be reserve lands, that the Crown breached a trust obligation when it took the lands. White J., found the pleadings on the point to be wanting and struck out that part of the claim with leave to amend. In its review of the cases on the Crown as trustee, the High Court of Justice of Ontario cited Chipman with approval and concluded:

It is my view that the cases leave it open for the Crown to stand in the position of trustee with regard to an asset such as the Band's reserve. Furthermore, as I read the cases, there is no absolute requirement for the capacity of the Crown to act as trustee to exist, that some statute or agreement explicitly accepts on the part of the Crown that it is a trustee. In other words, the relationship as between the Crown and the Band could arise by implication from statute or circumstances.²⁰⁷

With respect, the conclusion does not appear to be supported by the review. Not one case cited finds the Crown to be a trustee, and the most authoritative, such as

Civilian War Claimants and Kinloch, seem to require an expressed intent before such a holding might be reached. It is suggested that on this point, the case tries to accomplish too much.

It is uncontroversial, however, that it is possible for the Crown to be held to the duties of a trustee. But it would appear that explicit acceptance of the role by the Crown is necessary, preferably within the four corners of a statute. It may be sufficient if the acceptance is found in the terms of a contract.

ii The Native Law Trust

Both the Constitutional provision and the legislation are ambiguous on the trust responsibilities of the Crown. Arguably the legislation contains elements suggestive of a true trust but never explicitly states the intention to be held to a true trust obligation. This very much supports the argument that the origin of the trust-like elements is the wardship.

The courts have been insistent, in the little litigation which has pursued the issue, that the treaties and s. 91(24) of the Constitution Act, 1867, do not create a trust obligation in the Crown in favour of the Indians. In Attorney General for Canada v. Attorney General for Ontario, Canada argued that the province could be called upon to pay the annuities owed as a result of pre-Confederation treaties signed with certain Indians. They argued that ss. 109 and 111 of the Constitution Act, 1867 created a trust obligation on the part of the province to pay the annuities out of profits realised from the surrendered lands. The sections read:

s. 109 All Lands, Mines, Minerals and Royalties belonging to the several

Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals or Royalties shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

s. 111 Canada shall be liable for the Debts and Liabilities of each Province existing at the Union.²⁰⁸ (My emphasis)

The Privy Council rejected the trust argument. There was nothing to suggest that the Indians could bring themselves within the terms of s. 109. Lord Watson for the Court commented:

Their Lordships have no difficulty coming to the conclusion that, under the treaties, the Indians obtained no right to their annuities, ... beyond a promise or agreement, which was nothing more than a personal promise by [the governor of the Province of Canada], that the [Province] should pay the annuities when they became due; that the Indians obtained no right which gave them any interest in the territory which they surrendered, other than that of the province; and that no duty was imposed upon the province, whether in the nature of a trust obligation or otherwise, to apply the revenue derived from the surrendered lands in payment of the annuities.²⁰⁹

In a related case, The Dominion of Canada v. The Province of Ontario, Canada argued that the Dominion acted as the agent or trustee of Ontario when making treaty with the Indians in Northwestern Ontario.²¹⁰ Canada sought indemnity from Ontario for the costs of making and carrying out the treaty obligation. Lord Loreburn commented:

[I]t seems to their Lordships that the relation of trustee and cestui que trust, from which a right to indemnity might be derived, cannot, even in its widest sense, be here established. The Dominion Government were indeed, on behalf of the Crown, guardians of the Indian interest and empowered to take a surrender of it and to give equivalents in return. ... The only thing the in regard to which the Dominion could be conceivably be thought to be trustees for the province, namely the dealing with the Indian interest, was a thing concerning the whole nation. In truth, the duty of the Dominion Government was not that of trustees, but that of ministers exercising their powers and their

discretion for the public welfare.²¹¹

Equally, they were not an agent for Ontario. The Dominion, the Court noted, when making the treaties, acted "with a view to great national interests":²¹² the expenses were incurred "for distinct and important interests of their own."²¹³ His Lordship concluded:

This is really a case in which expenditure independently incurred by one party for good and sufficient reasons of his own has resulted in direct advantage to another. It may be that, as a matter of fair play between the two governments, as to which their Lordships are not called upon to express and do not express any opinion, the province ought to be liable for some part of the outlay. But in point of law, [there is no such obligation].²¹⁴

So while the court recognized the existence of the wardship, they would not give it legal significance. The statute, in this case the Constitution, covered the issue and it had separated the right to the property from the legislative jurisdiction over it.

On the existence of trust remedies for breaches under ordinary legislation, there also been only a limited amount of litigation, and the courts have not spoken with the same clarity. Few cases have sought trust remedies for breach of Indian Act duties. Usually the remedies found within the Act itself have been sufficient. The cases that have been argued are equivocal on the existence of a trust. The courts will usually find another remedy or will simply not offer a reasoned account of the basis of their decision. The result of this is that it is not possible to say that there is or is not an enforceable native law trust. The most that might be said is that there might be one.

Henry v. The King typifies the problem.²¹⁵ In 1905 in the Exchequer Court, members of the Mississaugas of the Credit, sought to obtain moneys in the hands of

the Crown. The moneys were the proceeds from the sale of surrendered lands. The band also sought full payment of annuities due under a treaty made with the Province of Canada.

The Mississaugas claimed that the money, which had apparently been paid into the general accounts of the Dominion of Canada, was held by the government in trust for them. The Court agreed that in relation to Indian moneys, the Crown was a trustee. However, it held also, that there was no remedy against the Crown for its breach. Burbidge J., held:

[W]ith regard to moneys arising from the sale of lands surrendered by the Mississaugas of the Credit, it is clear, I think, that the Crown holds them in trust for that band of Indians. By the terms of the surrender ... the lands were to be held upon the trust therein mentioned.²¹⁶

The court then referred to the relevant Act, that of the Province of Canada of 1860, c. 151, and continued:

But it does not follow that because the Crown is a trustee for the Indians in respect of such land or moneys, that the court has jurisdiction to enforce the trust, or to make any declaration of the rights of the parties. ... The Crown .. does not in respect of Indian lands or moneys stand in the position of an ordinary trustee. ... Parliament alone has the authority to review the decision come to or the action taken.²¹⁷

That part of the action, consequently, failed.

For the claim for full payment of the annuities, the Band was successful. The Province of Canada, in agreement with the Dominion of Canada, had capitalized the annuities and paid over the sum to the Dominion. Section 111 of the Constitution Act, 1867, held the Dominion liable for the debts of the Province. It reads:

s. 111 Canada shall be liable for the Debts and Liabilities of each Province existing at the Union.

Burbidge J., held:

As [the right of the Mississaugas to their annuities], rests upon a treaty or contract between the Crown and them, and upon the [Constitution Act, 1867], the court has, I think, jurisdiction so to declare. ... The office of the court is to define, as best it may, the rights and relations of the parties. All other matters arising out of the case are for the consideration of those upon whom the rests the responsibility of advising the crown, and of inviting the co-operation of Parliament, if it is found that such is advisable.²¹⁸

The acts of the Crown as a party to a contract are reviewable by the courts because legislation exists which covers the issue. The acts of the Crown as trustee or ward, by contrast, are not reviewable.

Lowry suggests that this case is decided in error because there were cases which allowed that the Crown might be a trustee.²¹⁹ It would be difficult not to agree with his contention that the case is therefore "of little value in relation to enforcement of a trust".²²⁰ Nevertheless, it must be pointed out that Burbidge J., was correct in justifying his decision not to review the point by noting that no case could be found where the Crown had been held to be a trustee.²²¹ The case is also unique in finding that the obligation to pay the annuities is enforceable. However, it must be remembered that while the right arises in the treaty and the long practice of the Crown, the enforceability originates in s. 111 of the Constitution Act, 1867. Certainly, on the problem at hand, the case is unhelpful.

Equally unhelpful on the issue of the trust, is Miller v. The King.²²² There are three claims in this case. The first alleged breach of trust by the government of Upper Canada in not claiming compensation for reserve land lost in 1824 to flooding caused by the building of a canal. The second claimed another breach of trust

resulting from expropriation without compensation of reserve lands for the same canal in 1836. Both these claims were denied because they were based on a right against Upper Canada and while the Dominion of Canada had accepted liability for the "debts and liabilities" of the Province of Canada, it had not agreed to accept any liability for the torts of Upper Canada.

The third claim seems to have been framed as an action for breach of contract although both Kellock and Locke JJ., recognize the possibility of trust liability. The Six Nations alleged that funds in the hands of the Crown realized from the surrender of reserve lands had been improperly used to purchase shares in a company which had eventually become insolvent. The moneys had been in the hands of the Crown in approximately 1833. Subsequent to that they had been used to purchase the shares, in violation of the terms of the surrender. It was alleged that some of the shares had been purchased after 1840 under the jurisdiction of the Province of Canada, thus avoiding the grounds on which the other two claims were dismissed.

The claim was allowed to proceed. Kerwin J., based his approval on breach of contract. Locke and Kellock JJ., as noted seem to allow the appeal on the basis of both trust and contract. Kellock and Kerwin allowed the claim only as it related to purchases made after 1840. The broader problems which might arise if the purchase had in fact been a breach of trust, are not adverted to. It might be argued, for example, that if money in the hands of Upper Canada, had been imbued with trust obligations, then a breach by that government could result in a finding that the

funds used to purchase the shares were not those of the Six Nations but rather those of the government. The trust would then follow the moneys transferred by Upper Canada into the revenues of first the Province and then the Dominion of Canada. Another possible argument would be that a breach occurred when the government allowed the funds to remain in an enterprise fund which was failing. The liability for such a breach would certainly have fallen to the Province of Canada since the failure occurred under that government. Such implications were not addressed. For these reasons and for the fact that the case is concerned with the question of jurisdiction, the case is unhelpful.

Ultimately then, we have only appearances and allegations of a true trust in relation of Native law. Where an allegation of trust is successful, the court has allowed it only to find that the administration of the "trust" is unreviewable. This is a recognition of the general unenforceable trust obligation of the Crown: the wardship. Only where there is legislation entrenching the wardship will the courts enter. Or unequivocally refuse to do so. And then with the statutory remedy. One last example might be useful.

In Chisholm v. The King, the widow of a lawyer attempted to obtain funds owed to her late husband by the Six Nations.²²³ The moneys was owed for legal services rendered to the Six Nations who had promised to pay him out of their trust funds. With the support of the Band, she sued the Crown. The Department of Mines and Resources, then responsible for Indian Affairs, refused to pay. The court sided with the Department. The Exchequer Court held;

The decision of the Minister either to pay or not to pay the account is not

reviewable by the Court.²²⁴

On a second ground, that the agreement of the Six Nations was an assignment of a portion of the Band's trust funds to the lawyer, the Court held that the Indian Act, by denying any liability without the consent of the Minister, covered the issue.

So, it is suggested, that while the Indian Act may appear to contain elements of the true trust, it has not been viewed as a trust instrument. Where trust-like provisions have been justiciable, the courts have not enforced those provisions through the use of trusts law but have confined themselves to statutory remedies. Furthermore, it is clear that the Act as a whole reflects a much broader purpose than simply the protection of Indian lands and moneys. It is suggested that the Indian Act strongly supports the argument that the federal government actively took up the wardship of the Indian nations.

iii The Enforceable Trust: The True Trust

Only three cases have found a true trust obligation owed to the First Nations by the government. All three find the source of the trust in the Indian Act. In 1916 in Attorney General Canada v. Giroux, Duff J., one of four judges writing in the case, reviewing the provisions of c. 14 of the Consolidated Statutes of Lower Canada, governing Indian lands in Lower Canada, described its provisions in these terms:

Looking at the ensemble of rights given [by the Act to the Commissioner of Indian Lands], I can entertain no doubt that in the sum, they amount to ownership.²²⁵

The same interest would have been carried into the 1860 legislation and then into

the federal jurisdiction at Confederation. Consequently, he finds:

The Indian interest being, as I have pointed out, ownership, is by the terms of the surrender a surrender to Her Majesty in trust to be dealt with in a certain manner for the benefit of the Indians.²²⁶

This is an unequivocal statement that Indian lands in Quebec at least were held in a true trust. The case, however is suspect.

Only five years later, the same judge writing for the Privy Council, cut out the basis for the finding of the trust. In Attorney General for Quebec v. Attorney General for Canada, the Star Chrome case, Duff J., described the Indian interest in reserve lands in Quebec in the same terms as they had been described in the St. Catherine's case.²²⁷ Since the interest is less than ownership, then no true trust could be created by a surrender. Duff concludes there is no trust:

It results from these considerations, in their Lordships opinion, that the effect of the Act of 1850 is not to create an equitable estate in lands set apart for an Indian tribe.²²⁸

It would appear then, that the Giroux case is either wrongly decided, or that the Act of 1850 altered the nature of the Indian interest in their lands. For the same reasons, the Payant case is further weakened.²²⁹ It would appear that there is no trust in relation to surrendered Indian lands in Quebec.

In the second example, the 1935 case of Dreaver v. The King,²³⁰ the Exchequer Court seems to have assumed that a trust is created when a Band surrenders reserve lands to the Crown. The case concerned the misuse of Band funds realized from the sale of surrendered lands by the Department of Indian Affairs. No discussion justifying the finding of a trust relationship appears in the

report. The Exchequer Court ordered the Crown to restore the money basing its remedy on breach of trust. This case seems to represent the only case where a Band has succeeded on the basis of a true trust. The decision, however, is a weak one since the lawyers for the Crown, and the Court, do not seem to have put their mind to argument that the relationship might not be one of trust.²³¹

In the history of the Supreme Court of Canada since it became the court of last resort for Canada, the opinion Madame Justice Wilson in Guerin is unique in laying out a principled argument supporting a finding a true trust relationship between the government and the First Nations. For Wilson J., the statutory scheme governing reserve lands resulted in the creation of a trust once reserve land had been conditionally surrendered to the Crown.²³² The surrender is essential to the trust. Without that, no true trust exists. Lowry, writing in 1973, had reached the same conclusion. He notes:

[I]t can only be assumed that it is in fact the surrender, when read with the appropriate provisions of the Indian Act, which affect the agreement with a trust. One may therefore reach the conclusion that it is the Indian Act which creates the trust and not the surrender per se and it is also apparent that a claim may be made on the basis of a contract relying only on the surrender.²³³

Dickson, of course, writing for the majority, disagreed with this proposition. For Dickson, it will be remembered, the nature of the Indian interest in their lands prevents the creation of a true trust. The relationship, though, is fiduciary and very similar to the true trust. Given the disagreement at the Supreme Court, the point remains undecided.

These three cases, all of which have some doubt attached to them, do indicate

a useful point in relation to the trust obligation. That is, that if there is a true trust relationship between the Indian Nations and the Crown, and that point is not authoritatively decided yet, the origin of that trust is in part the Indian Act. The significance of this is that if such is the case, then, s. 35 aside, that trust remains subject to the will of Parliament. If the trust were to be held to have been created by the pre-contact relationship of the Indians to their lands or by the constitutional arrangements then the trust would be a much powerful force. As Lowry comments:

The importance of what the Federal Government has done with regard to the passing of the past and present Indian Act, and what it can do with regard to Indian Acts, is directed related to whether the jurisdiction it has been constitutionally granted created the trust relationship or the Indian legislation created the trust. There is little doubt that the ... native trust cases point to the conclusion that the Indian Act is a trust instrument and that should the federal government desire to end its trust relationship, it could do so without any constitutional bar.²³⁴

Of course the passing of s. 35 of the Constitution Act, 1982 has in all probability changed the ease with which the trust could be abrogated. It would not appear to have put it beyond the reach of Parliament however.

In the law of the United States, it will be remembered, control of the trust remains with Congress. If the trust in Canada is in fact created by, or dependent on, the Indian Act, it too may remain subject to the will of Parliament. If that is the case, Guerin may have little import in relation to the interpretation of the new Constitution. In R. v. Sikyea, Johnson J.A. noted in relation to treaty promises:

It is always to be kept in mind that the Indians surrendered their rights in the territory in exchange for these promises. This "promise and agreement" like any other, can, of course, be breached, and there is no law of which I am aware that would prevent Parliament, by legislation, properly within s. 91 of the B.N.A. Act ... from so doing.²³⁵

The same thing might be said of a trust obligation dependent upon the Indian Act.

One last point might be made here. Whatever the final outcome regarding the existence or otherwise of a true trust following the surrender of reserve lands, the majority of opinions considered support the point being pressed here. By and large they all find the background obligation of the government to protect the Indians relevant to the determination of the enforceable duty. This strongly supports that it is the background duty which is the sine qua non of the Indian/Crown relationship.

d Summary

We see three different obligations owed to the First Nations. The general wardship, which is not enforceable except through the political process and which underlies the dealings between the First Nations and the government. The wardship which is entrenched into the Indian Act and is enforceable through the remedies and powers enunciated in that Act. Finally, in s. 18(1) and perhaps in s 61(1) of the Act, the similar provision governing Indian moneys, there is a trust-like relationship enforced at least as a fiduciary obligation and perhaps as a true trust. The protection offered by s. 35 of the Constitution Act, 1982, in all probability, affects all of these. But, it is suggested, it is the general wardship which is affected most.

The general wardship is, I suggest, a pre-requisite to the enforceable duties. Its unenforceability should not blind one to power and importance. Nor should its selective and all too often devastating implementation be allowed to detract from

its true significance. Without it, there would be no s. 18(1) and no s. 61(1), indeed, no aboriginal rights. In fact, the wardship informs the whole field of Indian law and is what makes the field distinctive. Of the duty in the United States, Wilkinson has said:

[T]he trust relationship has played a pervasive role in serving as the philosophical basis for a number of important doctrinal advances.²³⁶

I would argue at least for a similar importance in Canada.

The wardship is at the root of the constitutional arrangements and at the heart of the Indian Act. Placing Indians and the lands reserved for Indians under the federal jurisdiction in s. 91(24) of the Constitution Act, 1982 has given the federal government power over the Indians, but with that power came a duty. It is suggested that that duty informs s. 35 of the new Constitution. The trust obligation in Canada, unlike that in the United States, is, I suggest below, enforceable. And it is further suggested that Dickson's opinion in Guerin offers a principled basis for its enforceability.

NOTES

1. Royal Proclamation of 1763, R.S.C. 1985, Appendix II, No. 1.
2. See: B. Schwartz First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft (Montreal: The Institute for Research on Public Policy, 1986); N.K. Zlotkin Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference (Kingston: Institute of Intergovernmental Relations, Queen's University, 1983).
3. Most notably in Delgamuukw et al. v. Attorney General of British Columbia, presently at the British Columbia Supreme Court, statement of claim filed October 23, 1984. See L. Mandell "Gitksan-Wet'suwet'en Land Title Action" [1988] 1 C.N.L.R. 14; "The Address of the Gitksan and Wet'suwet'en Hereditary Chiefs to Chief Justice McEachern of the Supreme Court of British Columbia" [1988] 1 C.N.L.R. 17. For related cases see, for example, Delgamuukw et al. v. R. [1988] 1 C.N.L.R. 188 (B.C.S.C.); Delgamuukw et al. v. B.C. [1988] 1 C.N.L.R. 173 (B.C.C.A.).
4. Quebec, "Rapport de la Commission d'étude sur l'intégrité du territoire du Québec: Le domaine Indien" (Québec, 1971)(Chair: H. Dorion) vol. 4.1 at 259/260.
5. J.R. Ponting "Introduction to Part Three, "Aboriginal Rights and Claims"" in J.R. Ponting, ed. Arduous Journey: canadian indians and decolonisation (Toronto: McClelland & Stewart Ltd., 1986) 228.
6. Fred Plain "A Treatise on the Rights of the Aboriginal Peoples of the Continent of North America" in M. Boldt & J.A. Long The Quest for Justice: Aboriginal Peoples and Aboriginal Rights (Toronto: University of Toronto Press, 1985) 31, 32. See also the various statements of the First Nations: e.g., National Indian Brotherhood "A Declaration of First Nations" (1981). See also some of the proposals put forward at the First Ministers Conferences on Aboriginal Constitutional Rights: e.g., Joint Proposal for Self-Government put forward at the March 26/27 1987 Conference, and "Documents from the 1987 First Ministers Conference on Aboriginal Matters" [1987] 3 C.N.L.R. 1.

7. Report of the Special Parliamentary Committee on Indian Self-Government: Indian Self-Government in Canada (Ottawa: Queen's Printer, 1983) (Chair: K. Penner), 43-45. Especially at 43: "If, as many assert, the right to self-government exists as an aboriginal right, there could be a substantial re-ordering of powers. Indian governments may have implicit legislative powers that are now unrecognized." The abridgement in J.R. Ponting ed., Arduous Journey: Canadian Indians and Decolonization (Toronto: McClelland & Stewart Ltd., 1986), 327, states unequivocally, at p. 329: "Actually, it is quite possible that Indian governments may already have the right to self-government,"
8. St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 A.C. 46, 4 Cart. B.N.A. 107, 2 C.N.L.C. 541 (J.C.P.C.). All cites are to A.C.
9. See, R. v. Chevrier, [1989] 1 C.N.L.R. 128 (Ont. Dist. Ct.).
10. supra note 1.
11. supra note 8, 54.
12. ibid., 60.
13. ibid., 55.
14. ibid., 58.
15. See the opinion of Strong J., St. Catharines Milling and Lumber Co. v. The Queen (1887), 13 S.C.R. 577, 602, 4 Cart B.N.A. 127, 2 C.N.L.C. 441. All references are to S.C.R. See also the opinion of Gwynne J., ibid., 650ff.
16. J. Hurley "The Crown's Fiduciary Duty and Indian Title: Guerin v. The Queen" (1985) 30 McGill L. J. 559
17. B. Slattery The Land Rights of Indigenous Canadian Peoples Ph.D. thesis, Oxford, 1979, (Saskatoon: Native Law Centre, University of Saskatchewan, 1979); G.S. Lester The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument (J.S.D. thesis, York University, 1981).
18. Attorney General of Quebec v. Attorney General of Canada; Re Indian Lands, [1921] 1 A.C. 401, 4 C.N.L.C. 238 (J.C.P.C.). All cites are to A.C.
19. ibid., 408.
20. Smith v. The Queen, [1983] 1 S.C.R. 554, 147 D.L.R. (3d) 237, 249/250, [1983] 3 C.N.L.R. 161 (S.C.C.). All cites are to D.L.R.

21. Calder v. Attorney General of British Columbia, [1973] S.C.R. 313, 34 D.L.R. (3d) 145 (S.C.C.). All cites are to D.L.R.
22. Johnson & Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat) 543, 5 L.Ed. 681 (1823)
23. Campbell v. Hall (1774), 1 Cowp. 204, 98 E.R. 1045 (K.B.).
24. ibid., Cowp. 208-9. These rules are as follows: 1 A conquered Nation becomes a dominion of the King and subject to Parliament of Great Britain; 2 The inhabitants become British subjects; 3 Any articles of capitulation, surrender, or cession, are inviolable according to their true intent; 4 British subjects resident in the conquered nation are to be governed by the laws of that nation; 5 The laws of the conquered nation continue in force until altered by the conqueror; 6 The Sovereign has a limited power, subordinate to Parliament, to alter the laws of the conquered nation but cannot do so in a way which offends fundamental principles. Cited by Hall at 198/199.
25. supra note 21, 199.
26. Re Southern Rhodesia, [1919] A.C. 211(J.C.P.C.).
27. ibid., 234. Cited by Hall J., in Calder, supra note 21, 198.
28. supra note 21, 190.
29. ibid., 156.
30. The literature and caselaw on this topic is massive. See for example, P.A. Cumming and N.H. Mickenberg, Native Rights in Canada, 2nd ed. (Toronto: General Publishing Co., 1972), c. 20, 207ff; K. McNeill Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada (Saskatoon: Native Law Centre, University of Saskatchewan, 1983). For the case law, see the discussion of the Sparrow v. The Queen, [1987] 1 C.N.L.R. 145 (B.C.C.A.), infra c. 5, part a.iii.a, and see any copy of the Canadian Native Law Reporter.
31. supra note 21, 195, citing from Worcester v. Georgia, 31 U.S. (6 Pet.) 535, (542 Pet.), 8 L.Ed. 483 (1832).
32. Hamlet of Baker Lake v. Minister of Indian Affairs, [1980] 1 F.C. 518, 107 D.L.R. (3d) 513, [1979] C.N.L.R. 17 (F.C.T.D.). All cites are to D.L.R.
33. ibid., 542. It should be noted that scheme has its flaws. For example, it would appear to deny the possibility of any right where a tract of land was used by more than one aboriginal group. Nevertheless, the case is important.

34. Jack et al. v. The Queen, [1980] 1 S.C.R. 294, 100 D.L.R. (3d) 193, [1979] 5 W.W.R. 364, [1979] C.N.L.R. 25. All cites are to C.N.L.R. Dickson J.'s opinion in this case is the basis for the decision in Sparrow with which I deal in greater detail infra c. 5, part a.iii.a.
35. Terms of Union, art. 13, being the schedule to the Order in Council admitting British Columbia into the Union, R.S.C. 1985, Appendix II, No. 10.
36. supra note 34, 40.
37. Nowegijick v. The Queen, [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193, [1983] 2 C.N.L.R. 89. All cites are to C.N.L.R.
38. Indian Act, R.S.C. 1985, c. I-5.
39. supra note 34, 94.
40. ibid. 95.
41. Calder, supra note 21, 156.
42. Logan v. Styres (1959), 20 D.L.R. (2d) 416 (Ont. H.J.).
43. In a recent decision the Supreme Court of Canada appears to favour this standard for the extinguishment of aboriginal title. It makes no comment on how this might be interpreted. Canadian Pacific Ltd. v. Paul, [1988] 2 S.C.R. 654, [1989] 1 C.N.L.R. 47, 61 (S.C.C.).
44. supra note 21, 208.
45. ibid., 167.
46. supra note 32.
47. ibid., 551.
48. Canadian Pacific Ltd. v. Paul, [1988] 2 S.C.R. 654, [1989] 1 C.N.L.R. 47 (S.C.C.). All cites are to C.N.L.R.
49. ibid., 61. Having mooted the point the Court declared that they did not have decide the issue in that instance.
50. Department of Indian Affairs and Northern Development Comprehensive Land Claims Policy (Ottawa: Minister of Supply and Services Canada, 1987), 9.

51. The Musqueam Band sought an injunction preventing the creation of this park from adversely affecting their claim to the foreshore lands. See, T. Glavin, "Musqueam Band raps University Endowment Lands transfer" Vancouver Sun, (December 13, 1988) A-3.
52. See for example, D. Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983) 61 C.B.R. 315; K. McNeill, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4 Sup. Ct. L. Rev. 255; N.K. Zlotkin Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference (Kingston: Institute of Intergovernmental Relations, Queen's University, 1983). And see K. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada" in W.S. Tarnopolsky & G.A. Beaudoin, ed. The Canadian Charter of Rights and Freedoms: A Commentary (Toronto: Carswell, 1982), 467ff.
53. Sparrow v. The Queen (1986), 9 B.C.L.R. (2D) 300, [1987] 1 C.N.L.R. 145 (B.C.C.A.). I deal with this case in more detail infra c. 5, part a.iii.a.
54. For a discussion of this case, see, K. McNeill, "The Constitution Act, 1982, Sections 25 and 35" [1988] 1 C.N.L.R. 1, 11ff.
55. This scheme originates in Dickson's opinion in the Jack decision, supra note 34.
56. D.R. Lowry "Native Trusts: The Position of the Government of Canada as Trustee for Indians, A Preliminary Analysis" Unpublished, December 1983, p.2.
57. See: D.R. Lowry ibid.; D. Sanders "The Friendly Care and Directing Hand of the Government: A Study of Government Trusteeship in Canada" Unpublished February 1977. Copy in Native Law Centre Library, University of Saskatchewan; R.H. Bartlett "The Existence of an Express Trust derived from the Indian Act in Respect of Reserve Lands" Unpublished, June 1979; D.M. Brans "The Trusteeship Role of the Government of Canada" Working Paper, Indian Claims Commission, 1971. All these writers conclude that a legally enforceable trust could or should be found to exist.
58. Sanders, ibid., 46.
59. supra c. 2, part c.iv.
60. Manchester Band of Pomo Indians, Inc. v. U.S., 363 F. Supp. 1238 (1973)
61. Cited in P.A. Cumming and N.H. Mickenberg, Native Rights in Canada, 2nd ed. (Toronto: General Publishing Co., 1972), 15.

62. Cited in Journals of the Legislative Assembly of the Province of Canada, Appendix EEE, s.1, (20 March 1844-45)
63. supra note 1.
64. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 8 L.Ed. 483 25 (1823). All cites are to U.S.
65. ibid., 17.
66. R. v. St. Catherines Milling and Lumber Company (1885), 10 O.R. 196, 4 Cart. B.N.A. 214, 2 C.N.L.C. 374, 404, (Ont. Ch.). All cites are to C.N.L.C.
67. D.C. Scott The Administration of Indian Affairs in Canada (Toronto: Canadian Institute of International Affairs, 1931), 1.
68. supra note 21, 203.
69. Instructions from the Colonial Secretary in London, England, to Governor Douglas, July 31, 1858. Cited in Calder v. A.G.B.C., supra note 21, 157, per Judson J., 213, per Hall J. In his reply, Governor Douglas assured the Secretary, "I shall not fail to give the fullest scope to your humane consideration for the improvement of the native Indian tribes, and shall take care that all their civil and agrarian rights be protected." Calder, supra note 21, 214, cited by Hall J.
70. Governor Musgrave to Colonial Office, January 29, 1870. Cited in Calder, supra note 21, 160, per Judson J.
71. An Act to provide for the establishment of "The Department of the Interior", S.C. 1873, c. 4, s. 3.
72. Canada "Annual Report of the Department of the Interior" No. 9, in Sessional Papers (1876), xii. The Report was critical of the policy preferring to promote a policy of lifting the Indian out of his state of tutelage and dependence. (p. xii/xiii)
73. U.K., H.C., "Report of the Select Committee on Aboriginal Tribes" (1837), 2nd para. And see: A.H. Snow The Question of Aborigines in the Law and Practice of Nations Reprint of Washington, Government Printing Office, 1919, ed., (Northbrook, Ill: Metro Books, 1972), 10.
74. ibid. Snow, 13.
75. Province of Canada, "Report on the Affairs of the Indians in Canada", in

Journals of the Legislative Assembly of the Province of Canada, June 24th, 1847, App T, 360.

76. Constitution Act, 1867, R.S.C. 1985, Appendix II, No. 5, s. 91(24).
77. Sanders, supra note 57, 6. See also: Treaties and Historical Research Centre, P.R.E. Group, Indian and Northern Affairs The Historical Development of the Indian Act (Ottawa: Department of Indian Affairs and Northern Development, 1978), c. 2. Cited hereinafter as P.R.E.Group.
78. Bown v. West (1846), 1 E. & A. 117, 2 U.C.Jur. 675, 1 C.N.L.C. 30(U.C. Executive Council)
79. Doe D. Sheldon v. Ramsay et al. (1852), 9 U.C.Q.B. 105, 134, 1 C.N.L.C. 439, 468. All cites are to C.N.L.C.
80. supra note 66, 384.
81. ibid., 393/4.
82. ibid., 408.
83. supra note 8, 54.
84. A.G. Canada v. Giroux (1916), 53 S.C.R. 712, 30 D.L.R. 123, 4 C.N.L.C. 147. All cites are to C.N.L.C.
85. C.S.L.C., c. 14, s. 7.
86. supra note 84, 163.
87. ibid., 164. This case was later overruled on the nature of the interest reserved to the federal government and the Indians. The Court made no comment on the guardian/ward terminology. Interestingly, the decisions were written by the same judge: Mr Justice Duff. See Attorney General Quebec v. Attorney General Canada. Re Indian Lands, [1921] 1 A.C. 401, 90 L.J.P.C. 33, 56 D.L.R. 373, 2 C.N.L.C. 238. All cites are to C.N.L.C.
88. Mowat & Cosgrain v. Pinsonneault (1897), 6 Que. Q.B. 12.
89. Boucher v. Montour (1901). 20 Que S.C. 291, 4 Que. P.R. 175, 3 C.N.L.C. 29, 30. All cites are to C.N.L.C.: "The general effect of the law, demonstrates clearly that the legislator wished to treat the Indians as infants for whom the Commissioner was to be the guardian. ... The implication is that ... the law was passed in favour of the Indians to protect them from their inexperience and improvidence." (My translation)

90. Brossard v. D'Aillebout (1914), 15 Que. P.R. 412, 4 C.N.L.C. 39, 40 (Que. C.S.) All cites are to C.N.L.C.: "[I]l n'en demeure pas moins un sauvage soumis à la tutelle qui est imposée et est sous les dispositions de la loi des sauvages."
91. Re Caledonia Milling Co. v. Johns (1918), 42 O.L.R. 338, 14 O.W.N. 1, 4 C.N.L.C. 42, 43 (Ont. H.C.). All cites are to C.N.L.C.
92. Armstrong Growers Association v. Harris (1924), 33 B.C.L.R. 285, [1924] 1 D.L.R. 1043, [1924] W.W.R. 729, 4 C.N.L.C. 1,4 (B.C.C.A.). All cites are to C.N.L.C.
93. Rex v. Easterbrook, [1929] Ex. C.R. 28, 4 C.N.L.C. 300, 301 affd. sub. nom Easterbrook v. The King, [1931] S.C.R. 210, 4 C.N.L.C. 304. All cites are to C.N.L.C.
94. Ex Parte Tenasse, [1931] 1 D.L.R. 806, 2 M.P.R. 523, 4 C.N.L.R. 476, 478 (N.B.S.C.A.D.). All cites are to C.N.L.C.
95. R. v. Morley (1931), 46 B.C.R. 28, [1932] D.L.R. 483, 58 C.C.C. 166, [1932] W.W.R. 193, 5 C.N.L.C. 446, 453 (B.C.C.A.). All cites are to C.N.L.C.
96. The King v. Weremy, [1943] Ex C.R. 44, [1943] 1 D.L.R. 9, 5 C.N.L.C. 534, 539. All cites are to C.N.L.C.
97. Re Kane, [1940] 1 D.L.R. 390, 5 C.N.L.C. 230 (N.S.Co. Ct.). All cites are to C.N.L.C.
98. ibid., 237.
99. Chisholm v. The King, [1948] Ex.C.R. 370, [1948] D.L.R. 797, 5 C.N.L.C. 39, 40. All cites are to C.N.L.C.
100. St. Ann's Island Shooting and Fishing Club Ltd. v. The King, [1950] S.C.R. 211, [1950] 2 D.L.R. 225, 5 C.N.L.C. 608, 616. All cites are to C.N.L.C.
101. supra notes 69, 70, and the accompanying text.
102. supra c.1, part a.
103. First passed as The Indian Act, S.C. 1876, c. 18. Currently, Indian Act, R.S.C. 1985, c. I-5. The Act has been frequently amended. Major amendments were enacted in 1951: Indian Act, S.C. 1951, c. 29. See: S.H. Venne Indian Acts and Amendments 1868 - 1975: An Indexed Collection (Saskatoon: Native Law Centre, University of Saskatchewan, 1988), R.H. Bartlett The Indian Act in

- Canada 2nd ed. (Saskatoon: Native Law Centre, University of Saskatchewan, 1988)
104. See, for example, S.M. Weaver Making Canadian Indian Policy: The Hidden Agenda (Toronto: University of Toronto Press, 1981)
 105. supra note 62, and the accompanying text. The discussion here is based largely on P.R.E. Group, supra note 77.
 106. P.R.E. Group, supra note 77, 12.
 107. The Management of Indian Lands and Property Act, S.C. 1860, c. 151.
 108. See: An Act for the protection of the Lands of the Crown in this Province from trespass and injury, C.S.U.C., c. 15, (1839). This statute covered lands which were not covered by a treaty of cession. See s. 1.
 109. An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied and enjoyed by them from trespass or injury, S.C. 1850, c. 74, Preamble.
 110. ibid., ss. 3,4,5,6,7,. Section 5 speaks of the Superintendent etc, "who may, for the time being, be charged with the subordinate superintendence of the said Indians".
 111. An Act for the better protection of the Lands and Property of the Indians in Lower Canada S.C. 1850, c. 42, Preamble.
 112. ibid., s. 1.
 113. ibid., s. 3. This is the provision which led Mr Justice Duff to characterize the governor as parens patriæ. See supra note 87, and the accompanying text.
 114. An Act to authorize the setting apart of Lands for the Use of certain Indian Tribes in Lower Canada, S.C. 1851, c. 106, s. I.
 115. An Act for the Gradual Civilization of the Indian Tribes in the Canadas, S.C. 1857, c. 6.
 116. ibid., ss. III, IV, VII.
 117. That the policy at that time was assimilationist, or perhaps even one of termination, does not defeat the argument. It is clear that at that time many of the Indian peoples favoured such a policy. Consequently, such policies could be considered a proper exercise of the wardship. Following the promotion of the same policy in 1969, it might be noted, assimilation was

- decisively rejected by both the First Nations and eventually by the government of the day.
118. An Act respecting Management of Indian Lands and Property, S.C. 1860, c. 151. Section 3, a provision respecting Indian moneys similar in effect to s. 2, continued the pre-existing provisions. Section 8 grants the government a broad discretion regarding the purposes to which Indian moneys could be applied.
 119. ibid., s. 4.
 120. See, for example, on the struggles of the Mississauga Indians of what is now Southern Ontario to obtain title to their reserve lands: D.B. Smith Sacred Feathers: The Reverend Peter Jones (Kahkewaquonaby) and the Mississauga Indians (Toronto: University of Toronto Press, 1987). Many reserves were actually surrendered before legislation cleared up the issue of the nature of the Indian interest in the reserves.
 121. supra note 109, s. 1.
 122. Bartlett, supra note 57, 2.
 123. supra note 111, s.5. In 1985, an amendment to the Indian Act allowed Band to assume control of their membership. Bill C-31, passed as S.C. 1985, c. 27. For an example of the litigation provoked by the changes, see: Omeasoo v. Canada, [1989] 1 C.N.L.R. 110 (F.C.T.D.).
 124. Little et al. v. Keating (1842), 6 U.C.Q.B. (O.S.) 265, 1 C.N.L.C. 285.
 125. R. v. Strong (1850), 1 Gr. 392, 1 C.N.L.C. 419 (U.C. Ch.). All cites are to C.N.L.C.
 126. ibid., 428/9.
 127. ibid., 433.
 128. ibid., 436.
 129. R. v. Johnson (1850), 1 Gr. 409, 1 C.N.L.C. 396, 398 (U.C.Ch.). All cites are to C.N.L.C.
 130. R. v. Baby (1854), 12 U.C.Q.B. 346, 1 C.N.L.C. 350, 363. All cites are to C.N.L.C.
 131. R. v. Hagar (1857), 7 U.C.C.P. 380, 4 U.C.L.J. 208, 1 C.N.L.C. 393. The court recognized the protective role of the statute.

132. Commissioner of Indian Lands v. Jannel (1865), 18 R.J.R.Q. 187, 1 L.C.L.J. 111, 1 C.N.L.C. 65 (L.C.S.C.).
133. Commissioner of Indian Lands v. Payant (1856), 8 R.J.R.Q. 29, 3 L.C.Jur. 313, 1 C.N.L.C. 66 (L.C.S.C.). All cites are to C.N.L.C.
134. ibid., 69.
135. Vanvleck v. Stewart (1860), 19 U.C.Q.B. 489, 1 C.N.L.C. 476, 477. All cites are to C.N.L.C.
136. Bastien v. Hoffman (1867), 17 L.C.R. 238, 16 R.J.R.Q. 264, 1 C.N.L.C. 5, 11 (L.C.Q.B.). All cites are to C.N.L.C.
137. supra note 75.
138. supra, c. 3, part c.i.
139. Rupert's Land and Northwest Territory Order, R.S.C. 1985, Appendix II, No. 9, Schedule B, Joint Resolution of the Parliament, May 29 1869, May 30 1869.
140. British Columbia terms of Union, R.S.C. 1985, Appendix II, No. 10, Schedule, para. 13.
141. Constitution Act, 1930, R.S.C. 1985, Appendix II, No. 26, Schedules, (1) Manitoba, para. 11,12,13, (2) Alberta, para. 10,11,12, (3) Saskatchewan, para. 10,11,12.
142. A. Morris The Treaties of Canada with Indians Toronto, 1880 ed., (Toronto: Coles Publishing Co., 1979), 28.
143. ibid., 95.
144. An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands, S.C. 1868, c. 42. See s. 5: The Secretary of State shall be the Superintendent General of Indian affairs, and shall have control and management of the lands and property of the Indians in Canada. Ss. 6 and 7 contain the same wording as ss. 2 and 3 of the 1860 Act.
145. An Act to provide for the establishment of "The Department of the Interior", S.C. 1873, c. 4. See s. 3: the Minister of the Interior shall be the Superintendent General of Indian Affairs, and shall, as such, have the control and management of the lands and property of the Indians in Canada. S. 8 continued the Indian provisions of S.C. 1868, c. 42, substituting the Minister of the Interior for the Secretary of State.

146. supra note 144. The powers transferred included power over land surrenders, trespass, controls on timber cutting, liquor controls and the definition section from earlier legislation.
147. An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, c. 6. This repealed C.S.C., c. 9.
148. ibid., ss. 9, 10.
149. ibid., s. 12.
150. ibid., s. 13.
151. P.R.E. Group, supra note 77, 53.
152. Canada, Parliament, Annual Report for 1870 of the Indian Branch of the Department of the Secretary of State", No. 23, Sessional Papers, (1871) (at 4 of the paper).
153. Paraphrasing P.R.E. Group, supra note 77, 2.
154. An Act to amend certain Laws respecting Indians, and to extend certain Laws relating to matters connected with Indians to the Provinces of Manitoba and British Columbia, S.C. 1974, c. 21, ss. 3-7.
155. ibid., s. 9.
156. The Indian Act, S.C. 1876, c. 18.
157. ibid., ss. 10, 94.
158. ibid., s. 3(6).
159. ibid., s. 3(7). Special reserves are those such as the Oka reserve in Québec the title to which was in the church. See: Corinthe et al. v. Seminary of St. Sulpice, [1912] A.C. 872, 5 D.L.R. 263, 4 C.N.L.C. 83 (J.C.P.C.). Another example is the reserve near Portage La Prairie purchased by the Dakota in 1893 the title to which was placed in three non-Indians. By 1957 the reserve was abandoned due to the effects of erosion and lost without surrender, in 1963, through a special bill passed in the legislature of Manitoba. See D. Elias The Dakota of the Northwest: Lessons for Survival (Winnipeg: University of Manitoba Press, 1988), 189-198.
160. The Indian Act, S.C. 1951, c. 29, s. 2(1)(o). Consolidated, largely unchanged as Indian Act, R.S.C. 1952, c 149.

161. Sanders, supra note 57, 15/16. Bartlett comments that this could give only "tenuous" support for the existence of a trust, particularly when one notes the change from the phrase "use or benefit" in the 1876 Act, to "use and benefit" in 1951; supra note 57, 11/12.
162. supra note 160, s. 36.
163. supra note 156, s. 22.
164. Bartlett, supra note 57, 14.
165. See at supra note 57, 46: "[I]t seems relatively clear that we can describe the federal governments (sic) responsibility to manage surrendered lands and band funds, as a trust obligation enforceable by the courts".
166. ibid., 16.
167. supra note 156.
168. supra note 160.
169. An Act to amend the Act thirty-sixth Victoria, chapter four, intituled "An Act to provide for the establishment of the Department of the Interior", and to amend "The Indian Act, 1880", S.C. 1883, c. 6, s.3.
170. supra note 160, s. 3(1).
171. See, S.C. 1966-67, c. 25, s. 40, substituting the Minister of Indian Affairs and Northern Development. The provision today is Indian Act, R.S.C. 1985, c. I-5, s. 3(1).
172. supra note 156, s. 2.
173. ibid., ss. 5,6
174. ibid., s.9.
175. ibid., ss. 12-19.
176. ibid., ss. 17-20, 45.
177. ibid., s. 20.
178. ibid., ss. 23-24.
179. ibid., ss. 25-28.

180. ibid., s. 62.
181. ibid., s. 69.
182. ibid., s. 95.
183. ibid., s. 29.
184. ibid., s. 88.
185. ibid., s. 97.
186. supra note 38, s. 17.
187. supra note , s. 71.
188. ibid., ss. 114-122.
189. supra note 160.
190. supra note 38, s. 18(1).
191. ibid., s. 82. This provision is strongly supportive of the argument advanced here. In allowing and encouraging band control of the reserve, the Crown clearly promotes the concept of First Nations self-administration. However, it recognized the necessity of a transition period during which it could oversee the development of responsible European local government. In the legislation, that role is served, in the least intrusive way, by s. 82. I am not suggesting that the implementation of s. 82 powers has not been intrusive.
192. supra note 56, 33-40, 49.
193. supra note 57, 16.
194. supra note 133.
195. Wike's case (1609), Lane 54, 145 E.R. 294 (Ex. Ct.).
196. Lowry, supra note 56, discusses a number of cases where the Crown came into the property of a subject inadvertently and the courts, usually without describing the Crown as a trustee, found an obligation on the Crown to return the property. The Crown did not come into the property of the Indians through inadvertence. Furthermore, since the caselaw discussed below suggests that the Crown will not be made a trustee by implication, it is suggested that these cases shed little light on the problem of trusteeship in relation to the Crown. Consequently I do not discuss them. In addition, the point has been rendered academic by the decision in Guerin.

197. Walsh v. The Secretary of State for India in Council (1863), 11 E.R. 1068 (H.L.). By the Act for the Better Government of India (1858), 21 & 22 Vic. c. 106, property in the hands of the East India Company was transferred to the government of India and the subject was given the right to sue for property etc., naming the "Secretary of State for India in Council as a body corporate" as defendant. See ss. 1,65. In Walsh, the heirs of the settlor of trust fund sued successfully for the reversion of the residue of a trust fund established with the East India Company as trustee and of which the class of beneficiaries had become empty. The House of Lords ordered the reversion. The trust had been administered under the Secretary of State for India in Council for a number of years.
198. Civilian War Claimants v. The King, [1932] A.C. 14, 27 (H.L.).
199. Rustomjee v. The Queen, [1876-77] 2 Q.B.D. 69, 74 (C.A.).
200. Kinloch v. The Secretary of State for India in Council (1882), 7 A.C. 619 (H.L.)
201. ibid., 626.
202. Central Canadian Railway v. The Queen (1873) 20 Gr. 273, 290 (Ont. Ch.).
203. Federal Court Act, R.S.C. 1985, c. F-7, s. 18.
204. McQueen v. The Queen (1886), 16 S.C.R. 1, 58, (Ex. Ct.), affirmed without comment on the point at the S.C.C. The Exchequer Court decision in McQueen v. The Queen begins at 16 S.C.R. 24. The decision of the Supreme Court of Canada begins at 16 S.C.R. 59.
205. Chipman v. The King, [1934] Ex. C.R. 152, 159.
206. Gardner et al. v. The Queen in Right of Ontario (1984), 45 O.R. (2d) 760, [1984] 3 C.N.L.R. 72 (H.C.J.). All cites are to C.N.L.R.
207. ibid., 82.
208. supra note 76.
209. Attorney General for Canada v. Attorney General for Ontario, [1897] A.C. 199, C.R. (11) A.C. 308, 3 C.N.L.C. 483, 497 (P.C.). All cites are to C.N.L.C.
210. Dominion of Canada v. Province of Ontario, [1910] A.C. 637, 3 C.N.L.C. 353 (J.C.P.C.). The treaty in this case was the post-Confederation Treaty 3.
211. ibid., 363.

212. ibid., 362.
213. ibid., 363.
214. ibid., 363.
215. Henry et al. v. The King (1905), 9 Ex. C.R. 417, 3 C.N.L.C. 89. All cites are to C.N.L.C.
216. ibid., 110.
217. ibid., 112,115.
218. ibid., 118/119.
219. supra note 56, 19.
220. ibid., 20.
221. supra note 215, 113.
222. Miller v. The King, [1950] S.C.R. 169, [1950] D.L.R. 513, 5 C.N.L.C. 298.
223. Chisholm v. The King, [1948] Ex.C.R. 370, [1948] D.L.R. 797, 5 C.N.L.C. 39. All cites are to C.N.L.C.
224. ibid., 41.
225. supra note 84, 163/4.
226. ibid., 164.
227. supra note 87, 242-244..
228. ibid., 244/5.
229. supra note 133 and the accompanying text.
230. Dreaver et al. v. The King (1935), 5 C.N.L.C. 92 (Ex. Ct.).
231. ibid., 95-97.
232. Guerin et al. v. The Queen, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, 55 N.R. 161, [1984] 6 W.W.R. 481, 522, 59 B.C.L.R. 301, [1985] 1 C.N.L.R. 120 (S.C.C.) All references are to W.W.R. See supra c. 1, part a.ii.

- 233. supra note 56, 29. By analogy, he notes, s. 18(1) of the Indian Act might place the treaties in the same position as a surrender.
- 234. ibid., 28.
- 235. R. v. Sikyea (1964), 46 W.W.R. 65, 69 (N.W.T.C.A.).
- 236. C.F. Wilkinson American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy (New Haven and London: Yale University Press, 1987), 85.

CHAPTER 4

A SEARCH FOR COHERENCE

Unlike the Indian law of the United States, Canadian Native law has not yet achieved the status of a coherent body of law. It was possible in 1953 for Felix Cohen to describe Indian law in the United States as a unity. In Canada more than thirty years later, the courts still tend to approach Native law in an ad hoc fashion. Only a few judges have recognized the value that a consistent Native law would have for Canadian society. Chief Justice Dickson, I would suggest, is one of those few. He has written decisions which have given principle to treaty interpretation,¹ hunting and fishing rights² and, in Guerin, has laid down a standard for the judicial review of administrative action in relation to Indian matters.

By viewing the trust obligation as giving rise to an enforceable duty on the part of the Crown to the Indian Nations, he has drafted a theory which can only increase the justice which they can expect from the Canadian government. He has at least introduced the United States' fiduciary theory of statutory interpretation in relation to the administration of Indian matters into Canada. I explore in this chapter how it might be possible to broaden the theory in Guerin in order that it might fit as a basis for a theory of constitutional review.

The trust obligation, while it is central to Indian/government relations in Canada, has not received much attention in the literature and, consequently, has

remained a vague and uncertain doctrine. Each side has a vastly different view of what the obligation is and what it is meant to achieve. Three groups of First Nations described it in these terms during the patriation of the Constitution:

The elders understood that they were entering into a sacred relationship of trust with another sovereign which would endure the passage of time and governments.³

At the same time, the federal government was in the courts arguing in the Guerin case that the trust obligation was not a legal duty, but was only a political one which it was up to the government to decide if and when to implement.

It is unfortunate that the obligation has remained obscure. Its obscurity contributes to the feelings of injustice which arise when the Indian nations see the obligation, as they define it, breached. The courts, as we have seen have recognized it, but rarely enforced it. When tempted to employ the trust obligation, the courts have either found another right on which to base their remedy, or they have lost their nerve and offered no remedy. This is perhaps precisely because there has been so little literature on the obligation. Being uncertain as to its basis and its purpose, the courts have left its enforcement to the legislatures. Perhaps rightly so, but in the long run, justice has suffered.

The origin of the trust obligation is not directly the law of trusts. Its origin is, rather, the wardship which results from the denial of sovereignty implicit in the doctrine of Discovery, and explicit in the legislation and governmental practice which followed. It is the wardship which finds expression in the Constitution and in legislation such as the Indian Act. There are trust-like aspects in the codification

of the wardship, but that is, I suggest, incidental. The protection of lands and money and the remainder of the extensive legislative scheme of the Indian Act, I suggest, have a common thread. That common thread is the wardship.

I have suggested three aspects to the trust obligation. I now go on to suggest that each of these aspects has its unique purpose and its unique theoretical basis. The wardship is designed to protect the Indians and to assist them in adjusting to the imposition of the European way of life in North America. The true trust has as its function, the protection of property. It has only limited application in Indian law. The fiduciary obligation, I shall suggest, is intended to protect power, or perhaps, the lack of it. Put another way, it is a duty which accompanies the assumption of power by the British imperial government. Complicating the issue is the fact that there is also a generic sense to the word trust. And in this sense also we see it in the relationship between the Indian Nations and the government.

a A Problem of Terminology

Trust is an aspect of all social relations: personal, political or legal. We must trust that our friends and acquaintances will deal with us more or less decently thus enabling us to order our lives as best we might. When we are unable to reach a mutually agreeable position privately, we must trust that the political system will be able to arrange things so that, even though we are not in complete agreement, we can still live together in some harmony. And we must trust that our legal institutions will sort out the mess that results when all else has failed. Without trust our

communities would collapse into chaos.

Essential as it is to our lives and our communities, trust remains an ill-defined concept. It has many meanings and many uses. This in itself is not a problem. Many words and concepts, though fundamental to our daily existence, remain ill-defined. Democracy, for example, is capable of communicating many different meanings, but, by and large, our democratic institutions prosper. Exact definitions are neither always necessary nor desirable.

Many a successful relationship between persons or groups has been described by those involved in terms of trust. And many of our relationships are defined in terms of trust. Lack of precision only becomes a problem when the relationship sours. Such an event might have many causes, but if and when it does occur, disagreement as to what was the object of the trust often becomes a major source of contention. Each party might perhaps argue that the trust relied upon required certain conduct which was not forthcoming. The method and difficulty of solving the resulting problems varies according to the type of trust involved.

A legal trust is a very different creature from a political trust. Trust in its generic, or ordinary language sense, is different again. Between friends, problems are often easily fixed. In politics they are harder to contain. Friends can talk things out in order to resolve the disagreements caused by misunderstandings. A political trust breached can result in people changing their vote to another person or group. In extreme circumstances it might lead to disorders or even revolution. Legal trusts are, perhaps, the most contentious. In legal matters it will often fall to a third party,

the courts, to correct things.

The term trust is used rather freely in the field of native law. In this field, as elsewhere, it is problematic because all three types occur. The government has shouldered many responsibilities, some of which entail legal obligations and some which carry less onerous responsibilities. Much of the confusion concerning the obligations of the government to the Indians would not exist had those obligations been spelled out in terms other than those of trust.

The fault is not that of the government alone, though probably it must take the largest share of the blame. The courts are at fault also. Many of the decisions rendered have been contradictory regarding whether the trust obligations are legal ones or merely moral ones. While it denies that any trust created has legal force, nevertheless, the government has consistently used the language of trusts in treaties and in legislation. Does all this imply that the relationship is a trust relationship? They certainly have similarities of language and content. The Associate Solicitor of the United States Department Bureau of Indian Affairs has seen a trust in guardian/ward relationship found by Chief Justice Marshall in the Cherokee Nation v. Georgia in 1832,⁴ and Worcester v. Georgia.⁵ He states:

[T]he courts have implied a trust relationship from early treaties and statutes as early as the 1830s. The first Supreme Court decisions to expressly formulate the trust responsibility doctrine were the two Cherokee cases.⁶

Is a trust relationship a trust? And if it isn't does it help to call it a trust relationship? If we would wish to be able to state clearly where the line between legal and non-legal obligations must lie, it is important to define terms very carefully.

Barber, speaking of trust in its generic and political senses, has said, "Today nearly everyone is talking about trust."⁷ But as he goes on to point out, they are using the word in many different ways.⁸ And of course, this leads to confusion. Different types of trust carry different types of obligations or expectations. With the legal trust the problem is similar. Mr. Justice Roxburgh in the English Court of Chancery made the following observation about the legal trust in 1952. He said:

[A]s the principles of equity permeate the complications of modern life, the nature and variety of trusts ever grow, and it is perhaps rash to think of some conception of a trust having certain characteristic attributes, and then to say that a trust which lacks one or more of those characteristic attributes is not a trust in the full sense.⁹

There are, then, even within the legal world, different forms of the trust. One of the strengths of the legal trust is its ability to change and to adapt to new circumstances.

This adaptability is important and worth preserving. On the one hand, clear and complete definitions can help to clarify. On the other, they can be artificial and restricting. Speaking of the legal trust Pettitt has said:

It is commonly said that no one has succeeded in producing a wholly satisfactory definition of a trust, although the general idea is not difficult to grasp.¹⁰

We might then, aim to come close to a complete definition as long as we recognize that we should not restrict the subject by the definition itself.

Trust can be said to range through a spectrum which contains many meanings. I have suggested three of relevance in the field of native law. Informing the

discussion is the ordinary language meaning which, following Barber, I have termed its generic sense. At the other end of the spectrum, it has a legal sense. In its legal sense it is an artificial device which is comparatively easy to describe. In between these two there is the fiduciary obligation described by Dickson J. in Guerin.¹¹ Finally there is a political sense. This refers to the acts or promises of politicians or legislatures confirming that a certain course of action will be followed. It is a promise which cannot be given in such a way as to bind future legislatures but it might, nevertheless, give rise to legal obligations binding for the present upon future governments. In its political sense, trust fills the spectrum between the generic and legal trusts. The trust obligation in Native law contains elements of all these varieties. It is this fact that makes the Native law trust so problematic.

i. Trusts in the Generic Sense

Niklas Luhmann has said of trust:

Trust, in the broadest sense of confidence in one's expectations, is a basic fact of social life. In many situations, of course, man can choose in certain respects whether or not to bestow trust. But a complete absence of trust would prevent him even from getting up in the morning. He would be prey to a vague sense of dread, to paralysing fears. He would not even be capable of formulating definite distrust and making that a basis for precautionary measures, since this would presuppose trust in other directions. Anything and everything would be possible. Such abrupt confrontation with the complexity of the world at its most extreme is beyond human endurance.¹²

Trust in its most general sense is merely the belief that things will continue or develop more or less in the way that one expects.

Barber agrees with this. He has commented:

In its most general sense, trust means the expectations, which all humans in

society internalize, that the natural order - both physical and biological - and the moral social order will persist and be more or less realized.¹³

Barber has also argued that there are two more specific meanings. Of these other meanings he says:

[T]here are two more specific kinds of expectations that are meant when we speak of trust. One is the expectation of technically competent performance and the other is the expectation of fiduciary obligation and responsibility. These two kinds of trust are indispensable for the maintenance of social order and for the construction of relatively orderly social change. As individuals deal with one another, with organizations, and with institutions, and when organizations and institutions deal with one another, they count on both technically competent performance and on direct moral responsibility for their welfare.¹⁴

Of the first of these, Barber gives as an example the expectation that a doctor will perform an operation in an acceptable manner.¹⁵ Of the second he says:

Trust as fiduciary obligation goes beyond technically competent performance to the moral dimension of interaction. Technically competent performance can be monitored insofar as it is based on shared knowledge and expertise. But when some parties to a social relationship or some members of a social system cannot comprehend that expertise, performance can be controlled by trust. A fiduciary obligation is placed on the holder and user of the special knowledge and skill with regard to other members of his social system. Trust of this kind, then, is a social mechanism that makes possible the effective and just use of the power that knowledge and position give and forestalls the abuses of that power. Society usually seeks to instill the moral sense of fiduciary responsibility in those who wield power, whether they be parents, government officials, ... or professionals.¹⁶

Put this way it is easy to see how necessary trust is in our daily lives. And, of course, how important it would have been to the First Nations in the early days of European domination.

It is clear that the First Nations were urged to place great trust in the Crown and its intermediaries. From the Instructions to the Governors, through the Royal

Proclamation, through legislation and statements of government policy, the First Nations have been encouraged to rely upon the good faith of the Crown. It is clear that they recognized that they faced an uncertain future. Faced with the arrival of the European with a new economy driven by new technology, together with the destruction of the traditional and the fur-trade based economies, must have left the leaders with a "vague sense of dread". They must have recognized that the newcomers had within their grasp, the power either to assist or destroy them. Given the constant proclamations of the good intent, is it any wonder that the First Nations did place their faith in the Crown?

Trust was an essential part of their survival. Indeed, it is fundamental to the functioning of the world in which we all live. Democracy itself requires it. Democracy is founded on the delegation to politicians and to the legislature of the power to run the institutions necessary to our society.¹⁷ Without trust, in particular the Barber's second sense, we would not create that power in the people who run society. Barber notes:

[T]he granting of trust makes powerful social control possible. On the other side, the acceptance and fulfilment of this trust forestalls abuses by those to whom power is granted. Although trust is only one instrument or mechanism of social control, it is an omnipresent and important one in all social systems.¹⁸
(emphasis in the original)

How that control is effected depends upon the type of trust and the social context in which it is granted. In the legal trust we see a particular instrument of control: the courts.

ii Trusts in the Legal Sense: The True Trust

The legal trust is probably the easiest to describe but the most difficult to define. In the words of Aristotle, "The law speaks generally."¹⁹ That general rule has many exceptions. It is possible to describe the many different relationships that have been defined as trusts. That, however, would be lengthy and not very helpful. A general definition describing the essential elements is more useful. Pettitt's, based on Underhill's, is, probably, the best:

A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) either for the benefit of persons (who are called the beneficiaries or cestuis que trust) of whom he may himself be one, and any of whom may enforce the obligation, or for a charitable purpose, which may be enforced by the Attorney General, or for some other purpose permitted by law though unenforceable.²⁰ (authorities and emphasis omitted)

The trust is directly focused on the protection of property. It is not, and cannot, be directed at protecting an Indian right to self-government or even justice in relation to education or other social services. The courts, we have seen, when they have mooted the possibility of the existence of the true trust, have done so only in relation to Indian lands and Indian moneys. I have suggested that, because of its technicalities, it is not the most appropriate legal concept for Native law.

A valid trust requires a settlor, a beneficiary or beneficiaries, a trust corpus, words of settlement, certainty of object and certainty of obligation. These technical requirements are important. The implications in a true trust relationship have caused the courts to lay down stringent prerequisites to the finding of a true trust.²¹

The settlor, the person who creates the trust, must have the capacity to deal with the subject matter of the trust.²² An infant for example cannot create a trust for land since an infant cannot hold a legal estate in land. Similarly, the beneficiaries must have the legal capacity to hold the particular interest he has under the terms of the trust.²³ These requirements place significant problems in the way of the true trust. Clearly the Indians and the government have the requisite capacity to hold their respective interests. However, it is no easy task to determine who the settlor is under a Native law trust. In the case of Indian Act reserve lands, the settlor would presumably be the federal government and the creation of the trust would be found in the setting apart. But in the case of a trust arising out of the treaty process, one can only assume that the settlor would have to be the First Nations themselves.

The three certainties are also necessary for a valid trust.²⁴ Pettitt cites the judgment of Lord Langdale in Knight v. Knight²⁵ as first setting out this proposition.²⁶ There must be certainty of intention. That is to say that the intention of the settlor to create a trust must be clear in the instrument creating it. There is no need for the words creating a trust to take any particular form. As Pettitt notes:

It is a case in every case of construction of the words used to ascertain whether they (together with any admissible extrinsic evidence) establish an intention to create a trust.²⁷ (footnotes omitted)

While the words "in trust" or "for the benefit of" are not necessary to create a trust,²⁸ neither does their presence necessarily create a trust.²⁹

This particular point has great relevance in the field of native law. LeDain's

decision in Guerin at the Court of Appeal turns on the lack, in his eyes, of an unequivocal intent to create a trust.³⁰ It is not an unreasonable position. A legal trust is enforceable through the courts. With both political and generic forms of trust, the enforcement must be through much weaker mechanisms. Where the line is drawn between legal and extra-legal trusts is of vital importance to the aboriginal inhabitants of this country. The closing words of ss. 18 and 61 of the Indian Act, the provisions dealing with Indian lands and moneys respectively, suggest that Parliament intended to retain for itself the decision making power in these particular areas. The closing words read:

[T]he Governor in Council may determine whether any purpose for which lands in a reserve (s.61: Indian moneys) are used or are to be used is for the use and benefit of the band.³¹

And it is only in relation to the issues of land and money, that a true trust would appear even to be possible.

The second certainty is that of object. This requires that, where the trust is not a charitable one,³² the beneficiary or class of beneficiaries must be ascertainable.³³ It would appear that the aboriginal people are ascertainable. Certainly, as regards the status Indians, there can be no argument that the class is easily ascertainable, although the problem of protection of future beneficiaries should not be minimized.³⁴ Ascertainment might be more difficult in the case of non-status Indians or the Metis, but this difficulty, it is hoped, should not cause a trust, if there were one, to fail.³⁵

The third certainty is that of subject. Glanville Williams has noted that this

might refer to certainty of subject matter of the trust or to certainty as to the nature of the beneficial interests of the beneficiary.³⁶ Both of these would raise problems for a native trust. Only if the subject of the trust were the full property right in reserve lands could these problems be avoided.

The nature of the Indian interest in land remains uncertain. It was this that caused Dickson to hold in Guerin that no true trust was possible. Halsbury says of the trust res:

Any property or interest in property which a person can, at law or in equity, transfer or assign, or dispose of inter vivos or by testamentary instrument, can be affected by him with a trust by an instrument inter vivos or by a testamentary instrument.³⁷ (authorities omitted)

The surrender document in Guerin appears to suggest that the interest surrendered to be the land. The treaties also seem to surrender a full property interest in land but this has been refuted.³⁸ And we have seen that the Indian interest is not capable of any transfer or assignment. It is an interest which "disappears in the process of release".³⁹ Pettitt has commented:

Where the trust property cannot be clearly identified, the purported trust is altogether void.⁴⁰

The Indian interest as it has been recognized is far from clear. It would, therefore, be difficult for it to form the subject of a trust.

Even if the subject matter of the trust were held, as did Wilson J. in Guerin, to be the whole estate in the land, the nature of the beneficial interest of the Indian people in the trust would remain equally difficult to determine with any certainty. The instrument in Guerin⁴¹ for example provides only that the reserve land was

surrendered to Her Majesty, "in trust to lease ... upon such terms as the Government may deem most conducive to Our Welfare." The band's interest as beneficiary is not easily or clearly identifiable from this description. Only when the subject of the trust is viewed as the money resulting from the subsequent leasing can the trust be considered to have certainty of subject.

Where the trust res is land or money it is possible to get around the vagueness of the Indian interest as Wilson does in Guerin. But there are, potentially, other less proprietary purposes for which the trust might have been established. These are, admittedly, controversial. It has been posited, for example, that the trust purpose is to preserve self-government⁴² and the distinct cultural and, even national identity.⁴³ Certainly the setting aside of reserves is intimately connected with such issues, as is the signing of treaties. And the land right, rooted as it is in the pre-contact relationship of the Indians with the land, is, without question, coloured by them.

Certainly the First Nations see the preservation of national identity as a major purpose of the trust obligation. And I have proposed that the trust obligation suggests a broader scope than merely the protection of land. How could one characterize such an interest so as to make the beneficial interest of the Indians certain? The blocks which could be set in the way of such an interest, and even in defining it, are insurmountable. Wilson's avoidance of the problem of the nature of the Indian interest is logical. It would, however, limit the nature of the Indian interest to only property rights in land or money. This, I would suggest, would not

reflect the Indian view of the trust obligation.

All in all, the technicalities which surround the true trust make it an unwieldy tool for the protection of Indian interests. Its strengths over the fiduciary obligation for the protection of Indian interests in land and money are remedial. Trusts which have been breached through fraud, do not come within limitations statutes. This would be considerable benefit for the First Nations when seeking to protect their lands. It remains uncertain whether, should the court finally adopt the true trust for Indian lands and moneys, the land would be better protected.⁴⁴

One should, perhaps, note a group of trusts, to which Pettitt refers in his definition above,⁴⁵ which are known as "unenforceable trusts."⁴⁶ These are trusts such as those for the erection of monuments, for the saying of masses(if they are not charitable), for the maintenance or benefit of animals, and certain other anomalous cases.⁴⁷ Known also as "trusts of imperfect obligation," they are can only be enforced indirectly by a court obtaining an undertaking from the trustee that he will apply the res to the unenforceable purpose.⁴⁸ The Henry case might seem to suggest that the Native law trust should be brought within this category.⁴⁹ Certainly, the Native law trust obligation has been unenforceable. It has been suggested, however, that it is preferable to view the Native law trust as a wardship. Should the Native law trust be held to fit within the category of unenforceable trusts it would be weakened beyond its present state. And the entrenchment of rights in s. 35 of the Constitution Act, 1982 would make no difference. Fortunately, no court has ever suggested that the Native law trust is within this category.

The obligations of the trustee vis a vis the trust corpus present further reasons for rejecting the true trust as a model for the Native law trust. Pettit states that the trustee must deal with the property for the benefit of the cestuis que trust.⁵⁰ But the relationship between the Indians and the government was not established as it is for the benefit of the Indians alone. It was, as the Privy Council has suggested, for the benefit of all Canada.⁵¹ And it seems clear that the government did not intend to bind its hands in relation to its legislative power over "Indians and the Lands reserved for Indians", even if that were possible. The "trust" was for the purpose of protecting Indian lands, not from the Crown, but from the settlers, the government of the colonies, and, after 1867, the provincial governments. The provisions were designed to pursue national aims, not just Indian ones, and to prevent the alienation of Indian lands outside of the national policy.

It is also the duty of a trustee to avoid self-dealing. It was clearly never within the intentions of the federal government that they should not be able to alienate Indian lands to themselves. Their duties to the Canadian polity as a whole would prevent them from placing such a restriction upon themselves. And indeed, the government has taken Indian lands for its own purposes.⁵²

We have seen how the courts resile from finding an enforceable trust in Indian law even when they have mooted it. We have also passed rather cursorily over some of the technical difficulties which stand in the way of the trust. It is suggested that for all these reasons, the trust is not the appropriate legal device for structuring the relationship between the Indians and the government. The trust in

Native law, it is suggested, is a political, rather than a true trust.

iii Trust in the Political Sense

Mr. Justice Rand, described the obligations of the government to the Indians as a "political trust of the highest obligation".⁵³ Political obligations have often been described in terms of trust.⁵⁴ What distinguishes the legal trust from its generic and political counterparts is the remedies available and its enforceability through the courts. Halsbury, for example, contains the following on the distinction between political and legal trusts:

Ministers of the Crown often administer property for the benefit of others in the exercise of the Crown's governmental functions. No trust arises in such a case. If a person carrying out a public statutory duty is in breach of that duty, there is no remedy in breach of trust or equitable account. There are, instead, remedies of judicial review, declaration, injunction and recovery of money if wrongly demanded and paid.⁵⁵ (authorities omitted)

The remedies available for a breach of a political trust are more limited than are those available for breach of the legal trust.

There are two extremes of political trust which form the limits of the range of trust in its political sense. At one end is the normal obligation of a politician to his constituency. At its most trivial this could include the promises made by politicians during election campaigns. It would take a more serious form if included in a speech from the throne as part of a program of action for a parliamentary session. Both of these obligations, though founded upon trust, would not be enforceable. They are simply forms of generic trust. The other end of the spectrum consists of those obligations owed by the government or its officers under statute or,

perhaps, executive instrument which are legally enforceable. In between these extremes are many other species of trust in its political sense. Some give rise to legal obligations while others do not.

a Government as Trust

Interestingly, the characterization of the obligations of the government as a trust corresponds with the colonisation of North America. In 1689 Locke made what is the probably the definitive statement on democratic government as trust.⁵⁶ Locke saw the democratic form of society as having been created by each individual giving up part of his absolute sovereignty over himself in order to live amongst others in harmony under a government of laws and not under the tyrannical rule of a despot. The delegated sovereignty was given over to elected representatives who were bound to use the power in the interests of all those who had delivered up that power to them. The law was to check the exercise of the power.

The law making power, exercised by the legislature was not to be absolute.

He notes:

Though the legislature ... be the supreme power ... it is not, nor can possibly be absolutely arbitrary over the lives and fortunes of the people. ... Secondly, the legislature, or supreme authority, cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice. ... Thirdly the supreme power cannot take from any man part of his property without his consent.⁵⁷

For Locke, the relationship created by the delegation of power was a fiduciary one.

He states:

The power of assembly and dismissing the legislature, placed in the executive a superiority over it, but it is a fiduciary trust placed in him, for the safety of

the people in a case where the uncertainty and variableness of human affairs could not bear a steady fixed rule. ... [The executive is one] whose business is to watch over the public good.⁵⁸

Control of the executive, he concludes, rests in the public: the group who delegated aspects of their sovereignty to the legislature. He says:

Who shall be the judge whether the prince or the legislature act contrary to their trust? This [question], perhaps, ill-affected or factitious men may spread amongst the people when the prince only makes use of his due prerogative. To this I reply: The people shall be judge; for who shall be the judge whether the trustee or deputy acts well and according to the trust reposed in him, but he who deposes him, and must, having deposed him, have still the power to discard him when he fails in his trust?⁵⁹

The power to govern for Locke is without doubt a trust. He is not alone in this.

If governmental obligations take the form of a trust it is clear that some of those obligations are legally enforceable and some are not. The difficulty is where we are to draw the line between those that will be enforceable and those which will not. Clearly the trust in Locke's sense is not legally enforceable. Also, it would probably be unworkable to give legal effect to election campaign promises. But given that modern governments now play such an active role in day to day affairs of the nation, running businesses and making contracts etc, some of its agreements must be seen to give rise to legal obligations.

One example of a trust which was not legally enforceable can be illustrated by a comment of Mr. Justice Ivan Rand. Before patriation of the Constitution in 1982, legislation amending the British North America Act could only be passed in Great Britain. It had become the norm for the British Parliament to do so only in response to a request from Canada. While the British retained the legislative

jurisdiction over constitutional change in Canada, in practice the power had been lost. And one can assume that had the British Parliament attempted to alter the Canadian constitution unilaterally, that Canada would not have acquiesced. Discussing this state of affairs he commented:

[T]he British Parliament has become a bare legislative trustee for the Dominion.⁶⁰

The British Parliament, one might say, was possessed of a power which it was under a legally unenforceable duty to legislate for Canada, only as instructed by Canada.

It has been the case, we have seen, that certain promises made to the First Nations have been unenforceable through the courts. It is clear that to some extent the Native law is a trust in the Lockean sense. Clearly the First Nations accepted that the Canadian government and its predecessors would assist them in the transition from their traditional to the modern economy. An important difference, however, is their relative weakness in the democratic process. They were not granted full rights to vote until 1961, by which time they had become a very small minority dispersed across the nation. When they were in the majority they were denied the right to vote. It can be seen that the First Nations have been denied the power to affect governmental actions in the normal democratic fashion. Therefore Locke's theory of democracy would accentuate the positive duties of the Crown.

The trust obligation has always been acknowledged to place the Indian nations in a unique position. It is a greater obligation than that owed to the general Canadian population. Locke's theory, it is suggested, is a useful one for developing

a theory governing the Constitutional rights of the aboriginal peoples.

b Fiduciary Duties Implied into Statutes

A second type of political trust, that found in Halsbury's definition, is concerned with the obligations of governments or their officers under statute or statutory instrument. As we have noted, some of these obligations give rise to legal rights. Others raise only moral issues. The aboriginal peoples of North America are much affected by this distinction. In Canada, for example, the status of the treaties is one issue that comes squarely up against this dichotomy. International treaties in Canadian law are enforceable only if implementing legislation has been passed.⁶¹ Indian treaties, which have been held not to be treaties in the International law sense, are equally unenforceable before implementation.⁶² It follows, then, that any broader or general trust obligation contained within the terms of a treaty and which finds its origin in matters relating to changes in sovereignty, must be the subject of implementing legislation before it can attract legal remedies.

Where obligations binding in law on governmental officers are written into law, the actions of those officers can be checked in the courts. The normal rules of judicial review will apply and the possible remedies include mandamus, certiorari, and injunctions. Where remedies have been written into statute, those remedies may have to be exhausted before other review is possible. The trust obligation to the Indians in as much as it is written into statute, comes within such rules. Consequently, litigation relating to provisions of the Indian Act concerning, for

example, elections and registration, is not framed in terms of the trust obligation but rather in terms of judicial review of administration.⁶³ Dickson's opinion in Guerin is certainly at least a theory for judicial review. This second type of political trust would appear to be fertile ground for rooting the obligations to the First Nations.

The courts, as we have seen in the Crown as trustee cases, are reluctant to expand the remedies. This is because of the danger of entering into the realm of politics. Nevertheless, there are cases where the courts have implied fiduciary duties into statutes. The remedies sought in these cases have often not been trust remedies. In a British case where a government department had signed a lease using the words "in trust" the lessor sought to enforce the lease. Lord Diplock denied the existence of a true trust but did allow that the relation might be a fiduciary one. He said:

[T]he use of the expression "in trust" to describe the capacity in which the property is granted to an officer of state is not conclusive that a trust in private law was intended; for "trust" is not a term of art in public law and when used in relation to matters which lie in the field of public law the words "in trust" may do no more than indicate the existence of a duty owed to the Crown by the officer of state, as servant of the Crown, to deal with the property for the benefit of the subject for whom it is expressed to be held in trust, such duty being enforceable administratively by disciplinary sanctions and not otherwise.⁶⁴ (my emphasis)

The remedies are those of judicial review.

In many of these cases, the action of the courts borders on an intrusion into the role of policy making, a role which is generally thought of as legislative rather than judicial. This of course is very relevant to the issue at hand here. A theory of

constitutional review which is only a thinly disguised substitution of the court's view for that of the legislature is no theory of constitutional review at all. A series of British cases are a useful illustration of the difficulties and dangers of a public law fiduciary obligation. The cases allow ratepayers to follow their interest in the rates paid into the hands of the local authorities. The uncertainty of the line separating legitimate judicial decision making from judicial intervention into the realm of politics, is apparent, as is the desire of the courts to justify their actions as the adjudication of justiciable issues. The dangers of a fiduciary duty unanchored by sound and principled theory are well demonstrated in these cases.⁶⁵

In 1925, in Roberts v. Hopwood, the House of Lords suggested that the relationship between a local authority and its ratepayers was fiduciary.⁶⁶ The Council had refused to lower wages during difficult economic times and had also instituted a program of equal pay for women. Roberts sought an order of mandamus forcing the Council to lower the wages. Issuing the mandamus, Lord Atkinson relied upon an implied fiduciary obligation of the local council to their ratepayers and stated:

A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body owes, in my view, a duty to those latter persons to conduct that administration in a fairly businesslike manner with reasonable care, skill and caution, and with a due and alert regard to the interests of those contributors who are not members of the body. Towards these latter persons the body stands somewhat in the position of trustees or managers of the property of others.⁶⁷

The duty was discussed further in 1930. In A.G. v. Guardians of the Poor Law of Tynemouth, a group of ratepayers sought an injunction preventing the defendant from forgiving loans made to the wives of miners who, at the time of the

loans, had been engaged in a long strike.⁶⁸ Four years after the loans were made, the defendants, a part of the local government structure, proposed to forgive the remainder of loans. The Court found that to forgive the loans was either ultra vires or a poor exercise of discretion in that only the interests of the debtors were considered and that the individual capacity of each debtor to pay was ignored. The Court stated:

It cannot be overlooked that they [the defendants] stand in a position of a fiduciary nature towards those whose monies will ultimately be utilised for meeting their commitments.⁶⁹

The Court granted an injunction.

In 1954 in Prescott v. Birmingham Corporation, another case initiated by a ratepayer, the Court of Appeal issued an injunction to prevent the city council from instituting a free bus pass system for old age pensioners.⁷⁰ The Court held:

Local authorities are not, of course, trustees for their ratepayers, but they do, we think, owe an analogous duty to their ratepayers in relation to the application of funds contributed by the latter. ... [They are not entitled] to make a gift to a particular class of persons ... on benevolent or philanthropic grounds. ... In the absence of clear statutory authority for such a proceeding, we would for our part regard it as illegal on the ground that, to put the matter bluntly, it would amount simply to making a gift or present in money's worth to a particular section of the local community at the expense of the general body of ratepayers.⁷¹

The court implied into the statute, a duty to run the bus service "in accordance with ordinary business principles".⁷² What the court is attempting in these cases is to force the authorities to balance the interests of the various sectors of the community served.

In 1982, the principle was again invoked, this time by a Borough Council

against the umbrella Greater London Council. In Bromley v. Greater London Council, the Bromley Council wished to prevent the G.L.C. from implementing a subsidy designed to enable the London Transport Executive to offer cheap fares.⁷³ Under the governing Act, the G.L.C. had a duty to "develop policies and encourage and organise and, where appropriate, carry out measures which will promote the provision of integrated, efficient and economic transport facilities".⁷⁴ The services, to be delivered by the London Transport Executive, were to be provided with "due regard to efficiency, economy and safety of operation".⁷⁵ One of the effects of the scheme, which was to be implemented against the wishes of the national government, would be to lose a £50 million grant from the national government. In a decision which is difficult to summarize since five opinions were handed down at the House of Lords, the court held the scheme to be invalid.

The decision is based on the same general duty to run the undertaking on sound business principles as had been found in the cases above.⁷⁶ Two breaches were discovered. Loughlin has called the first "abuse of power".⁷⁷ The G.L.C. had just been elected after a campaign in which they had pledged to lower fares. In the Court of Appeal, Lord Justice Oliver stated:

[T]he rigid adoption of a policy simply as a matter of political commitment to a section of the local government electorate and without regard to the purpose for which the statutory powers are given by itself demonstrates a breach of fiduciary duty.⁷⁸

The second ground, Loughlin calls "excess of power".⁷⁹ When determining the reduction the G.L.C. had failed to consider the loss of the grant. This also constituted a breach of duty:

[T]he G.L.C.'s decision was not simply about allocating a total financial burden between the passengers and the rate payers, it was also a decision to increase that total burden so as nearly to double it and to place the whole of the increase on the ratepayers. ... [T]he whole of the extra £50 million was to be recovered from the ratepayers. That would, in my view, clearly be a thriftless use of moneys obtained by the G.L.C. from the ratepayers and a deliberate failure to employ to the best advantage the full financial resources available to it by avoiding any action that would involve forfeiting any grants from central government funds. It was thus a breach of fiduciary duty owed by the G.L.C. to the ratepayers.⁸⁰

Although the courts have couched their intervention in the principles of private law, it can be seen that they are dangerously close to being driven by political considerations rather legal ones.

Loughlin has commented:

Expenditure decisions and rate burdens are issues for which the political process provides the most appropriate mechanism for accountability: they are the very stuff of local politics. It seems illegitimate that the courts should be able, in the guise of some notion of fiduciary duty of local authorities to their ratepayers, to pre-empt political decision-making in this way.⁸¹

Loughlin's concern is in part based on the fact that the court created the fiduciary obligation out of whole cloth rather than a close reading of the provisions of the statutory provisions defining the duties of the local governments.

Loughlin's criticism is that the courts did not properly found their fiduciary principle in the statute at hand. Rather they took a principle from an earlier case, relating to a different set of statutory powers and took it to be a general rule of law, ignoring the fact that the legislation governing local authorities had changed in the intervening years.⁸² In addition, the balancing to the interests between ratepayers and other groups, whether bus passengers or debtors, if granted to the local authority, is more properly a role for a legislative body. He comments:

[I]t is submitted that the question of determining the proper balance between ratepayers and beneficiaries in the absence of discrimination is for the local authority to determine. The reason is that the courts are institutionally incapable of dealing with the issues which arise and that the appropriate route for persons aggrieved by the local authority's actions lies through the political process.⁸³

The courts may have reached a similar conclusion. Actions against local authorities based on the fiduciary principle have been rejected in a number of cases since Bromley. In Pickwell v. Camden, the Camden Authority settled a strike by service workers by raising wages.⁸⁴ The local auditor asked the court for a declaration that the Council had breached its fiduciary duty in granting raises that were excessive. Ormrod L.J. warned:

[T]here is a growing tendency to treat particular expressions, used by judges, taken out of context, as if they were propositions of law in themselves.⁸⁵

After an analysis of the relevant statute, Ormrod L.J. rejected the fiduciary argument. Substantial revision of the related statutes, greatly limiting the powers of the local authorities have virtually eliminated the need for the fiduciary cause of action in this area of municipal law.

The doubtful legitimacy of the principle in these cases demonstrates the need for vigilance when implying fiduciary obligations into a statute. The ease with which the courts can cross the line separating the supervision of responsible spending from the determination of social policy, should give us pause. Discussing the Roberts decision, Branson commented:

[T]he judges altered the law in a way never contemplated by Parliament. ... They had in short filched the power of policy-making from elected representatives and placed it in the hands of non-elected officials and judges.⁸⁶

The lesson to be learned, it is suggested, is that the principle, if not firmly anchored in some substantive right, can be a dangerous one. A second lesson, more important in my estimation, is the importance that these cases demonstrate of a need for a clear understanding of the policy that the fiduciary obligation is intended to promote.

Although judicial intervention on this scale has not been seen Canadian municipal law, public officers have also been held to owe implied fiduciary obligations in Canada. In City of Toronto v. Bowes, an 1858 case concerning a secret profit made by the Mayor, the Privy Council commented:

He may not have been agent or trustee within the common meaning or popular acceptance of that term, but he was so substantially; he was within reach of every principle of civil jurisprudence, adopted for the purpose of securing, as far as possible, the fidelity of those who are entrusted with the power of acting in the affairs of others.⁸⁷

And in 1907, in McIlreith v. Hart, an action alleging breach of fiduciary duty in paying the expenses the mayor incurred attending a convention on municipal affairs, the Supreme Court of Canada went even further.⁸⁸ The legislation at the time did not allow the payment of such expenses. The Court held:

The right of the inhabitants to compel city corporation, that is the city council as a body, to do its duty, rests on this: That the corporation is a trustee for the inhabitants. ... The city corporation is composed of all the inhabitants and not merely the ratepayers. ... Whether inhabitants or not, all the ratepayers are also cestui que trustent.⁸⁹

While a later case has resiled from this somewhat,⁹⁰ the principle would appear to be still vibrant since in 1979, in Hawreluk v. City of Edmonton in 1975, while no breach of fiduciary duty was found, the Supreme Court of Canada nevertheless accepted the applicability of the principle.⁹¹

It would appear that a fiduciary duty is owed by some public officers. Ellis has suggested otherwise:

Absent statutory remedies of the Municipalities Act, there would appear to be no fiduciary duty operative in favour of the municipality's inhabitants.⁹²

The conclusion seems somewhat categorical to this writer. It may not have the reach that the British duty has had, but the duty has not been denied by the highest court. Shepherd asserts the existence of such a duty:

We suggest that it is now quite apparent that at least some public officials are fixed with fiduciary duties.⁹³

And Finn also has compared the duties of public officers with the fiduciary:

A striking feature of the fiduciary is the close resemblance he bears to the public ministerial officer who, while entrusted with duties and discretions by statute and statutory instrument, discharges those duties and exercises those powers in the interests of the public. This resemblance is not an inconsequential one. ... [T]he actual obligation imposed on a fiduciary in the exercise of his discretions mirror to a large degree the obligations imposed on the public officer in exercising his.⁹⁴

And ultimately, even Ellis sees a place for continued application of the duty. Responding to a case in which the statutory duties of a councillor were narrowly construed because of the quasi-penal nature of the provisions at issue,⁹⁵ Ellis comments:

It is hoped that the [narrowness of vision necessary in relation to the quasi-penal statutes] is reserved for the interpretation of statutes while the underlying premise of fiduciary status [for elected officials] should be (and is) allowed a separate life independent of statute and statutory interpretation.⁹⁶

It would appear, then, even with its dangers, the fiduciary principle as a check on governmental officers is good Canadian law which finds support amongst the commentators.

This body of law is interesting because in Guerin, Dickson finds a very similar duty owed to the Indians by the officers of the Department of Indian Affairs. The duty in Guerin is not unanchored as is the one above because the trust obligation owed to the Indians is so well documented in the history of Indian/government affairs. By contrast, the "sound business principles" test is not evident in the British legislation. The fiduciary principle is, at first glance at least, an attractive one for defining the duties of the government to the Indians.

iv Summary

The language and concepts of the trust have been seen to be relevant to the obligations of the government to the Indians. The true trust is not applicable in a general theory for Indian law. The relationship of the Indians to the Canadian governments is rooted in a generic trust placed in the Crown by the First Nations faced by an uncertain future. I suggest that aspects of that relationship have been altered through the intervening years. Some of the promises have been passed into legislation, others have been implemented through policy initiatives of the Department of Indian Affairs and other governmental agencies. Some may have become enforceable simply by having been relied upon.⁹⁷

Locke suggests that a political relationship might be considered a fiduciary one. The relationship between the Crown and the First Nations, traditionally described as a trust relationship, would appear to be one well suited to Locke's model. He emphasises the duties of the government to its subjects. Locke suggested

that enforcement of the political trust should be through the political process, but for the First Nations that may no longer be possible. Their numbers are such that they are unlikely to have sufficient power to greatly affect the course of the government. The fiduciary model might provide a better model for the control of the obligation owed by the Crown to the First Nations.

Fiduciary law has been shown to be of value in controlling some governmental obligations, and although it is not without dangers, it would appear to be a useful body of law for the Native law trust obligation. Both Wilson and Dickson have recognized this. I wish now to suggest how one might go further.

The object pursued by the fiduciary obligation in any situation, as well as the circumstances amounting to breach, would, of course, rely on the particular facts and the relevant law.⁹⁸ It is important that the duty be well founded in law. The dangers of an unanchored duty have been illustrated. A fiduciary obligation owed by the government to the Indians invites the same dangers of judicial intervention, or non-intervention as we have seen in the British municipal law cases.

In Guerin, both Dickson C.J., and Wilson J., attach their respective duties to the facts and law surrounding the land interest. The provisions of the Indian Act and the Indian interest in the land, allow the court to interpret the discretionary power in light of the protective role of the Crown and guide the exercise by of the court of its supervisory role. The legal principle which ties the facts and the law together, is the fiduciary principle. In Guerin, the resulting duty is aimed at the protection of a property interest recognized by the Indian Act. As long as the

reasoning is guided by the legal and factual framework, and as long as the purpose of the duty is kept firmly in mind, the danger of excessive judicial activism is minimized.

There is a lesson here. The unanchored fiduciary obligation can be wayward. Therefore, if one wishes to expand the fiduciary duty recognized in Guerin, as is my intent here, to relate to such issues as the right to cultural survival or self-government, it must also be firmly anchored. That, it is suggested, is accomplished in Guerin by the delineation of the five part scheme. One needs a legislative scheme which invites the court's supervision, a recognition of the interest which is at the heart of the controversy to be litigated, a triggering event which gives rise to a duty, and one needs a purpose or object which the courts might legitimately pursue. Finally, a connecting principle is needed.

I propose a broader obligation defined by five similar and analogous elements, and which is firmly rooted in Canadian Native law and history. It is clear that the Constitution Act, 1982, s. 35 invites the supervision of governmental action by the courts. The interest in land remains as an important right to be protected. Further than that, it is suggested that protection of the land interest is an aspect of the trust obligation. We have seen that the trust obligation provides a "philosophical basis" to the whole of Indian law. In addition, I have suggested above that the Indian Act can be viewed as legislation implementing aspects of the trust obligation. As evidence for this, the words of Mr. Justice Rand, bear repeating:

The language of the [Indian Act] embodies the accepted view that these aborigines are, in effect, wards of the state, whose care and welfare are a political trust of the highest obligation. For that reason, every such dealing

with their privileges must bear the imprint of government approval.⁹⁹

The treaties as well as some constitutional arrangements may also constitute recognition of the trust obligation. There may be in this, a recognition of interests beyond the proprietary interest in land. And if that argument is good, it follows that the event which gives rise to the fiduciary duty is not the surrender of Indian land, but rather the denial of Indian sovereignty. And further, that purpose may be more than just protection and may include also some positive duties. These arguments form the centre of the theory presented here.

b The Native Law Trust

The wardship when viewed as central to Native law suggests a broader role for the fiduciary obligation. That broader role could be delineated by the legal and factual background of the Indian/Crown relationship. The Indian Act forms part of that background. Dickson and Wilson JJ., by reading the fiduciary obligation into the provisions of s. 18(1), both recognize that the Indian Act, to borrow Cardozo's memorable phrase, is "instinct with obligation".¹⁰⁰ They recognize that it is intended to protect Indian lands and moneys. I wish to suggest that role of the Act is much broader than just protection of tangible property. I wish to suggest that the Indian Act codifies, however imperfectly in today's eyes, an obligation accepted by the Crown to protect and promote the Indians and to provide them with a protective legislative scheme intended to assist them in adjusting to the colonisation of their lands.

i The Guardian/Ward Relationship

The wardship is related to the true trust and in Native law, has often been confused with it. Marshall, who could be considered to be the father of native law, referred to the government/Indian relationship as resembling a guardianship.¹⁰¹ Like the trust the wardship is an equitable doctrine. It began its existence in feudal times as the incident of tenure known as wardship.¹⁰² It was originally a valuable property right for both the King and the guardian. Lowe and White comment:

[Wardship arose] when a tenant died leaving an infant heir. On such occasions the lord became guardian of both the infant heir's land and body. Although there was a protective element in the guardianship, in that the lord was supposed to look after the land for the ward and was obliged to maintain and educate him according to his station, it was essentially profitable since the lord was entitled to keep the profits of the land until the heir became of age. Even the guardianship of the heir's body could be and was exploited for profit since the lord had the right to control and therefore to sell the heir's marriage.¹⁰³ (authorities omitted)

As Holdsworth points out this is a far cry from our present notion of guardianship as fiduciary.¹⁰⁴

In its early days it had its own court, the Court of Wards, which was abolished in 1660.¹⁰⁵ Subsequently, under the Court of Chancery, the modern form of guardianship as a protective relationship rather than an exploitative one developed.¹⁰⁶

Lowe and White continue:

By the nineteenth century it had become accepted that the true origin of wardship lay in the concept that the Sovereign as *parens patriae* had a duty to protect his subjects, particularly those such as children who were unable to protect themselves and that this duty had been trusted to the Lord Chancellor and through him to the Court of Chancery.¹⁰⁷ (footnotes omitted)

So, while it was originally based on protecting the property of the infant, by the end of last century the role of guardianship had developed into the protective form that we know today.¹⁰⁸ In 1893 in The Queen. v. Gyngall Lord Esher, M.R. spoke of the role of the court as:

[A] paternal jurisdiction, ... in virtue of which the Court ... was put to act on behalf of the Crown, as being the guardian of all infants, in place of the parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent.¹⁰⁹

Here we see it in its present day role as protector of the person, not just the property rights of a minor.

It is interesting to note that wardship developed its modern sense at the very time that the relationship between the Crown and the Indians was being worked out. And as we have seen, Locke described the relationship between the government and its citizens as a public trust. By 1660 colonization was a well established fact. By 1900 the Crown's role as guardian to the Indians was firmly established, even if the obligations may not have been certain and would be, anyway, at times cynically ignored. The analogy of guardianship with the trust is by this time clear.

Holdsworth comments:

[T]he chief contribution which the court made to the law on this topic, was the strict control which it exercised over the guardian's dealings both with the property and the person of the child, and the adequate machinery which it employed to overhaul his accounts -the analogy of the trustee was easily applied.¹¹⁰ (footnotes omitted)

The chief mechanism developed to deal with both the trust and guardianship was the requirement to account.¹¹¹ With the wardship, the obligations went further. There

was an obligation to pursue the best interests of the ward in all facets. This would include such obligations as obtaining for the ward a proper education and proper housing as well as protecting the ward from exploitation.

The prime purpose of the common law wardship is to protect the person. It is telling that this body of law developed at the same time as did the idea of a wardship role for the Crown vis a vis the Indian peoples. It suggests that purpose of the special protections for the First Nations in the Constitution and in legislation is not only to protect Indian property interests, but also to protect the Indians themselves. This protective role would include promotion of the Indians and assistance in coping with non-Indian culture. It is admitted that the policies pursued by the Crown in the exercise of its role as ward of the Indian Nations have varied. The major policy has been assimilation. However, one can also find evidence of a policy of integration for the Indians and for policies of genocide as well as what Wilkinson, in the United States, has called measured separateness.¹¹² The ambiguity of purpose does raise problems, but those problems are factual and would be better dealt with in the context of a particular claim.

It is possible to say that the history of the colonisation of North America took place against a backdrop of an increasing concern for the rights of colonised peoples. While that meant little in the early days of colonisation, it has come to have much more weight. Recent years have seen extensive decolonisation. In addition, the rights of minorities, both aboriginal and non-aboriginal have received increasing support on the international scene. Some support for increased recognition of the

positive obligations of the government to the Indian Nations might be garnered from this. While it is not my intention to pursue this line of inquiry, I do suggest that it is of some relevance in the interpretation of the obligations of the Canadian government to the Indian Nations. A brief exploration of the international law trusteeship, I suggest, supports the argument that the fiduciary role of the government includes the promotion of Indian interests as well as the protection of property rights.

ii The International Law Trusteeship

The colonisation of the Indian Nations of the Americas probably precedes the creation of an effective International law.¹¹³ Indeed, Goebel argues that the discovery and colonisation of North America was a essential preliminary to the development of an international code for the acquisition of territory.¹¹⁴ Be that as it may, the principles were worked out during the colonisation process and were well established by the end of the nineteenth century as colonisation in North America was finally and irrevocably achieved. Since it is only recently that the international law trusteeship has developed, it likely has limited significance to the position of the Indians in Canada. Nevertheless, it can help flesh out the parameters of the Native law trusteeship suggested here.

Snow finds the origins of the international law trusteeship in the 19th century struggle against slavery and the movement for the protection of aborigines.¹¹⁵ He comments:

The period since 1890 has been marked by a general acceptance and

application by all civilized States of the principle of guardianship of aborigines.¹¹⁶

Its heyday is much later. Green has commented:

The concept of agency or ward and guardian became fairly significant on the international level after the first world war with the introduction of the mandate system under art. 22 of the League of Nations Covenant.¹¹⁷

In the main the Covenant was intended to regulate the conduct between nations.

One of its purposes was enunciated as:

[T]he maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another.¹¹⁸

Since it speaks of "organized peoples" it seems unlikely that it was intended that the North American Indians would fall within the parameters of the Covenant.

Nevertheless, the comparison remains compelling.

Article 22 of the Covenant uses the same words as did Rand J. in the St. Ann's case.¹¹⁹ Article 22 states, inter alia:

1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization.

3. The character of the mandate must differ according to the stage of development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.¹²⁰ (my emphasis)

In its 1971 advisory opinion on Namibia, the International Court of Justice commented on article 22:

[There can be] little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.¹²¹

This, it should be noted, is probably not a legal right to self determination.¹²²

While the Indians do not meet the opening provisions of paragraph 1 of Article 22, and so consequently are not intended to be come within the protections offered, there is little reason to deny the relevance of the provisions in general to a discussion of the obligations to the Indians. Both Canada and the United States adhered to the Covenant. As an indication of the views of the government as to their obligations the Covenant can serve as a small window.

With the demise of the League of Nations the role was taken up by the "trusteeship" provisions of the Charter of the United Nations.¹²³ These provisions are stated much more narrowly. They are to apply only to territories previously under mandate, territories detached from enemy states as a result of the Second World War, and territories voluntarily placed under trust by the authorities responsible for them.¹²⁴ Clearly the Indians do not come within these.

The terms of the trusteeship were to be agreed upon by the States directly concerned.¹²⁵ The basic objectives were stated in section 76 and include:

(b) to promote political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned.

(c) to encourage respect for human rights and for fundamental freedoms.¹²⁶

O'Connell comments on the agreements concluded pursuant to the provisions:

All the agreements contained provisions: (i) to promote development of free political institutions suited to the territory; (ii) to ensure the inhabitants a progressively increasing share in the administration of the services of the territory; (iii) to develop participation of the inhabitants in advisory and

legislative bodies and in the government of the territory, both central and local, as may be appropriate ... ; (iv) to take all other appropriate measures with a view to the political development of the inhabitants in accordance with Article 76(b).¹²⁷

Although the trusteeship was well-intentioned, the reality fell somewhat short of the intention. Thullen notes:

Disparity between the administering authorities' concept of the trusteeship system as an institution for supervision of colonial administration, with promotion of political development only a secondary and long-term concern, and the anti-colonial's interpretation of the system as a channel for rapid attainment of independence by trust peoples gave rise to constant friction and conflicts.¹²⁸

The rather poor record of the trusteeship need not weaken the value of the trusteeship as informative of the nature of the role of the government vis a vis the Indian peoples. Given that a similar disparity exists between the views of the Indians and of the government, its value is perhaps heightened. While, as Green comments, the trusteeship is "completely devoid of legal significance"¹²⁹ it can inform the search for the true meaning of the guardianship of the government over the Indians.

Snow, at least, holds that the trusteeship has great relevance to the situation of the Indian peoples. He also feels that its basis is the protection of the person, much like the guardianship in the common law. He states:

When "trusteeship is used in this sense, it has not the meaning of trusteeship in the private law, but is used in a broad sense conforming to the literal meaning of the word. In the private law a trusteeship is the relation between persons arising out of the deposit of money or property by one with the other. ... A trust, in its literal sense, is a relationship of an essentially personal character. In its modern derivative sense, especially as used in the politico-legal language of the present day, the word "trust" covers all relations of a fiduciary character in which a person assumes a relationship of responsibility for or to another. ... In this broad sense, trusteeship is a generic term

including all fiduciary relationships relating to the person or property, and thus includes the relationship of parent and child, husband and wife, ... as well as trustee and cestui que trust, etc.

Using trusteeship in its literal sense and also to some extent in this generic sense, it seem (*sic*) to be the most appropriate word to describe the relationship between a civilized State and all its colonies and dependent communities of whatever character.

The trusteeship of a civilized State for its colonies and dependencies is, however, a trusteeship essentially relating to person rather than property, and therefore the closest analogies which the private law furnishes for determining the problems of this trusteeship are those derived from the rules of private law relating to patron and apprentice, and guardian and ward.¹³⁰

Snow concludes:

The conclusion which seems to follow ... is that the power which a civilized State exercises over all its colonies and dependencies is, according to the law of nations, a power of trusteeship, and the power of guardianship over its dependent aboriginal tribes is one of the manifestations of this general power.¹³¹

Certainly the relationship with colonized minorities within the nation is comparable to that with colonized nations outside the country.

If the international law trusteeship, and indeed the trends within the field of international law generally, has any significance to the situation of the aboriginal peoples of Canada, it suggests a set of purposes for the guardianship. Again, I am not suggesting that these are in any way legal obligations. They show only a general current towards, and perhaps a moral obligation to recognize, increasing rights for aboriginal peoples.¹³² The "rights" might include the content of the Covenants and the United Nations Charter: they might include "well-being and development", "political, economic, social, and educational advancement", "development towards self-government or independence", and "self-determination". The development of the trust obligation precedes and parallels the development of the international law

trusteeship. That contemporaneity lends weight to the argument for a broader role for the trust obligation than merely the protection of property rights. It suggests also at least moral and perhaps political obligations to promote the First Nations and to assist them as they adapt to the changed circumstances precipitated by colonization.

iii The Native Law Trust: A Wardship

The function of trust in society is, in Luhmann's words, "to anticipate the future. It is to behave as if the future were certain."¹³³ It is a way of coping with a future which has become, or has been realized to be, too complex to be coped with in the raw, so to speak.¹³⁴ This fits quite accurately the Indian situation after the colonization of North America. Taylor has written of the Indian insistence, in the face of government resistance, on including in the treaties provisions for education, agricultural assistance and other help in making the transition to a new life. He says:

To the Indians, these additional treaty terms were necessary because of their fear and anxiety about their own survival.¹³⁵

The treaty process, from the Indian point of view, was to provide for a continued separate existence as Indians in their traditional lands.

The Crown, as we have seen, promoted such an idea of their responsibility to the Indians. From the earliest days of colonization, the First Nations were assured that their best interests would be protected by the Crown. The Doctrine of Discovery, the Instructions to the Governors, the Royal Proclamation, the various provisions in the Constitution, and even the Indian Act, speak to the Crown's

insistence that it will not only protect, but also promote the interests of the Indians.

To provide for the future which they desired, the Indian peoples signed treaties with the white man. Incorporated in those treaties were all forms of trust. Much was only the generic form. Some took the form of political obligations which could not be legally enforced. Some of the obligations, have become, if they were not originally, legal obligations, often through codification. All in all, this process, which has given the wardship its content, corresponds with the international law trusteeship. The common law wardship ultimately was intended to protect the person of ward, not the land. With the Indian wardship, it is suggested, the intent was to protect the Indian communities. Consequently, the interest protected by the wardship, and arguably the fiduciary obligation, is the continued existence of the Indians, not merely the protection of some of their land. Its purpose was to help the Indians survive colonisation and to secure for them a meaningful participation in Canada's future. Exactly what that future was to be, assimilation, integration, or measured separateness, was not completely worked out, either by Canada or the Indians themselves. The failure of the First Ministers Conferences, suggests that it may fall to the courts to work out the meaning of s. 35.

c Guerin: The Basis of a Theory?

Guérin, since it predates the passing of the Constitution Act, 1982, is not concerned with aboriginal rights beyond the statutory protection offered by the Indian Act. Consequently, Dickson J., as he then was, could confine himself to a

discussion of the interest in land which was at the heart of the dispute. The fiduciary principle he posited there found its origin in the surrender requirement codified in s. 39 of the Indian Act, was focused on the Indian interest in land recognized by s. 18 of the Indian Act, and had as its underlying rationale the protective role of the Crown. The five elements came together to require the courts to supervise the actions of the Crown. But not all actions of the Crown: The supervision is only of the discretionary power granted by Parliament and it requires the courts to make certain that discretionary powers granted are used without fraud in the best interest of the Indians.

The Guerin decision is concerned only with Indian Act interests. Since the cause of action predates 1982, the Musqueam were obliged to limit their action to what were at that time justiciable issues, and, consequently, the Court have done the same. But we have seen that Dickson particularly, ranged much wider than the Indian Act, and that, I have suggested, could be seen as an indication by the Court of how it is predisposed to deal with the new constitutional provisions. If this is so then we are obliged to look behind the decision to search out its underpinnings. I have suggested above that logically, the interest which the fiduciary principle protects can be taken further than it is in Guerin. Let us look once more at Dickson's opinion, this time in light of the above exploration of the legal history and this time seeking out any implications for constitutional interpretation of the obligations to the Indians.

i. The Triggering Event: The Assumption of Sovereignty

We have seen that the guardian/ward relationship in the general law starts with the protection of the property rights of minors, but develops very quickly into a protection of the person. Protection of the person was only necessary because the ward lacked the factual and legal capacity to conduct her own affairs without excessive vulnerability to the unscrupulous. The responsibility flowed naturally from merely preserving the property of the ward to including the obligation to equip the ward to protect her own interests when that time came. We have traced a similar development in international law.

The wardship of the Indians, I suggest, is analogous. While the wardship first manifests itself in relation to land, in fact it encompasses greater responsibilities, and the importance of the Royal Proclamation is that it constitutes the recognition of a special responsibility of the Crown vis a vis the First Nations. Because of the dangers to the Crown inherent in the unregulated taking of Indian lands, the Indians were denied the power to deal with their lands, and ultimately, denied any legal capacity at all. The denial of legal capacity was accompanied with an acceptance of a special responsibility to promote their interests. The resulting relationship is the wardship: A particular sort of fiduciary obligation. This, until 1982, has been a non-justiciable aspect of the trust obligation.

The obligation in Guerin has its roots in aboriginal title and is raised because "the Indian interest in the land is inalienable except ... to the Crown".¹³⁶ Aboriginal title, we have seen, is itself a recognition of the pre-contact relationship of the Indian

Nations with their traditional lands. The surrender requirement, as Dickson realises, was first established as a legislated policy in 1763 through the Royal Proclamation.¹³⁷ However, the surrender requirement may in some cases precede this date. Certainly, the practice was common in the 17th century.¹³⁸ Arguably then, although Dickson does not say so, the fiduciary obligation he recognizes extends back beyond the enactment of the first federal Indian Act in 1876 and perhaps even beyond the promulgation of the Royal Proclamation in 1763. It is clear that the fiduciary obligation is intimately bound up with the colonisation of Indian lands. But one can go further than that.

We have seen that in the United States, Indian law has developed from a recognition of land rights towards a recognition of some right to continued sovereignty. The opinion of the then Mr. Justice Dickson in Guerin points to the possibility of a similar development in Canada. Dickson J. explains at great length that the Indian interest in land was not, and is not, a proprietary right. Referring to Johnson v. McIntosh and the doctrine of discovery which gave the discovering European nation rights over those of other European nations, Dickson notes that the rights of the Indian nations were diminished upon discovery but that "their rights of occupancy and possession remained unaffected".¹³⁹ So while the rights in land were not themselves affected, the ability to deal with those rights was.

Put another way, the effect of colonization on Indian rights in land was incidental: It is the power to exercise them that had been taken. He continues:

The principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants was approved by the Privy Council in Amodu Tijani v. Southern Nigeria (Secretary), [1921] 2 A.C.

399. That principle supports the assumption in Calder that Indian title is an independent right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it.¹⁴⁰

It is not, then, rights in the land which are altered by discovery: It is Indian sovereignty. Necessarily then, the fiduciary obligation rests not on the rights to the land, since they have not been altered, but must rest, to some extent, on the denial of sovereignty in the Indian nations and the assumption of that sovereignty by the discoverer. It is the denial of sovereignty, and that alone, which appears to have legal significance to the raising of the duty. Such an analysis is supported by the discussion in Guerin. Describing the fiduciary obligation in the abstract, Dickson comments:

[W]here by statute, agreement, or perhaps by unilateral undertaking, one party has the obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.¹⁴¹ (my emphasis)

We see here that Dickson not only moots a power based theory of fiduciaries but also that he suggests that the power can be an assumed one. Consequently, a fiduciary obligation based on the denial of sovereignty, would date not from legislative enactment, or perhaps even from contact or colonisation, but from the date of discovery.

We could go further. Dickson states that it is the surrender requirement which gives rise to the fiduciary obligation. The Royal Proclamation and the Indian Act deny that right to the Indian nations, not to individuals. No right in individual Indians has been recognized. This is clearly an aspect of sovereignty. And the particular aspect of sovereignty which Guerin explores is the power to deal with

rights in land. But that is not necessarily the end of it. As Dickson explains in his opinion, the denial of sovereignty dates from discovery. If, as Dickson also says, the Indian Act only narrows the fiduciary obligation then possibly so does any Royal Proclamation related fiduciary obligation and, potentially at least, much greater responsibilities might lie behind the justiciable obligation. And these responsibilities might not have to relate closely to land.

There is a point of massive import here which drives home the potential importance of Guerin for constitutional analysis and the importance for developing the theoretical basis for a broad reading of the case. The fiduciary obligation explored in Guerin originates in the denial of an aspect of sovereignty which both the Indian Act and the Royal Proclamation acknowledge. It is possible, and I would argue necessary for a sensible reading of the case and of the duty, that the obligation extends back to the time of the denial of sovereignty. And that logically it might also embrace other aspects of sovereignty. It is suggested that the wardship is itself an aspect of the fiduciary obligation recognized in Guerin, albeit an unenforceable one in the case itself.

Let us put the argument simply. If the rights in land have not altered since contact, land can have only a very limited legal significance to the fiduciary theory. Since it is an aspect of sovereignty which has changed, then it is sovereignty which must have legal significance. Support for this proposition can be garnered by looking back at sections 18(1) and 38(2) of the Indian Act.¹⁴² Dickson, it will be remembered, notes the importance of the narrowing of the fiduciary obligation

permitted by these sections. Some aspects of the narrowing are clearly based upon Indian involvement in the surrender process. These are such aspects as conditional or qualified surrender and restrictions of the government discretion through treaty and surrender conditions. Such Indian involvement could be characterized as a reclaiming, or exercising, of some aspects of the ancient power of self-government. If not that, it is certainly a regaining of the power of self-determination.

Be that as it may, if the fiduciary obligation is created at the time of the loss of sovereignty, it must at least date back to the time of contact. It must date back at least to the creation of the policy of surrender in 1763. The scope of the obligation, of course, would vary according to the particular course of dealing between the different Indian nations and the Crown. But at root and in theory, the obligation owed to all the aboriginal peoples could be the same. The duty would vary with the facts relevant to any particular aboriginal group.

It is important to note that the scope of the Indian Act is much broader than merely the protection of land and money. It contains a complete governmental scheme and a remarkably complete one.¹⁴³ Covering everything from birth through education to death, it suggests that the protective role of the Crown has been seen by the federal government itself as incorporating a much broader scope. In addition, the gradual increase in the range and power of the governmental powers granted in recent years to the First Nations further supports that one might and should see a broader set of obligations in the Crown's role vis a vis the Indians. The international law also suggests a broader obligation. And if, as I argue below, these

obligations are part of the content of s. 35, then it follows that Dickson's opinion logically provides a theory for the limitation of the legislative power of the Crown.

Viewed in this way, Dickson's opinion in Guerin is an exciting one which has great potential for correcting some of the injustices suffered by Native people. The result in the case itself, while the damages may be somewhat small,¹⁴⁴ is a just one. As a theory for judicial review of administrative action Dickson's opinion works well. As a theory for constitutional review it has great potential. Unlike the American situation outlined above, in Canada the protection of existing aboriginal rights may require a constitutional amendment before Canadian governments can affect aboriginal rights. At the very least the same sort of balancing of federal or provincial and Indian rights as takes place in the United States between the State governments and the Indian Nations will be necessary.¹⁴⁵ Guerin might just provide the constitutional tool to make certain that the balancing take place in a principled and rights-based fashion. If it does, the analysis proposed here suggests that the rights arise when sovereignty was denied. That is, at the time of discovery. It suggests further that the full range of governmental powers may be subject to s. 35 limitations.

ii Fiduciary Law: The Background

The theory I have suggested is based not upon the recognition of an interest in land, but rather on a taking of power the of regulation over that land. The question arises, is it possible for a fiduciary obligation to be based on the assumption

of power rather than the transfer of a property right. The answer, suggested here, is a qualified yes.

The fiduciary concept is a very fluid one and consequently difficult to define. It is, of course, the type of the obligation owed by a trustee to his beneficiary.¹⁴⁶ While it originated in the law of trusts, it has developed to become relevant in many more fields. As Sealy noted it is fairly recently that it has become a much used term.¹⁴⁷ Its current multiplicity of meanings developed during the last half of the 19th century as a term to cover those relationships which had been termed trusts but which, because of the increasing technicality of the trust itself, could no longer meet its more and more rigid requirements.¹⁴⁸

The development has produced confusion, not least because neither the courts nor academics have produced a satisfactory theory of fiduciaries. In fact there has, until very recently, been little interest in the law of fiduciaries as an object of study in its own right. As Finn says in his recent text on the topic:

[T]he legacy of this neglect has been doubt and confusion. The cursory attentions which so far have been given to "fiduciaries" have nonetheless produced one notable conclusion - the term "fiduciary" is itself one of the most ill-defined, if not altogether misleading terms in our law.¹⁴⁹

Finn, and Shepherd in another recent text,¹⁵⁰ have attempted to correct this state of affairs.

There is good reason for the difficulty of definition. The law of fiduciaries has developed in a variety of areas, of both law and equity, and over a considerable period of time. Shepherd comments:

The law of fiduciaries has not developed as a separate area of the law, or even as an offshoot of one particular area of the law. Rather, it has existed

for centuries as a fundamental and often unstated assumption underlying the areas of agency, trusts, corporations, wills, and restitution generally. Within each of these areas of law, rules and approaches have evolved to deal with this "fiduciary assumption", but it has only been in the last hundred years or so that any cross-pollination has occurred. The result ... is that the fiduciary duty is not yet treated consistently in situations which although factually different, are analytically the same.¹⁵¹

It is useful to review at least the outline of these origins and their different effects. The Indian law fiduciary is one sui generis. Consequently it might contain aspects of many varieties of fiduciary.¹⁵²

Of the role of the trustee and his responsibilities, we have seen something above. While it is of an early vintage it is not as old as the agency. Shepherd describes the agency in this way:

Agency as legal concept existed, long before the advent of the Court of Chancery, as a segment of the common law. It had then, and still has to deal with two sets of rights and responsibilities- those of the principal, and those of the agent. As to the rights and responsibilities of the principal, the theoretical basis was that of the agent as amanuensis: a tool, capable of many wonderful things, but not independent action. That approach has survived, with only superficial variation, and to this day the position of the principal remains primarily common law in its roots.¹⁵³

The agent, then, is treated as if he were an inanimate object.

The trustee, by contrast, treated originally by the law as if he were completely unencumbered. Shepherd describes this relationship:

The essence of the trustee-beneficiary relationship has never been one of tool and actor. In the common law, the trustee was the actor, and the beneficiary had no legal existence. The courts of equity quickly recognized that the issue was one of property ownership, and therefore created rights and obligations inter se that reflected that approach. Instead of trying to limit the rights and powers of the trustee, as the common law did with agents, Equity chose to expand the rights of the beneficiary to achieve the necessary balancing of interests. The method adopted to accomplish this was the idea of beneficial as opposed to legal ownership.¹⁵⁴

The corporation, which of course developed centuries after the creation of the trust, contains a mixture of legal and equitable fiduciary relationships. This is because of its rather odd genesis. Shepherd notes:

Agency and trusts come together in the application of the fiduciary principle to corporate interrelationships, especially the position of the director. The most common form of business organization in the 17th and 18th centuries was the Deed of Settlement company, which had two sets of fiduciaries: the trustees, who held the company's property on behalf of the members; and the governors, later called the directors, who made the day to day decisions on behalf of the members.¹⁵⁵

In the modern corporate form, both of these roles have devolved to the directors, even though, theoretically at least, it is the corporation itself that holds the property. Furthermore, the members, once almost partners, have become, as shareholders, mere financiers.¹⁵⁶ The legal result is, once more in Shepherd's words, that the directors, from the shareholders point of view, are at once "their agent in the management of the business and their trustee in the holding of its assets."¹⁵⁷ This is, of course, only one of the many fiduciary relationships that abound in the corporate world.

These three types of fiduciary relationship are all based in control of property. There is a second group which are, in Shepherd's analysis, influence based. In the law of wills, at least in the United States, a fiduciary relationship has been recognized as existing between the testator and his prospective beneficiaries.¹⁵⁸

The last influence on the modern law of fiduciaries is the law of restitution. Restitution covers areas such as "inter vivos influence, inequality of bargaining power, unconscionable transactions, and the like."¹⁵⁹ Like the law of fiduciaries itself,

restitution is a mixture of varying influences from both law and equity. Its basis is "some concept of unjust enrichment."¹⁶⁰

Modern fiduciary law has built upon this base and has in the process become more complex. It is neither possible nor necessary to cover that complexity here. It is enough to note here that fiduciary relationships have been found in the law of local government,¹⁶¹ the armed forces,¹⁶² bankers,¹⁶³ and, of course, in the law relating to native people,¹⁶⁴ as well as many other areas too numerous to mention. It has even been suggested as supplying the basis for impeachment in the United States.¹⁶⁵

As can be seen by this cursory look at fiduciary law, it is a flexible and fertile field. Indeed, its very flexibility has been the cause of the reluctance to attempt definition.¹⁶⁶ Shepherd adds another reason for the difficulty in defining the term. He sees the law of fiduciaries as having a very large role to play in society. He comments:

The law of fiduciaries is the legal system's attempt to recognize the more blatant abuses of trust we place in each other.¹⁶⁷

This comment brings us full circle to Luhmann's definition of the role of trust in society.¹⁶⁸

Shepherd goes further. For him it is a very political doctrine. He notes its recent development, particularly in the control of the corporate form, paralleling the development of industrial society and comments:

We are now in the tail end of the corporate opportunity phase of fiduciary doctrines, and in the infancy of a new phase based on unconscionable transactions. Again, social influences, chiefly the development of a Post-Industrial Society with a strong social democratic component, have caused fiduciary law to expand into a new area.¹⁶⁹

For Shepherd, at least, it is a body of law looking for new fields to conquer. With Guerin Mr. Justice Dickson, as he then was, might just have provided one of those new fields.

iii The Connecting Principle: The Transfer of an Encumbered Power

Modern fiduciary law is most often thought of as having a number of categories. Sealy, for example, has four.¹⁷⁰ Shepherd has three traditional and a fourth catch-all category.¹⁷¹ Finn prefers not to create a list saying:

[I]t is meaningless to talk of fiduciary relationships as such. Once one looks to the rules and principles which actually have been evolved, it quickly becomes apparent that it is pointless to describe a person - or for that matter a power - as being fiduciary unless at the same time it is said for the purposes of which particular rules and principles that description is being used. The rules are everything. The description "fiduciary", nothing.¹⁷²

Finn prefers only to note that there are two basic types of fiduciary.

The first describes the situation where powers given by one are to be exercised for the benefit of another. The second describes "in a very general way, persons who are acting for, or on behalf of, or in the interests of, or with the confidence of, another."¹⁷³ On this scheme he imposes a description of the duties and standards of conduct required of many different fiduciary roles.

Those in the first group, for Finn, are under a duty to "act honestly in what they consider to be (another's) best interests."¹⁷⁴ The second must adhere to the standards laid down by equity for the trustee. These vary according to the duty owed.¹⁷⁵ He finds eight duties which might be owed by this second group of fiduciaries. The duties concern:

- 1: Undue influence.
- 2: The misuse of property held in a fiduciary capacity.
- 3: The misuse of information derived in confidence.
- 4: Purchases of property dealt with in a position of a confidential character.
- 5: Conflict of duty and interest.
- 6: Conflict of duty and duty.
- 7: Renewals of leases and purchases of reversions.
- 8: Inflicting actual harm on an "employer's" business.¹⁷⁶

Finn analyses each area noting what types of relationships will be held to which duty and to what standards. Finn's types, it is readily apparent, are defined, not by a relation to property, but by the fact that the fiduciary exercises power for another. However, his analysis, while it might be helpful in defining the duties of this sui generis fiduciary, is not as clearly supportive of the suggested theory as is Shepherd's.

Shepherd takes a different approach. Out of his history and a survey of the same modern fiduciary law as Finn, Shepherd develops a general theory for fiduciary relationships. The definition he uses as a base for his theory is a very useful one for my purposes.¹⁷⁷ He proposes this definition and explanation:

A fiduciary relationship exists whenever any person acquires a power of any type on condition that he also receive with it a duty to utilize that power in the best interests of another, and the recipient of that power uses that power. The essence of this theory of fiduciary relationships is that powers are a species of property, which can be beneficially owned by one person while being exercised by another person, who may be referred to as the legal owner of the power.¹⁷⁸

He calls his theory "the theory of the transfer of encumbered power."¹⁷⁹ While it seems rather unnecessary to describe a power as property, the support which this theory gives the fiduciary duty proposed above is clear. We have seen that the

power exercised by the Crown over the Indian nations is an encumbered one. Shepherd's theory supports describing the power as a fiduciary one.

Further support can be gleaned from two recent decisions of the Supreme Court of Canada. In Frame v. Smith,¹⁸⁰ Madame Justice Wilson, in dissent, laid out a description of the fiduciary obligation which has been adopted by the majority in the more recent Lac Minerals Ltd. v. International Corona Resources Ltd.¹⁸¹ Frame, beyond the discussion of the fiduciary relationship, is a family law case and has little significance to the field of native law. Wilson comments on the difficulty of defining the fiduciary relationship except by defining the conditions under which it arises. Having said this, Wilson J., lays out what for her constitutes a fiduciary obligation. She describes the conditions which give rise to a fiduciary obligation in this way:

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.¹⁸²

It is worthy of note that Wilson allows, in her second principle, that the fiduciary obligation protects more than just a property interest.¹⁸³ This could be extremely important for Native peoples. She adds, by way of illustration:

[T]he corporation's interest which is protected ... 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.¹⁸⁴

Wilson J., does not clarify this comment but it does leave one with the impression that the interests protected might be broad indeed.

The particular interest protected in Frame is the relationship between the non-custodial parent and the child. She notes:

It seems to me that the three underlying characteristics of relationships in which fiduciary duties are imposed are present in the relationship under review. The custodial parent has been placed as a result of the court's order in a position of power and authority over the children with the potential to prejudicially affect and indeed utterly destroy their relationship with the noncustodial parent through improper exercise of that power. There can be no doubt also that the requisite vulnerability is present and that in practical terms there is little that the noncustodial parent can do to restrain the custodial parent's improper exercise of authority or to obtain redress for it. The options open to an aggrieved noncustodial parent in the face of a campaign by a custodial parent to cut the noncustodial parent off from the child are exceedingly limited.¹⁸⁵

Madame Justice Wilson clearly advocates a concept of the fiduciary which is not required to be based in the protection of a property right.

Mr. Justice LaForest, in Lac Minerals, suggests that there are three types of fiduciary relationship. The first group are the relationships which are essentially fiduciary in nature. These include such relationships as the solicitor/client, trustee/beneficiary and director/corporation. It was these, LaForest suggests, to which Wilson was referring in Frame.¹⁸⁶ The second group consists of those relationships which are not essentially fiduciary but which become so. He comments: "[A] fiduciary obligation can arise as a matter of fact out of the specific circumstances of a relationship."¹⁸⁷ These first two are legitimate fiduciary relationships.

The third type, LaForest rejects. These he describes as cases where the

relationship is imposed "because of the view that certain remedies, deemed appropriate in the circumstances, would not [otherwise] be available".¹⁸⁸ In rejecting a remedial notion of fiduciary law, LaForest lends support to the notion that the Indian law fiduciary duty should be a principled and rights-based one. In accepting Madame Justice Wilson's description in Frame, he also allows that a non-proprietary relationship might give rise to a fiduciary relationship.

The duty in Guerin is clearly what LaForest would describe as an essentially fiduciary one. The more general relationship, being one of wardship, is also an essentially fiduciary one. Both would be, if we follow the reasoning of LaForest in Lac Minerals, duties for breach of which all appropriate equitable remedies would properly be available. Furthermore, in describing the essentials of the relationship in terms of those adopted by Wilson in Frame, LaForest also emphasises the importance of vulnerability and the unilateral exercise of power. Consequently, a broader fiduciary duty owed by the federal government could very easily fit within the parameters of both of these recent decisions. The factors emphasised in these two cases supports the adoption of Shepherd's transfer of encumbered power theory as descriptive of the fiduciary obligation owed by the Crown to the First Nations.

Some of the commentators on recent developments in fiduciary law also would appear to accept the possibility of a fiduciary obligation unrelated to property rights. Emond, for example, in his discussion of the Guerin decision, suggests that the obligation "need not attach to anything."¹⁸⁹ Finn, in a recent article, discusses some of the recent cases which extend fiduciary duties to protect non-proprietary

interests such as a name, and business goodwill. He speculates:

[I]f a relationship does give one party access to what both parties would reasonably acknowledge to be a thing of value in the circumstances, is there any justifiable reason for allowing the custodian to utilize it disloyally for his own profit and without being accountable therefor, simply because that "thing" does not fall within our conventional conceptions of property?¹⁹⁰

Waters also recognizes that Guerin may have opened doors to court supervision of Indian interests against not only the Crown but also the non-aboriginal population of Canada. He comments:

In the highly sensitive political environment of competing interests that now surrounds Indian assertions and aspirations, particularly with regard to land claims and the Indian desire for self-government, the courts are likely increasingly to find themselves called upon to replace the hesitations of a faltering political process and therefore to solve the disputes between these contending interests as well as determine the obligations of the Canadian taxpayers, through the instrumentality of the federal government, to the Indian peoples.¹⁹¹

Unfortunately, having said this, Waters, perhaps the leading expert on Canadian trusts law, fails to provide any advice on how the courts might or should do this. He presents only a series of questions which the courts are likely to be called upon to address.

Flannigan in his analysis of the business trust moots a control test for determining principal status.¹⁹² It is this theory to which Johnston refers for support for in her discussion of Guerin.¹⁹³ His argument is that when attempting to determine who in a business trust should be held to have principal status and its resulting liabilities and benefits, the courts should look to the locus of control rather than to the nominal form of the enterprise. His is, of course, a property centered test and so offers only limited support to the theory suggested here. Nevertheless,

in focusing on the importance of control in fiduciary relationships, his writings, as Johnston comments, can assist in understanding the duty arising in Indian law.

Ultimately however, it must be admitted that none of the commentators seem inclined to suggest how a non-proprietary fiduciary theory might be developed. Similarly, none have attempted to develop a broader theory for the Crown's obligation towards the Indian nations. Even Shepherd prefers to describe power as a form of property rather than to moot a theory unrelated to proprietary interests. This is unfortunate. It would appear that for the moment at least, it is the Supreme Court of Canada, notably Madame Justice Wilson, which has gone the furthest in asserting such a principle. We can take heart in that.

If at the heart of the Native law fiduciary obligation there is the assumption of power linked with a duty, then such a relationship might have existed since the beginnings of colonisation. Until 1982, the duty was largely unenforceable. With the passing of the Constitution Act, 1982, all that may have changed. The unlimited discretion existing at large under the obligation that I have called the wardship has, I suggest, been narrowed and has become justiciable. By enacting s. 35, I argue, the Canadian Crown has narrowed its discretion vis a vis the First Nations by requiring that aboriginal and treaty rights be respected. The wardship, once only a moral or political duty, has become a legal one. If we view Dickson's fiduciary duty in light of a power-based theory, it reveals, it is suggested, a minimal standard by which to check the exercise of the legislative power of the Crown.

d Summary

I have suggested here a fiduciary duty consisting of five elements: A recognized legal interest, a triggering event, a legislative scheme which invites the supervision of the courts, a purpose, and a connecting principle. Guerin recognized all these elements in relation to reserve lands held under the Indian Act. I have suggested that the history of Indian/Crown relations coupled with the legislative scheme under which the Indians are governed, serve to both broaden the duty and to advance the date of its creation to the date of either contact or discovery.

The legal interest recognized by the Colonial law is the pre-contact sovereignty of the Indian nations. The triggering event would be the assertion of sovereignty by the colonial nation and the duty which came with the denial of Indian sovereignty. The law of fiduciaries can provide a legal principle uniting the elements of the theory, and the aboriginal rights sections of the Constitution Act, 1982 serve as a legislative scheme which invites the supervision of the courts. I have suggested that a property interest is not necessary for a fiduciary relationship. It only remains now to discuss these provisions in order to ascertain what the justiciable scope of the wardship has become. Under the Indian Act only limited aspects were enforceable through the courts. In the next chapter I shall look at the aboriginal and treaty rights provisions of the Constitution Act, 1982 and suggest what a broader fiduciary obligation might mean for Constitutional review.

NOTES

1. See R. v. Nowegijick, [1983] 1 S.C.R. 29, 144 D.L.R. (3d) 193, [1983] 2 C.N.L.R. 89; and Simon v. The Queen, [1985] 2 S.C.R. 387, 62 N.R. 366, [1986] 1 C.N.L.R. 153.
2. See his opinion in Jack v. The Queen, [1980] S.C.R. 294, [1979] 2 C.N.L.R. 25, which appears to be the basis of the decision in Sparrow v. The Queen, [1987] 1 C.N.L.R. 145 (B.C.C.A.).
3. Memorandum of Law presented by the Union of British Columbia Indian Chiefs, the Indian Association of Alberta, and the Four Nations Confederacy at the time of the patriation of the Constitution. Cited in Canada, Report of the Special Parliamentary Committee on Indian Self-Government: Indian Self-Government in Canada (Ottawa: Queen's Printer, 1983) (Chair: K. Penner), 119.
4. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831).
5. Worcester v. Georgia, 31 U.S. (6 Pet.) 535, 8 L.Ed. 483 (1832).
6. Memorandum of the Associate Solicitor for Indian Affairs, "The Secretary of the Interior's Trust Responsibility for the Indians." (U.S.A., no date, not published), 15. I am grateful to Professor N.K.Zlotkin for bringing this document to my attention.
7. B.Barber, The Logic and Limits of Trust (New Brunswick, New Jersey: Rutgers University Press, 1983), 1.
8. ibid., c. 1.
9. In re A Solicitor, [1952] Ch. 328, 332
10. P.H.Pettitt, Equity and the Law of Trusts, 5th ed. (London: Butterworths, 1984), 22.
11. Guerin v. The Queen, [1984] 2 S.C.R. 335, 13 D.L.R.(4th) 321, 55 N.R. 161, [1984] 6 W.W.R. 481, 501, 59 B.C.L.R. 301, [1985] 1 C.N.L.R. 120. All cites are to W.W.R. And see supra, c. 1, part a.iii.
12. N.Luhmann, Trust and Power trans. H. Davis, J. Raffan, K. Rooney (Chichester, New York: J.Wiley and Sons, 1979), 4.

13. supra note 7, 9. The relevance of this to the Native law trust is apparent in the quote at the beginning of this chapter, supra note 3 and the accompanying text.
14. ibid., 165.
15. ibid., 14.
16. ibid., 15.
17. see Locke, infra notes 56-63 and the text accompanying.
18. supra note 7, 20.
19. Aristotle The Nichomachean Ethics trans. Sir D. Ross, (London: Oxford University Press, 1961), 133. (Book V, 10, 1137^b8).
20. supra note 10, 22.
21. Two major implications of the trust are the tying up of lands, a valuable form of wealth well beyond the life of the settlor, and the possibilities of tax avoidance.
22. supra note 10, 36.
23. ibid., 37/8.
24. ibid., 38-47.
25. Knight v. Knight (1840), 3 Beav. 148, 49 E.R. 58 (Ch.).
26. supra note 10, 38.
27. ibid., 39.
28. See, for example, 37 Can.Abr.(2nd) 941-943.
29. See, for example, 37 Can.Abr.(2nd) 944-945.
30. supra c. 1, part a.
31. Indian Act, R.S.C. 1985, c. I-5.
32. Trusts for charitable purposes are in a class of their own. Charitable trusts do not necessarily fail if their objects are not ascertainable. Pettitt supra note 10, 201, says of the charitable trust: Where, ... ,there is a clear intention to give property for charitable purposes the gift will not fail on (the ground that

there is no certainty of objects.) Charity is a word with technical legal meaning, and accordingly if trustees are given a discretion to distribute property amongst charitable objects, the court can determine whether any object chosen is charitable or not, and ... a procedure is available for selecting the objects of a gift to charity where the settlor or testator either makes no provisions for the purpose or the provisions are for any reason ineffective. The certainty required is certainty to devote the property to charitable purposes."

Generally speaking these trusts would appear not to be relevant to the field of native law. There is Corinthe v. The Seminary of St. Sulpice, [1912] A.C. 872 (J.C.P.C), where a reserve was set up under what the courts have speculated might have met the requirements of a charitable trust. That point is now academic since the government purchased the reserve in 1945. (See R.H. Bartlett Indian Reserves in Quebec (Saskatoon: Native Law Centre, University of Saskatchewan, 1984), 38.) Indian moneys, which have been realized from the proceeds of surrenders, are clearly not charitable trusts.

33. See, for example, Lord Evershed M.R. in Re Endicott, [1960] Ch. 232, 246, [1959] 3 All E.R. 562, 568: "No principle perhaps has greater sanction behind it than the general proposition that a trust by English law, not being a charitable trust, in order to be effective, must have ascertained or ascertainable beneficiaries."
34. It seems possible that Bill C-31 might precipitate some problems where non-member status descendants of a particular band might assert a claim to a portion of compensation resulting from violations of band rights dating from a time when the claimants' antecedents were members of the band. Compare, for example, Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 97 Sup.Ct. 911, 51 L.Ed. 2d. 173 (1977), supra c. 2, part c.iii, and the accompanying text.
35. This is precisely the issue presently before the courts in Dumont et al. v. Canada, [1988] 3 C.N.L.R. 39 (Man C.A.), presently on appeal to the Supreme Court of Canada.
36. Glanville Williams, "The Three Certainties" (1940) 4 M.L.R. 20.
37. 48 Halsbury's (4th) 505.
38. St. Catherines Milling and Lumber Co. v. The Queen (1888), 14 A.C. 46, 58 L.J.P.C. 54, 60 L.T. 197, 5 T.L.R., 4 Cart. 107, 2 C.N.L.C. 541. All cites are to C.N.L.C.
39. Smith v. The Queen, [1983] 1 S.C.R. 554, 147 D.L.R.(3d) 237, 249/250, [1983] 3 C.N.L.R. 161. All cites are to D.L.R.

40. supra note 10, 40.
41. supra c. 1, part a.
42. Worcester v. Georgia, supra note 5. And see D. Sanders, "The Friendly Care and Directing Hand of the Government: A Study of Government Trusteeship on Indians in Canada" (February 22, 1973) (Unpublished), 52.
43. Cherokee Nation v. Georgia, supra note 4.
44. The other difficulties which could be placed in the way of recovery are substantial. For example, the proof of fraud necessary to avoid the limitations problems is in itself not easy.
45. supra note 20, and the accompanying text.
46. supra note 10, 48ff.
47. ibid., 50.
48. ibid., 49.
49. Henry et al. v. The King (1905), 9 Ex. C.R. 417, 3 C.N.L.C. 89. All cites are to C.N.L.C. And see supra c. 3, notes 215-218, and the accompanying text.
50. supra note 20, and the text accompanying.
51. Dominion of Canada v. Province of Ontario, [1910] A.C. 637, 3 C.N.L.C. 353 (J.C.P.C.). See the discussion supra c. 3, notes 210-214, and the accompanying text.
52. Kruger et al. v. The Queen (1985), 17 D.L.R. (4th) 591, [1985] 3 C.N.L.R. 15 (F.C.A.). Apsassin et al. v. Canada, [1988] 1 C.N.L.R. 73 (F.C.A.). See the discussion infra c. 5, part a.iii.b. The power to take lands is written into the numbered treaties and into the Indian Act, s. 35.
53. St. Ann's Shooting and Fishing Club v. The King, [1950] S.C.R. 211, 232.
54. LeDain J., in Guerin et al., [1983] 2 F.C. 656, 143 D.L.R. (3d) 416, 45 N.R. 181, [1983] 2 W.W.R. 686, 13 E.T.R. 245, [1983] 1 C.N.L.R. 20, 21 (C.A.), described the effect of s. 18 of the Indian Act as embodying only political obligations, supra c.1 part a. See also the discussion of the Crown as trustee infra, c. 3, part d.i.
55. 48 Halsbury's (4th) 514.

56. John Locke, Treatise on Civil Government, C.L. Sherman ed. (New York: Irvington Publishers, 1979).
57. ibid., 89-93.
58. ibid., 104.
59. ibid., 162.
60. I.C. Rand, "Some Aspects of Canadian Constitutionalism" (1969) 38 C.B.R. 135, 145.
61. see, for example, Francis v. The Queen, [1956] S.C.R. 618, 3 D.L.R. (2d) 641. See particularly D.L.R., 643.
62. The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, [1982] 2 All E.R. 118, [1981] 4 C.N.L.R. 86 (C.A.). And see: L.C. Green "Legal Significance of Treaties Affecting Canada's Indians" (1972) 1 Anglo-American L.Rev. 119. In this essay, Green suggests that the parties intended the treaties to have legal effects, see p. 132. See also the discussion of Apssassin v. The Queen, supra note 52, infra c. 5, part a.iii.b.
63. See for example: Omeasoo v. Canada, [1989] 1 C.N.L.R. 110 (F.C.T.D.), registration of Indians, Bear v. Canada, 1 C.N.L.R. 45 (F.C.T.D.), review of Band Council elections. See also, Campbell v. Elliot, [1988] 4 C.N.L.R. 45 (F.C.T.D.), allotment of reserve lands.
64. Town Investments Ltd v. Department of the Environment, [1977] 1 All E.R. 813, 819 (H.L.).
65. For a useful discussion of these and related cases, see C. Harlow & R. Rawlings, Law and Administration (London: Weidenfield and Nicolson, 1984).
66. Roberts v. Hopwood [1925] A.C. 578 (H.L.).
67. ibid., 595.
68. A.G. ex rel. County Borough of Tynemouth v. Guardians of the Poor Law of Tynemouth, [1930] 1 Ch. 616.
69. ibid., 624.
70. Prescott v. Birmingham Corporation, [1954] 3 All E.R. 698 (C.A.).
71. ibid., 706.
72. ibid., 707.

73. Bromley v. Greater London Council, [1982] 1 All E.R. 129 (H.L.).
74. Transport (London) Act 1969, (U.K.), 1969, c. 35, s. 1.
75. ibid., s.5.
76. supra note 73, 137 (C.A.), 157 (H.L.).
77. M. Loughlin Local Government in the Modern State (London: Sweet and Maxwell, 1986), 70.
78. supra note 73, 147.
79. supra note 77, 70/71.
80. ibid., 166.
81. M. Loughlin Local Government, the Law and the Constitution (London: Local Government Legal Society Trust, 1983), 46/47.
82. See his discussion of Lord Diplock's decision at supra note 77, 71-75.
83. supra note 81, 114/5.
84. Pickwell v. Camden London Borough Council, [1983] All E.R. 602 (Q.B.D.).
85. ibid., 625.
86. N. Branson, Poplarism, 1919-1925: George Lansbury and the Councillors' Revolt (London: Lawrence & Wishart, 1979), 223.
87. City of Toronto v. Bowes (1858), 11 Moo. 463, 14 All E.R. 770, 790/1 (P.C.).
88. McIlreith v. Hart (1907), 39 S.C.R. 657.
89. ibid., 670.
90. See: Norfolk v. Roberts (1914), 50 S.C.R. 283. In this case, two judges held that the ratepayers had no standing to impugn the council's action. Three judges allowed the ratepayers standing but held that the corporation acted within its allowed discretion in not demanding immediate payment of one property owner's arrears. And see: Gallagher v. Armstrong (1911), 3 Alta. L. R. 443 (S.C.) where Stuart J., held obiter that there could be "no cause against the corporation" because the corporation "is merely the body of inhabitants in their corporate form".(452/3) There was still, of course, a possible action against the councillors.

91. Hawreluk v. City of Edmonton, [1976] 1 S.C.R. 387.
92. M.V. Ellis Fiduciary Duties in Canada (Don Mills: DeBoo Publishers Ltd., 1988), 19-3.
93. J.C. Shepherd, The Law of Fiduciaries (Toronto: Carswell, 1981), 27.
94. P.D. Finn, Fiduciary Obligations (Sydney: The Law Book Co., 1979), 14.
95. Re Sharp and McGregor (1988), 64 O.R. (2d) 449 (Div.Ct.). This case concerned a councillor appearing as advocate before a committee of which he was not a member. The court held that there was no nexus between the councillor and the committee and therefore no breach. The fact that the penalties were severe, caused the court to construe the statute strictly.
96. supra note 92, 19-14.
97. This is in part the basis of Dickson J's. opinion in Guerin. He compares his reasoning to the "doctrine of promissory or equitable estoppel".(505) The Crown was liable because the Band relied upon a promise made to it, and changed its position in reliance on that promise.
98. supra note 92, 19-1.
99. supra note 53, 232.
100. Per Cardozo J., in Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (1917), citing Scott J., in Mc Call Co. v. Wright, 117 N.Y. Supp. 775; Cardozo J., in Moran v. Standard Oil Co., 105 N.E. 217.
101. supra note 4, 17. And see the discussion supra c.2, part c.i.
102. For the history of guardianship see: Sir W. Holdsworth, A History of English Law (London: Methuen and Co. Ltd., Sweet and Maxwell, 1966), III, 61-66. Cited hereinafter as III Holdsworth, etc.
103. N.V. Lowe & R.A.H. White, Wards of Court (London: Butterworths, 1978), 1.
104. supra note 102, 61/2.
105. An act for taking away the courts of wards and liveries, and tenures in capite, etc., 12 Car. II, c. 24, preamble.
106. ibid., ss. VIII, IX provide the parameters of guardianship. See particularly s. IX which provides that the profits of the land etc. are for the use of the ward.

107. supra note 103, 3. Parens Patriae, it might be noted, is one of the prerogative rights of the Crown. VI Holdsworth 648.
108. See VI Holdsworth 648-650 for the development.
109. The Queen v. Gyngall, [1893] 2 Q.B. 232, 239 (C.A.).
110. VI Holdsworth 649/650.
111. Great strides were made in this area in the latter part of the seventeenth century. ibid., 650-652.
112. C. F. Wilkinson American Indians, Time, and the Law (New Haven and London: Yale University Press, 1987), 31.
113. W.E. Washburn "The Moral and Legal Justification for Dispossessing the Indians" in J.M. Smith ed. Seventeenth-Century America: Essays in Colonial History (Chapel Hill: University of North Carolina Press, 1959), 16-25.
114. J. Goebel Jr. The Struggle for the Falkland Islands: A Study in Legal and Diplomatic Relations (Newhaven: Yale University Press, 1927), c. 2.
115. A. Snow The Question of Aborigines in the Law and Practice of Nations 1919 ed. (Northbrook, Illinois: Metro Books, 1972), c. 2.
116. ibid., 22.
117. L.C. Green, "North America's Indians and the Trusteeship Concept" (1975) 4 Anglo-Am. L. Rev. 137, 155.
118. COVENANT OF THE LEAGUE OF NATIONS, Preamble.
119. supra note 53.
120. supra note 118, art. 22.
121. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 4, 31.
122. Michla Pomerance, Self-Determination in Law and Practice (The Hague/Boston/London: Martinus Nijhoff Publishers, 1982), 69.
123. U.N.CHARTER, ch.XII.
124. ibid., art. 77.

125. ibid., art. 79.
126. ibid., art. 76.
127. D.P. O'Connell, International Law, 5th ed. (London: Stevens & Sons, 1970), vol. 1, 337.
128. G. Thullen, Problems of the Trusteeship System (Genève: Librairie Proz, 1964), 120.
129. supra note 117, 162.
130. supra note 115, 69.
131. ibid., 72.
132. See J.V. Williams, "Te Mans Motuhaka Me Te Iwi Maori: Indigenoussness and Self Determination" (L.L.M. thesis, University of British Columbia, 1989) [unpublished].
133. supra note 12, 10.
134. ibid., 24-31.
135. J.L.Taylor, "Canada's Northwest Indian Policy" in R. Price ed., The Spirit of Alberta Indian Treaties (Montreal: Institute for Research on Public Policy, 1979), 6.
136. supra note 11, 494.
137. ibid., 495.
138. P.A. Cumming and N.H. Mickenberg, Native Rights in Canada, 2nd ed. (Toronto: General Publishing Co., 1972) at 15 notes its significance in Massachusetts, Connecticut and Rhode Island.
139. supra note 11, 496.
140. ibid.
141. ibid., 501.
142. supra note 31.
143. See the discussion in Treaties and Historical Research Centre, P.R.E. Group, Indian and Northern Affairs The Historical Development of the Indian Act

- (Ottawa: Department of Indian Affairs and Northern Development, 1978), c. 4. Cited hereinafter as P.R.E. Group.
144. The Band claimed damages of between 45 and 71 million dollars, depending on the method of calculation used.
 145. State governments may regulate treaty guaranteed Indian food fishing rights only to the extent necessary to preserve the stocks. The Indian food fishery must also receive priority over commercial and sport fishing. See U.S. v. Washington, 384 F.Supp. 312 (1974).
 146. See for example, Black's Law Dictionary, 5th ed. (St.Paul: Wests Publishing, 1975): The term ... means (as a noun) a person holding the character of a trustee, or a character analogous to a trustee. ... As an adjective it means of the nature of a trust. See also Halsbury's 4th 799-803.
 147. L.S. Sealy, "Fiduciary Relationships" (1962) Camb. L. J. 69, 69-72. See also Sealy, "Some Principles of Fiduciary Obligation" (1963) Camb. L. J. 119.
 148. The parallel to the Indian/Government relationship is apparent.
 149. supra note 94, 1.
 150. supra note 93. The discussion here owes a great deal to Shepherd whose insightful and challenging analysis is probably the best of the recent attempts. Certainly it best suits my purposes here. The task here, after all, is to come to terms with the characterizing as fiduciary a relationship which in many ways is quite unlike any other. Shepherd, who attempts to develop a general theory of fiduciary relationships, is of great assistance in this task. Finn's analysis, while masterful, is devoted to describing the various relationships which go to make up the field of fiduciaries. Consequently, one has to be rather selective in one's use of it.
 151. ibid., 12.
 152. This point is of course the cause of the differing bases of the decision at the Supreme Court of Canada.
 153. supra note 93, 13.
 154. ibid., 14.
 155. ibid., 15.
 156. This is, of course, an oversimplification but suffices for my purposes here.

157. supra note 93, 16.
158. ibid., 17.
159. ibid., 18.
160. ibid.
161. Hawreluk v. City of Edmonton (1975), 54 D.L.R. (3d) 45 (S.C.C.).
162. Reading v. A.G., [1951] 1 All E.R. 617 (H.L.).
163. Lloyds Bank v. Bundy, [1974] 3 All E.R. 757 (C.A.).
164. Guerin, supra note 11.
165. E.M. Rogers and S.B. Young, "Public Office as Public Trust" (1974) 63 Geo. L. J. 1025.
166. Shepherd, supra note 93, 3 and the authorities cited there.
167. ibid., preface, v.
168. supra note 12 and the accompanying text.
169. supra note 93, 20.
170. supra note 147, (1962), 74-79.
171. supra note 93, 21/2.
172. supra note 94, 1.
173. ibid., 2 and Part I, 8-77.
174. ibid., 3 and Part II, 78-269.
175. ibid., 4.
176. ibid., cc. 15-24.
177. Madame Justice Wilson rejects Shepherd's theory as a basis for all fiduciary obligations. That, of course, does not mean that she would reject it in its entirety. See Frame v. Smith, [1987] 2 S.C.R. 790, 78 N.R. 40, [1988] 1 C.N.L.R. 152, and the discussion of that case infra, notes 180-185 and the accompanying text.

178. supra note 93, 93.
179. ibid., 96.
180. Frame v. Smith, [1987] 2 S.C.R. 790, 78 N.R. 40, [1988] 1 C.N.L.R. 152 (S.C.C.). All cites are to N.R. Majority opinion by LaForest J., concurred in by Dickson C.J., Beetz, McIntyre, Lamer, JJ.; the lone dissenter was Madame Justice Wilson whose opinion starts at 56.
181. Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, 101 N.R. 239. All cites are to S.C.R.
182. supra note 180, 78/79. Wilson comments that this is substantial agreement with the recent description of the Australian High Court in Hospital Products Ltd. v. United States Surgical Corp. (1984), 55 A.L.R. 417 (H.C.).
183. Compare Shepherd, supra note 93, who suggests that the fiduciary obligation protects property interests and then is forced to define power as property so that certain relationships might be considered fiduciary. Especially at supra note 178 and the accompanying text.
184. supra note 180, 79.
185. ibid., 83/84.
186. supra note 181, 646.
187. ibid., 648.
188. ibid., 649. LaForest J. seems to be criticizing the opinion of Wilson J. in Frame here. In that case Wilson found that the remedies available to the plaintiff under statute inadequate. (At p. 84-86.) The point is not important to the issue here.
189. D.P. Emond, "Case Comment: Guerin v. R., (1986) 20 E.T.R. 61, 70. Ultimately, it must be admitted, Emond does tie the obligation to the surrendered interest in reserve land.
190. P.D. Finn, "The Fiduciary Principle" in T.G. Youdan ed., Equity, Fiduciaries and Trusts, (Toronto: Carswell, 1989), 1 at p. 37.
191. D.W.M. Waters, "New Directions in the Employment of Equitable Doctrines: The Canadian Experience" in T.G. Youdan ed., Equity, Fiduciaries and Trusts, (Toronto: Carswell, 1989), 411, at p. 421.

192. R.D.M. Flannigan, "The Control test of Principal Status Applied to Business Trusts" (1986) 8 Estates and Trusts Q. 37 & 97. And see, R.D.M. Flannigan, ""Control" and the Control Basis of Legal Relationships and Business Organizations" (1989) 53 Sask. L. Rev. 1.
193. See supra c. 1, part b.

CHAPTER 5

A FIDUCIARY THEORY FOR CONSTITUTIONAL REVIEW

I have suggested that the fiduciary principle enunciated by Chief Justice Dickson in Guerin supports a general theory applicable to the constitutional rights of all aboriginal peoples.¹ Its scope and content will in all probability vary according to the legal and factual history of any particular First Nation. It is suggested that the concept results in a restriction on the legislative power of the Crown which requires it to consider the aboriginal interests when drafting and passing legislation. I suggest that only such derogation or abrogation of aboriginal or treaty rights as can be justified by the Crown should be able to pass constitutional review. The courts, I suggest, under the fiduciary principle would be required to interpret legislation affecting aboriginal rights by applying a presumption that the government intends to respect those rights. Where derogation or abrogation can be justified, I suggest that the courts should interpret the legislation so as to minimize the deleterious effects. Aboriginal and treaty rights would, of course, remain susceptible to alteration through constitutional amendment.

To close the chapter, I apply the theory developed in the thesis to three current problems in Indian law.

a The Aboriginal and Treaty Rights Provisions of the new Constitution

For the purposes of the theory advanced here, I have suggested that the aboriginal rights provisions of the Constitution Act, 1982 constitute the legislative scheme which invites the scrutiny of the courts. This raises the question as to what interests are protected by these provisions. The discussion of the wardship suggests that the complete range of the Crown's legislative powers are charged with a duty to the First Nations. The first consideration here is to determine which aspects of the wardship have been rendered justiciable through the aboriginal and treaty rights provisions of the new Constitution. Those aspects which are not within s. 35 must remain part of the unenforceable moral and political wardship.

Part II of the Constitution Act, 1982² is devoted entirely to the rights of the aboriginal peoples of Canada. It contains only four sections. The most important of these provisions is s. 35(1) which provides:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Part II of the Constitution Act, 1982, contains only aboriginal rights provisions.

Part I of the Constitution Act, 1982, contains the Canadian Charter of Rights and Freedoms and delineates certain rights held by all citizens against the government. The aboriginal rights provisions are protected from the effects of the Charter by s. 25. This important provision provides:

25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any treaty or aboriginal or other rights or freedoms that pertain to the aboriginal peoples of Canada ...

This is not the full extent of the provisions, but it is enough for the present. We

shall look at the complete provisions below. The meaning of these provisions is not yet clear. There has already been much learned discussion of the import of these provisions and, since the scope of the constitutional protection is only incidental to the intent of this thesis, I shall not deal exhaustively with them. It is necessary, however, to outline the understanding of them which informs this thesis.

In Kruger and Manuel,³ Mr. Justice Dickson, as he then was, said:

Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue, it should be so considered on the facts pertinent to that Band and to the that land, and not on any global basis.⁴

This statement should not be interpreted too simply. It seems unlikely that the learned Justice was suggesting that the law relating to aboriginal title could vary from region to region in the Nation. It is not the legal doctrine of aboriginal title which must be considered on "pertinent" facts: it is an aboriginal rights claim which must be confined to only pertinent facts. The nature, scope and effect of aboriginal rights must have a common basis in law and must, at some point in Canadian history, have been the same, from a theoretical standpoint, for all aboriginal peoples. While it is possible that the aboriginal title of a particular First Nation may differ in its incidents, either in content or in the method of extinguishment from that of another First Nation, it would appear that at root, the law requiring the recognition of the rights themselves must rest on the same rules of law for them all. The legal basis of the Indian and the Inuit duty, since for constitutional purposes they are the same,⁵ must also be similar.

i Section 35: A Purposive Analysis

The Supreme Court of Canada has not yet spoken on the policy behind the constitutional entrenchment of aboriginal rights. We must, then, start with an analysis of the document itself since, as section 52(1) states:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

Clearly it will be necessary in developing a theory to determine the limits of legislative power, to have an understanding of the policy which underlies the s. 35 rights. To fully understand the fiduciary obligation we must know the context in which it lives.

The interpretation of a constitution is not the same process as reviewing statutory provisions. In Hunter v. Southam,⁶ Chief Justice Dickson, speaking for the Court, warned:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new, social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one".⁷

Aboriginal rights, although not within the Charter, do have their own Constitutional status. Part II is, one might say, the aboriginal peoples' Charter. Arguably, the

existence of s.35 in the Constitution Act, 1982 requires that aboriginal rights too must meet with an interpretation which will allow "growth and development over time to meet new social, political and historical realities". Charter jurisprudence, then, is useful to an understanding of s. 35 rights.

The court has taken a "purposive approach" to the interpretation of the Charter. In R. v. Big M Drug Mart,⁸ Dickson J., as he then was, said:

The meaning of a right or freedom guaranteed by the Charter [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it was meant to protect.

In my view the analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought in reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for the individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must, therefore, ... be placed in its proper linguistic, philosophic and historical contexts.⁹

In that case the court discussed various laws from Tudor times to the present in order to interpret the purpose of s. 2(a) of the Charter. The same practice is clearly permissible with the interpretation of aboriginal rights.

In Re Section 94(2) of the Motor Vehicle Act.(B.C.),¹⁰ Lamer J., speaking for the Court on this issue, said of the process of Charter interpretation:

I have in this judgment taken the purposive analysis in accordance with the method established by this Court in R. v. Big M Drug Mart, (*supra*). Accordingly, the point of departure has been a consideration of the general objectives of the Charter in light of the general principles of Charter interpretation. ... This was followed by a detailed analysis of the language

and structure of the section as well as its immediate context within the Charter.¹¹

Assuming it to be proper to adapt this reasoning for our purposes, the interpretation of s. 35 is best commenced by seeking the general objectives of Part II of the Constitution Act, 1982. The next step would be to look at the language of s. 35 in the context of the Constitution Act, 1982 itself. Section 25 will require us to review the relationship between the Charter and Part II. It would seem proper to utilise such an approach to the interpretation of s. 35 rights.

ii The Purpose of Entrenchment of Aboriginal and Treaty Rights.

I suggest here that the purpose of Part II of the Constitution is to assure the Indian Nations some degree of separateness rather like that which Wilkinson describes in relation to the United States Indians. Section 35 rights are constitutional rights and s.25 evidences that they do to some extent override the Charter rights and freedoms. The relationship of aboriginal and treaty rights to Charter rights, which is to a large degree the relationship of s. 25 to s. 35, is the major difficulty in the interpretation of the aboriginal and treaty rights provisions of the new Constitution. I suggest here that, if we utilise an approach similar to that applied to the Charter, we shall be led to conclude that s. 35 is designed to protect some degree of self-determination for the aboriginal peoples.

Following Big M Drug Mart and Reference Re Motor Vehicles Act, I shall look first at the general objectives of the aboriginal rights provisions within the Constitution and then follow with an analysis of the specific provisions of ss. 25 and

35. It is suggested that both the overall scheme of the Constitution Act, 1982 as well as the analysis of the provisions, lend support to the view of Wilkinson expressed above, that the aboriginal peoples are intended to retain some separateness from non-Indian society and values.

a The General Objectives

The Constitution Act, 1982 is separated into seven parts. Part VI is of no significance since it consists of amendments to the Constitution Act, 1867. Part I, of course, is the Canadian Charter of Rights and Freedoms. Part II consists only of sections 35 and 35.1. Part III details a commitment to promoting equality across the nation and to the principle of equalization payments. Part IV, which consists of two sections obligating the governments of Canada to a series of constitutional conferences intended, *inter alia*, to identify and define aboriginal rights. Part V contains the amending formula. Part VII contains the general housekeeping provisions. The major provisions of this part are a declaration that the Constitution of Canada is the supreme law of Canada and that the English and French versions are equally authoritative.

What is striking about the general scheme of the instrument, given our focus on the aboriginal rights section, is that it is really only in parts I and II that the focus is on substantive rights. It might be argued that the amending formulae and some of the other provisions, for example the obligation to hold constitutional conferences or the protection of equal status for the French and English versions, are in fact

rights. However, it is suggested that they are much more procedural or interpretative provisions rather than substantive ones. Part I, the Charter outlines freedoms of the individual, including aboriginal persons, against the state. Part II, the section 35 rights, states the existence of additional, as yet undefined rights of the aboriginal peoples against the state. Both of these parts, in that they consist of substantive rights restricting the power of the Crown, are prima facie of similar status.

This may seem a rather bold assertion. The Charter is after all some 34 sections in length whereas Part II contains only two sections which consist of only one substantive provision, three interpretative provisions and a commitment to consult the aboriginal peoples before amending certain constitutional provisions. However, the simplicity of the part is deceptive. The constitutional conferences required by Part IV were to have fleshed out the parameters of s.35. Their purpose was to identify and define the rights of the aboriginal peoples "to be included in the Constitution of Canada".¹² Had the conferences been successful, it is likely that Part II of the Constitution would have become considerably more complex.¹³ And indeed, it may yet become so. It is not necessary here, nor is it possible, to examine the possible range of topics which might eventually find their way into s.35, but since the concept of self-government was agreed to by all the First Ministers, it can be imagined that the range of possible topics is wide indeed. It is not, therefore, absurd to suggest that Part II has an importance at least on a par with the Charter contained in Part I.

b The Relation of s. 25 and s. 35

Reviewing the interplay of ss. 25 and 35 supports this suggestion. Section 35, of course is the substantive section. Section 25 is a saving section. It reads in its entirety:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights that now exist by way of land claims agreements or may be so acquired.¹⁴

It does not of itself award any rights.¹⁵ The fact that it is found in the general section of the Charter supports such an argument.

The purpose of s. 25 is generally agreed to be to protect the aboriginal rights from the effects of the Charter.¹⁶ The implication here, is that aboriginal peoples possess, and, since they were consulted in the framing process, deserve a different set of values from those to which the rest of Canadians adhere. This is not to say that the Charter does not apply to Native persons: clearly where a s. 35 right is not involved, aboriginal persons can take advantage of Charter rights against the government. And even where s. 35 rights are involved, Charter rights might be invoked as long as they do not contravene the s. 35 rights. Their position is enhanced, not restricted. Part II is not an entrenchment of a form of apartheid.

The purpose would appear to be to put those rights which an aboriginal person has as a result of aboriginality, above the rights which are possessed as a

result of Canadian citizenship. The preamble of the Charter states that "Canada is founded upon principles that recognize the supremacy of God and the rule of law." These then are the values which underlie the Charter provisions. This preamble has no effect on Part II and its protection of aboriginal and treaty rights. This, arguably at least, is a recognition that Native society may be governed by a different set of values than is the dominant society. It is a recognition of separateness.

Furthermore, the authors seem to be unanimous that s. 1 which limits the application of the Charter to those rights demonstrably justified in a free and democratic society, cannot restrict the effect of s. 25 since the rights s. 25 protects are not Charter rights. Section 1 confines its operation to Charter rights and freedoms. In addition s. 25 explicitly protects certain "other rights" from the effects of the Charter. This would appear to include rights originating in legislation such as the Indian Act.¹⁷ Both of these facts further support the contention that s. 35 rights are of equal status to Charter rights. They are, then, powerful rights designed to allow the aboriginal peoples to preserve at least some aspects of their aboriginality.

Support for the special status of s. 35 rights over the Charter can be gleaned from the case law. As we have seen, the conditions under which the aboriginal peoples became members of the settler society, and therefore members of the Canadian society, are unique. Such aboriginal rights as may exist do so in part because of the manner in which the aboriginal peoples were colonized. They are pre-existing rights which have persisted and which still persist. The trust obligation,

which is I suggest is central to those rights, in a sense represents the basis of the understanding upon which the aboriginal peoples entered confederation. It is possible, looking at them in that sense, to analogize those rights to the status of certain Constitution Act, 1867 provisions for the founding provinces.

In Reference re Bill C 30, An Act to amend the Education Act (Ont.),¹⁸ the Court held that the right enshrined in the Constitution Act, 1867, s.93, which protects Ontario's legislative rights in relation to Catholic education, takes precedence over the provisions of the Charter. Speaking for the majority, Madame Justice Wilson commented:

It was never intended, in my opinion, that the Charter could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise.¹⁹

The Ontario Court of Appeal had called s. 93 as a "small bill of rights".²⁰ The right to discriminate in the field of education on the basis of religious affiliation is, in effect, fundamental to Confederation. In effect it allows the provincial legislature to pass laws which would otherwise be contrary to the Charter. Aboriginal and treaty rights too, since they predate both the 1867 and 1982 Constitutions, should be considered fundamental, and in a similar way, and should take precedence should they clash with legislated or even Charter rights.

This does not mean that they would be cast in stone. Constitutional rights, as with all legal rights, must always adjust their scope to permit others to exercise their own rights. Consequently, it must be assumed that the s. 35 rights of an aboriginal person might be adjusted when they come into conflict with the Charter

rights of another. And, of course the opposite would hold true. The first point has been made in a recent decision from the Ontario Court of Appeal.

In R. v. Agawa,²¹ Mr. Justice Blair, speaking for the Court, said:

Indian treaty rights are like other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves the balancing with the interests and values involved in the rights of others. This is recognized in s. 1 of the Canadian Charter of Rights and Freedoms which provides that limitation of Charter rights must be justified as reasonable in a free and democratic society. In the United States the rights proclaimed by the Bill of Rights are not qualified by a provision similar to section 1 of the Charter, yet they have been subjected, nonetheless, to reasonable limitation by judicial decisions.²²

The Court is not suggesting that the Charter rights are supreme over the s.35 rights, only that they will not be overruled by them.²³ Where a conflict exists, a balancing must take place. Unfortunately, he offers no principled basis for that balancing.

Let us summarize the above discussion. The Part II rights are both equal to, and in another sense superior to, the Charter rights of Part I. For the aboriginal person, the s. 35 rights can override Charter rights. Therefore, when they clash, it is the s. 35 right which would take precedence. In this sense, the s. 35 rights are superior to the Charter rights. However, should a s. 35 right clash with a Charter right of a non-aboriginal person, then a balancing must take place. In this sense they are equal. The theory presented here is intended to apply when the s. 35 rights are in opposition to the rights of non-aboriginal persons or when the Crown purports to act in manner contrary to an aboriginal or treaty right.

c The Purpose of s. 35

We are not here engaged in a determination of the content of s. 35. The issue examined here is the policy which underlies it. Part II of the Constitution contains no preamble such as is found in Part I, the Charter, and we can find no clear declaration of policy in the history of the provisions. Indeed, many commentators have noted the inconsequential nature of the legislative history of s. 35. Sanders, for example, has commented:

The legislative history for s. 35 of the Constitution Act, 1982, gives little guidance as to what the provision means or was intended to mean. It was the result of political bargaining.²⁴

And in fact, the legislative history is of little consequence in Canadian law. Mr Justice Lamer in Reference re Motor Vehicles Act commented that while the Minutes of the Proceedings of the Special Joint Committee are admissible to prove the intent of the constitutional provisions, they "should not be given too much weight".²⁵ It is, therefore, of very limited utility.

What is clear is that Part II rights are group rights not individual ones. The provisions speak in terms of the aboriginal peoples whereas the Part I provisions use such terms as everyone, every citizen, every individual, and any person. The commentators seem agreed on this point.²⁶ Pentney asserts:

Aboriginal rights are collective rights, which inure to the benefit of native groups. These rights have always been understood to derive from the existence of native groups as organized societies prior to contact with colonial powers, and the activities to which the claims relate were, and remain, group activities.²⁷

That the aboriginal peoples as a group have a set of rights in addition to those of other Canadians, supports the assertion that some measure of separateness underlies

the special protections of the Constitution.

The factual history of Canadian Indian policy also offers some perhaps equivocal support. The Indian policy is, like the legislative history, somewhat ambiguous since it is a fact that it appears that often conflicting policies were pursued at the same time. The earliest legislated policy, up to and including the Royal Proclamation of 1763, was clearly to permit the Indian nations to regulate their own lives outside the influence of the colonial government. During the early part of the nineteenth century for the most part they seem to have been permitted to govern their own affairs with little interference by the colonial administrations. Where the interest and expertise existed, it also appears that healthy Indian economies were encouraged and developed, sometimes with government support. We have seen above the legislation which was passed to protect Indian occupation of the reserves.

Smith chronicles the history of the Mississauga Indians of what is now southern Ontario.²⁸ During the mid-Nineteenth century, the Mississauga of the Credit River Reserve were a successful band of farmers and fishermen receiving some support from the colonial administration.²⁹ This suggests that the government took their duty to promote Indian development seriously.

The experiment at the Coldwater Reserve north of Lake Simcoe was implemented in the 1830s and was intended to create independent farmers of the Indian. It had a strong assimilationist component, but it too demonstrates the seriousness with which the government viewed its obligations to the Indians. The

project tried to encourage the integration of Indians through constant interaction with the local settlers. Ultimately, the project failed, in part because of lack of funding and an unenthusiastic administration on the part of the Indian Administration.³⁰

These examples show that the administration encouraged the Indians to remain on their reserves and to develop their economies in some measure apart from the majority of the population. Yet the same time more insidious assimilationist policies were advanced. The 1830s also saw the "plan" of Lieutenant-Governor Bond Head to remove the Indians, whom he saw as a doomed race, from Southern Ontario to Manitoulin Island where they would be able to live out their "twilight years".³¹ Others thought isolating the Indians on reserves would enable the church, schools and the Indian agent to wean them of their Indianness.³² While both of these policies had as their object the integration of the Indian into the mainstream society, it is a fact that a degree of "measured separateness" was an integral element.

After Confederation the reserve system remained an integral part of the Canadian Indian policy and, as we have seen above, legislation was developed which created a separate system of governance for the First Nations. That the Indian Act was strongly oriented towards the assimilation of the Indian peoples is unarguable. Nevertheless, it must be noted that the Act has also had the result of preserving Indian aspirations to independent status within Canada, and many leaders have argued for its retention until better legislation might be drafted to replace it.

Certainly the policies pursued by the Department of Indian Affairs have not been unequivocally devoted to the destruction of special status. Often the rhetoric with which the various programs and policies have been announced has advanced the best interests of the Indians as a primary component.

During the negotiations for the surrender of the prairie lands through the numbered treaties, for example, the promises made to the First Nations clearly declared a policy of allowing and even encouraging separateness as well as announcing a commitment on the part of the government to assist in the adjustment to the new reality. During the negotiations leading up to Treaty No. 1, for example, Lieutenant-Governor Archibald explained the reserve system in this way:

Your Great Mother wishes the good of all races under her sway. She wishes her red children to be happy and contented. She wishes them to live in comfort. She would like them to adopt the habits of the whites, to till the land and store it up against time of want. ... Your Great Mother, therefore will lay aside for you "lots" of land to be used by you and your children forever. She will not allow the whiteman to intrude upon these lots. She will make rules to keep them for you, so that as long as the sun shall shine, there shall be no Indian who has not a place that he can call his home, where he can go and pitch his camp, or if he chooses, build his house and till his land.³³

The treaties themselves contained similar sentiments. Treaty 6, for example, states:

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, ... for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada.³⁴

The Crown also committed itself to provide schools as well as commodities for economic development. Such commitments seem to undermine the notion that the policy of the Indian Department was solely intent upon the destruction of separate status for the Indian peoples.

Elias, in his study of the Dakota, shows the inconsistency of Indian Affairs policy.³⁵ The Dakota, who came to Canada in 1862 and 1863, were first given some reserve lands and then were largely left alone to develop their economies under their own governments. By the late 1800s with some help from the Canadian government, a number of them had developed into moderately successful farmers in the western part of the province of Manitoba.³⁶ At the same time other Dakota were in the process of becoming a "dependable urban and rural labour force".³⁷ Their traditional governments were left intact. This suggests that the government was at that time pursuing a policy of substantial separateness.

During the 1890s this was to change. Elias notes:

During this decade, the Indian department finally displaced the traditional leadership of the bands; it wrested management of most aspects of the Dakota economies from Indian decision makers and entrusted them to agency representatives; and it imposed political guidance upon them.³⁸

These measures were intended to assist the assimilation of the Dakota into mainstream Canadian culture. Even so, the attempts must be seen as equivocal. While the traditional governments were being undermined, there seems to have been no real attempt to actually assist the Dakota to become part of the dominant economy.

Controls were placed on Indian farming which prevented them from adapting to the changes which occurred in prairie agriculture through the first half of the twentieth century. The Dakota farms, for example, were limited in size by the Indian department, and so became uneconomic.³⁹ At the same time, the Dakota were denied homestead rights⁴⁰ and poor education restricted their entry to the job

market.⁴¹ The policy of assimilation through destruction of the traditional band structure, it can be seen, was not pursued in the area of the economy. Even though the Dakota demonstrated some ability to adapt to the dominant economy, the Department of Indian Affairs discouraged and thwarted their efforts to adapt. That was not completely at odds with the Dakota's wish to retain their traditional identity. As Elias points out, the Dakota wished to retain their distinctiveness:

Perhaps the Dakota could have improved their economic lot by dispersing into the general population as did so many other people in western Canada. ... Nevertheless, the historic record indicates that the Dakota drew the line at sacrificing the last of their distinctive Dakota ways, and accepted that their economic strategies would leave them poorer, but wiser.⁴²

For Elias, the history of the Dakota in Canada is an example of a people living apart within Canada managing and nurturing their own lands, resources and people in "ways that are culturally comfortable".⁴³ This he suggests is "virtually a demonstration" of the concept of "Indian self-government".⁴⁴ It is clear that the policy of the Indian department facilitated, as well as discouraged, the Dakota.

One could find examples of the ambiguous nature of the First Nations' experience under the Indian Act from all areas of the country. It is clear that the government of Canada has rarely presented an unequivocal face to the First Nations. McDonald has said:

It is important to point out the considerable ambiguity about the aim of the Indian Act and the whole notion of aboriginal and treaty rights. On the one hand, special provisions for native people in the Act and in various treaties can be seen as recognizing an historically based obligation to Canada's first peoples. ... On the other hand, such special provisions for the Indians have been seen as essentially transitory intended to provide a temporary measure to assist in the assimilation of Indians into a (superior) civilisation.⁴⁵

A clear example of this ambiguity can be seen during the first Mulroney administration. When the Mulroney government came to power it quickly instituted a special task force under the leadership of the deputy Prime Minister Eric Nielsen to review government spending. The Report, issued in 1986, recommended that the federal power over native people be given up and that the majority of programs be transferred to the provinces.⁴⁶ At the same time, the Minister of Indian Affairs, David Crombie, was advocating self-government, renewal of the treaties, and was even recognizing new bands in Northwestern Ontario.⁴⁷ Weaver has commented on the unreconcilable nature of these programs.⁴⁸

When the government has committed itself to a clear policy of termination, as it did in the White Paper of 1969,⁴⁹ the reaction has been swift and unequivocal: The aboriginal peoples have consistently rejected the notion of complete assimilation. And today, the government too has abandoned termination. Since the rejection of the White Paper, there has been a gradual transfer of the administration of Indian matters to the band councils. In 1973 the National Indian Brotherhood issued its demand for Indian control of education.⁵⁰ By 1981, shortly before the new Constitution came into force, over one third of the federal Indian schools had been transferred to band control.⁵¹ The process has continued.

In response to the recommendation of the Penner Report in 1983,⁵² which proposed constitutional entrenchment of Indian governments, the government introduced a Bill which was intended to introduce some measure of self-administration for the First Nations.⁵³ The Bill died on the order paper in 1984

when an election was called. The present government is also committed to Indian self-government. In 1985, it passed the Sechelt Band Self-Government Act⁵⁴ which permits the Sechelt Band to exercise some municipal-like governmental powers. The Community-Based Self-Government initiative, which is designed to encourage other bands to negotiate legislation similar to the Sechelt Act, proclaims;

The federal government is committed to the objective of self-government for aboriginal people.⁵⁵

A clearer statement of separate status for the First Nations could not be made.

While it is admitted that the intent of the government towards the Indians has been ambiguous, it cannot be seriously be argued that the idea of separateness has not consistently been present. It is suggested, regardless of the underlying intent, assimilation, integration, or simply a will to let them live out their twilight years, that placing the First Nations apart from the general population is one of the consistent elements of government policy. In the years since the White Paper, the concept of Indian self-government has gained more currency. At the last two of the First Ministers Conferences required under s. 37.1 of the Constitution Act, 1982, the sole topic of discussion was aboriginal self-government. None of the first ministers were opposed to the concept. Clearly, the policy of some sort of "measured separateness" is now a fundamental aspect of Canadian governmental policy. It seems acceptable to assume, therefore, that s. 35 recognizes some measure of self-government for the First Nations.⁵⁶ It clearly must recognize some separate status.

d Summary

While the United States' jurisprudence is not decisive in the interpretation of the Canadian Constitution, it has been influential.⁵⁷ And in Indian law matters, that influence is compounded.⁵⁸ Given the influence of the United States' law, it is useful to keep an idea of its scope in mind when interpreting the Constitution. I have suggested that the United States jurisprudence on Indian law has three components: First, the Indians are considered "domestic dependent nations" who live under the protection of the federal government; second, Congress, and perhaps the Executive, has the absolute power to legislate on Indian matters, included in these powers is the power to terminate Indian status over the objections of the Indian Nations themselves; and third, where the government has legislated for the Indians, in the absence of a statement to the contrary on the face of the statute itself, they owe a trust or fiduciary obligation to the Indians, the scope of which will be discerned from an interpretation of the legislation viewed in light of a presumption that the federal government intends to respect the residual sovereignty of the Indian Nations.⁵⁹

Wilkinson suggests that this law, together with the history of Indian/U.S. relations, is designed to allow the Indian nations to live separate lives within the United States. He views the late nineteenth century cases expressing the unrestricted power of Congress over Indians as the remnant of an assimilationist policy which has been tried and discarded. While the power remains, it is now rarely invoked. He comments:

Implicit in all the talk [at treaty time] was not only that each tribe would remain a people, but also the perception that a homeland, separate and distinct from the surrounding white culture, was a requisite element for that survival. ... The essence of [the] laws, then, as viewed by both Indian tribes and by the United States, was to limit tribes to significantly smaller domains

but also to preserve substantially intact a set of societal conditions and tribal prerogatives that existed then.⁶⁰ (authorities omitted)

This separateness, while it does not have constitutional protection, is the guiding principle, Wilkinson suggests, which restricts the courts, the executive, and Congress. The Indians' rights to pursue their own future within the United States are, for Wilkinson, part of the essence of the United States. They are not, however, constitutionally protected.

Such separateness has not been explicitly expressed in Canadian law, but, I suggest, it has been, and remains, an important aspect here also. The above analysis of the aboriginal and treaty rights suggests that Part II of the Constitution Act, 1982 recognizes and entrenches a measured separateness for at least the First Nations in Canada. The protection of Indian collective rights from derogation or abrogation by the individualistic Charter rights is consistent only with such a conclusion. Add to that the continuous existence of a governmental practice which preserved, intentionally or not, the separateness of the First Nations and one seems led inescapably to the notion that s. 35 must entrench separate status. Such an entrenchment would appear to provide, in contrast to the situation in the United States, some limitation of the legislative power of the Crown. At the very least, the s. 35 rights of aboriginal peoples must be balanced with the Charter rights of a non-aboriginal person.

iii A Closer Look at s. 35

a The Content of s. 35

Section 35, since it contains the troublesome word "existing", is better dealt with in relation to specific rights. The specific right upon which this thesis focuses is the fiduciary obligation, in particular the enforceable aspect of the wardship. For this section however, I shall deal with the entrenchment of the fiduciary obligation recognized in Guerin: the land related fiduciary obligation.

We noted above the absolute nature of the legislative power of Parliament under the old Constitution. The scope of any fiduciary duty is to found in federal legislation and the instruments surrounding the surrender. Consequently, before 1982, the scope of the duty which was breached in Guerin could have been changed at will by the federal government by an amendment to the Indian Act. If we assume that the Guerin interest has been entrenched as a s. 35 right a question is raised as to whether the federal government can still change that legislation at will and, thereby, alter the scope of the fiduciary duty? If they can, the entrenchment may have been an empty exercise. If they cannot, where does the balance lie?

Section 35 has generally been interpreted to provide two effects. First that Part II will not operate so as to revive any previously extinguished rights.⁶¹ Secondly that the rights that have been entrenched are entrenched in the form in which they existed in 1982. This second effect does not mean that s. 35 rights are frozen as of April 17, 1982. Some of the entrenched rights, and the Guerin fiduciary obligation may be one of these, are rights which have long been subject to legislated limits. Some aspects of that subordinate status remain. A recent case from British

Columbia illustrates this point.

Sparrow v. The Queen⁶² holds that, since they were regulated rights at the time of entrenchment, the Constitution Act, 1982, entrenches regulated aboriginal rights to hunt and fish.⁶³ The power to regulate in response to existing conditions has not been lost. This seems an uncontroversial interpretation of the word "existing". The power to regulate, however, has been limited by the entrenchment of the aboriginal right to fish.

The Musqueam Indian Band, whose reserves are part of their traditional lands around the mouth of the Fraser River, fish salmon under "Indian food fish licences" issued under federal legislation.⁶⁴ The court held that this was an "existing aboriginal right".⁶⁵ In 1984, the fisheries officials reduced the size of net permissible from that which had been allowed since 1982. When certain band members continued to use the larger net, they were charged with fishing contrary to the terms of their licences. They argued that, since the fishery was an aboriginal right, the level of regulation was frozen as of 1982. The authorities argued that their regulatory power was unchecked by the passing of the Constitution. The court disagreed with both.

The court reviewed the history of the regulation of the B.C. fishery and found that regulation dated from 1876, and that the Indian fishery had been covered since 1888. They recognized that both Indians and non-Indians had valid interests in the fishery. The problem was one of balancing. They held:

There continues to be a power to regulate the exercise of fishing by Indians even where that fishing is pursuant to an aboriginal right but there are now limitations on that power.⁶⁶

The limitations they found in the regulatory scheme in force at the passing of the Constitution Act, 1982 looked at in light of the history of the regulation of the fishery. The court stated:

The essential limitation on [the] power [to regulate the fishery] is that which is already recognized government policy as it emerges from the evidence in this case. That is, in allocating the right to take fish, the Indian food fishery is given priority over the interests of other user groups. What is different is that, where the Indian food fishery is in the exercise of an aboriginal right, it is constitutionally entitled to such priority. Furthermore, by reason of s. 35(1) it is a constitutionally protected right and cannot be extinguished.⁶⁷

The test they established for determining the validity of further regulation is this:

Those regulations which do not infringe the aboriginal food fishery, in the sense of reducing the available catch below that required for reasonable food and societal needs,⁶⁸ will not be affected by the constitutional recognition of the right. Regulations which do bear upon the exercise of the right may nevertheless be valid, but only if they can be reasonably justified as being necessary for the proper management and conservation of the resource or in the public interest. These purposes are not limited to the Indian food fishery.⁶⁹ (emphasis added)

The case, which is awaiting decision on an appeal to the Supreme Court of Canada, offers a reasonable rule for the determination of at least some aboriginal rights and how they might be balanced with other rights.

The rule suggested by Sparrow is this: Where an entrenched regulated aboriginal right is not affected by further governmental action, the governmental action is not reviewable. Where an entrenched regulated right is affected by governmental action, judicial review is appropriate. The governmental action will be checked against the requirements of any legislative scheme governing the matter viewed in light of the history of governmental action and policy in relation to the

matter. This rule should be familiar. The rule established for the fiduciary obligation in Mitchell II in the United States which was discussed in Chapter Two above, is all but identical.⁷⁰ It is also very similar to the rule in Guerin itself. The essence of the test is that the government must be able to justify, according to some rational standard, any action which derogates from an aboriginal right. The Crown's legislative power over regulated aboriginal rights, while it survives constitutional entrenchment of those rights, has become a limited one.

It is uncertain at this time whether the fiduciary obligation has been entrenched by s. 35. The obligation at issue in Guerin has its origin in rights arising from the Royal Proclamation and the Indian Act. It is probable that such rights are "other rights," protected by s. 25 from the operation of the Charter, but not explicitly entrenched in the Constitution.⁷¹ It is generally agreed that aboriginal title, which was recognized in Canada in Calder v. Attorney General of British Columbia,⁷² must be within the parameters of s. 35.⁷³ Given that, it would appear that all the while the Crown retains its control over the First Nations' power of disposal of that interest, then the duty of the Crown in relation to land surrenders, will remain a legally enforceable fiduciary one. Indeed, such a conclusion may be a necessary element of aboriginal title itself, if the interest is in fact inalienable except to the Crown as Canadian caselaw has consistently held.

The scope of the obligation, found as it is in statute and other instruments, was a variable one at the time of entrenchment. Consequently, one can assume, it remains so. But it is not variable at the will of the Crown as it was before. The

unilateral power to vary or abrogate the duty by amending the statute has been lost. Sparrow v. The Queen suggests that the Constitution Act, 1982, entrenches a regulated right to hunt and fish susceptible to further variation. That being the case it seems very probable that any fiduciary obligation which might have been entrenched, will also be capable of continued variation from time to time. The scope, as before the entrenchment, would be determined through scrutiny of the legislation governing surrender, together with the terms and conditions of the surrender viewed in light of the negotiations during the surrender process itself. Any attempt by the Crown to unilaterally limit the scope of the duty through legislation, regulation, or even administrative policy, would be reviewable to make sure that the variation fits the entrenched duty. The test would be a variant of the Sparrow test. The Crown could be required to justify the variation against a rational standard derived from the history and policy governing land surrenders. That, it is suggested, is the very least that Guerin can stand for. And, weak as it may be in that it does not absolutely prevent derogation, it is a substantial advance from the situation existing before 1982. Its strength is that it permits the First Nations to shoulder the duty.

The authors seem agreed, and it seems a reasonable position, that it is possible for the First Nations themselves, to agree to a surrender of their aboriginal rights without the need for a constitutional amendment.⁷⁴ Assuming this to be the case, the government could terminate its fiduciary obligation if it were to give to the First Nations themselves the power to deal with their lands as they wish. They could

do this either in the terms of a surrender or through constitutional or perhaps even legislative amendment.⁷⁵ In as much as it retains its discretion over the use of Indian lands, it would appear that the Crown must act as a responsible fiduciary. Any breach would be considered a breach of a legal and constitutional duty.

b Recent Judicial Discussion of the Fiduciary Obligation.

Two recent cases illustrate the value of this interpretation of the fiduciary obligation. In Kruger v. The Queen,⁷⁶ the Federal Court of Appeal held that the fiduciary obligation recognized in Guerin applied to the expropriation of reserve land held under the Indian Act as well as to surrenders. Kruger and other members of the Penticton Indian Band sought a declaration that land expropriated in 1940 and 1943 had been wrongfully taken. They alleged, inter alia that the Crown had breached its fiduciary obligation to the Band.

Three opinions were handed down. The judges agreed that the fiduciary obligation applied to this non-Treaty B.C. land. Two judges agreed that there was no breach of duty on the facts and that there was no fraud since the expropriation was completed openly and without concealment.⁷⁷ The third held that the government had breached its fiduciary duty but that the claim was statute barred. The application was dismissed.⁷⁸

Heald J., in dissent on the point, held that the government was in a conflict of duty situation during the expropriation process. This was so because it was wearing two hats at the time, acting for the Indians through the Department of

Indian Affairs, and against them through, at one time, the Department of Transport, and at another time, the Department of National Defence. Heald J., found a breach of the fiduciary obligation since the government failed to act exclusively for the Indians.

While Urie J. agreed that the Crown owed a fiduciary obligation to the Band, he held that there was no breach because the evidence showed that the Indian Affairs Branch through the Band's Indian agent and the Commissioner of Indian Affairs were "articulate, forceful and passionate spokesmen for the Penticton Indians".⁷⁹ He comments:

[T]he transport officials, too, owed a duty in the performance of their functions, not a direct duty to the Indians but a duty owed to the people of Canada as a whole, including the Indians not to improvidently spend their monies.⁸⁰

With respect, it is suggested that Urie has misunderstood the nature of the fiduciary obligation. The duty is owed at the time the decision is made, not only during the discussions leading up to the decision. It is not enough for the appropriate department to advance the proper arguments for the Indians: it is necessary for the Crown to fully weigh them against its other duties at the time it makes its decision.

After all, the statute gives the duty to approve expropriations to the Governor in Council, not to the officers of the Indian Branch,⁸¹ and it is the Crown which owes the duty. Urie seems to assume that once the arguments are made, that no breach by the Governor in Council is possible. With respect, the fiduciary duty, if it is to be a useful concept, must extend, and be reviewable, up to and including the highest level. It cannot be put too forcefully that when exercising its discretion, the

Governor in Council is exercising a duty delegated to it by Parliament. It is subject to the will of Parliament and it was Parliament which wrote the fiduciary duty into the Indian Act.

If Urie went too far against finding a fiduciary duty, it is suggested that Heald perhaps also went too far but in the other direction. It would be impossible for the government to legislate effectively if it were not able to wear two hats at one time on occasion. To hold that the duty to the Indians cannot be balanced against the interests of other Canadians, would be tantamount to entrenching an absolute aboriginal right, and to have done so through ordinary legislation. Since this cause of action arose before 1982, such seems unsupportable. A more supportable grounds would have been to follow the reasoning put forward earlier in this chapter, and to require the government to justify its taking of the Indian land rather than other provincial or private land. The fiduciary obligation should have at least required the government to demonstrate a rational basis for its acting against the interests of the one to whom it owes a special duty.

It would be hoped that the government could not engage in a conflict of duty situation such as is found in this case without justification. Just as Sparrow suggests that the Government must meet a certain legal and constitutional standard when derogating from the s. 35 right to fish, so too, it would be hoped, would the government have to justify its derogation from the fiduciary standard when in a conflict of duty situation. The result would be that the expropriation would have to be, not only valid, but also justifiable. Such, I would suggest, should have been the

holding in Kruger itself.

In fact, Heald, having stated that the duty to the Indians must not be breached, does seem to suggest that justification may be possible. In relation to the 1943 expropriation Heald had found additional breaches of the fiduciary standard in that there had not been full disclosure and that the price paid was less than the valuation.⁸² He commented:

[T]he Governor in Council is not able to default in its fiduciary relationship to the Indians on the basis of other priorities and other considerations. If there was evidence in the record to indicate that careful consideration and due weight had been given to the pleas and representations by Indian Affairs on behalf of the Indians and, thereafter, an offer of settlement reflecting those representations had been made, I would have viewed the matter differently.⁸³

Even so, for Heald to have been satisfied, it seems that the Governor in Council would have to have reached a different conclusion. The decision taken, Heald makes clear, was absolutely not acceptable.

Apssassin et al. v. Canada,⁸⁴ is the second case which deals extensively with the fiduciary duty. In this case the plaintiffs and other members of two Treaty 8 Bands, alleged several breaches of the fiduciary duty in relation to the surrender of certain reserve lands and minerals. The mineral rights were surrendered "in trust to lease" in 1940. In 1945 the reserve was surrendered "in trust to sell or lease" and in 1950 the surrendered lands complete with the minerals were transferred to the Director of the Veterans' Lands Act who subsequently disposed of them. In 1950, the Bands were granted new lands but did not receive the mineral rights with those lands.

This case, it is important to note, came to trial after 1982 and after the

decision in Guerin. In Kruger, the Department of Indian Affairs agreed, in exchange for the expropriated lands, to a sum less than the appraised value. In Apssassin when it transferred the surrendered lands, in this case to the Director of the Veterans' Lands Act, it did so for a price less than the appraised value. Addy J. found this to be in breach of the fiduciary duty of the Crown. But that is not all. The lower price was a breach also because the Crown was unable to justify the deficiency. He noted:

The defendant had a duty to convince the Court that it could not reasonably have been expected to obtain a better price.⁸⁵

This demonstrates a more sophisticated view of the obligation than that found in Kruger, and supports the reasoning suggested above.

Addy makes another very useful point in Apssassin. He suggests that the fiduciary obligation does not require the Crown to treat the Indians as if they were not sui juris.⁸⁶ This would appear to be correct. The fiduciary obligation is intended to protect the Indian Nations from third parties, not to prevent them ever taking over their own affairs.⁸⁷ Also the Guerin decision clearly recognizes the power of the Indians to restrict the discretion of the Crown during the negotiation process.

A further point that Addy makes which illustrates the sophistication of his understanding of the Crown's fiduciary duty is his recognition that Treaty 8 may also have created further fiduciary duties.⁸⁸ Rejecting an allegation of the plaintiffs that the Treaty included a promise to supply reserve lands as they might become necessary, he notes:

Because of the special relationship existing between the Crown and the Indians, the illiteracy of the latter and their dependency on the advice of the

agents of the Crown [at treaty time], if there was in fact any representation made to the Indians to that effect previous to signature, any such representation would be fully binding at law on the Crown, notwithstanding the fact that it might not have been fully incorporated in the formal terms of the treaty.⁸⁹

This acceptance of the enforceability of the promises made during treaty negotiations is a major step forward for Canadian native law. It is to be regretted that no rational basis for the assertion is offered.

Nevertheless, there are some problems with Addy's discussion of this point. It is suggested that he goes too far when he suggests that there is no legal duty to protect the Indians. If hitherto unenforceable terms of the treaties have become enforceable it can only be because of the passage of the Constitution Act, 1982. It is also clear that hitherto unenforceable aboriginal rights, such as that in Sparrow, have become enforceable.⁹⁰ That being so, it would seem unwise to make such rather all-encompassing statements. He states, for example:

There might exist a moral, social or political obligation to take special care of the Indians and to protect them (especially those who are not advanced educationally, socially or politically) from the selfishness, cupidity, cunning, stratagems and trickery of the white man. That type of political obligation, unenforceable at law, which the Federal Court of Appeal in the Guerin case felt should apply to the Crown following surrender (which concept was, of course, rejected by the Supreme Court), would be applicable previous to surrender.⁹¹

The problem with this is that the passing of the Constitution Act, 1982 may very well have rendered such an obligation, or perhaps some aspects of it, justiciable. That at least is the argument in this thesis.

Furthermore, he comments of the Indian Act:

The Indian Act was passed pursuant to the exclusive jurisdiction to do so granted by the Constitution Act, 1867. This does not carry with it the legal

obligation to legislate or to carry out programs for the benefit of Indians anymore than the existence of various disadvantaged groups in society creates a general legally enforceable duty on the part of governments to care for those groups although there is of course a moral and political duty to so do in a democratic society where the welfare of the individual is regarded as paramount.⁹² (emphasis in the original)

With respect, it is suggested that here too, he is wrong. It is just not appropriate to compare the aboriginal peoples with "disadvantaged groups". The rights of the First Nations originate in a unique history. Indeed, the aboriginal peoples are not disadvantaged in every sense. Their special constitutional status, in one sense, makes them especially advantaged. It may just be the case that some ministerial and cabinet discretions have become enforceable. It is possible, for example, that the education provisions of the Indian Act are also enforceable.⁹³ It need have nothing to do with a disadvantaged status.

A final criticism which it is possible to make with Addy's discussion of the Guerin type fiduciary relationship is that he speaks of the duty attaching to the land or the proceeds of its disposition.⁹⁴ With respect, this would seem to be misleading. If Dickson J., as he then was, is correct, the fiduciary duty does not attach to the land but rather is owed to the Band. The land, or the proceeds, provide only a method of setting damages for breach. It would appear that it will not be possible to follow the land and Addy sees this.⁹⁵ Consequently, it is misleading to speak of the duty "attaching to the land". Only if Wilson J.'s opinion were to be followed, and the relationship deemed to be one of trust, would the duty attach to the land. Improperly taken land, it would appear, will be lost to the Band. It is a minor quibble, but worth commenting on in passing.

Complaints aside, Addy's decision is a useful one for examining the possible scope of the fiduciary duty. In the final analysis, it would appear that these two cases support the argument that the best interpretation of the fiduciary obligation as a constitutional doctrine, would be one that would require the government to justify any actions which operate to the detriment of the Indian Nations. We find support for such a position in the meagre case law that has so far taken place. This would make the fiduciary obligation considerably stronger than the equivalent obligation in the United States.

iv Summary

The argument, it is suggested, is compelling. The fiduciary obligation recognized in Guerin when entrenched in the Constitution would go further than allowed by Urie in Kruger. The Constitutionally entrenched duty would remain one variable through federal legislation. The power to abrogate the duty, it is suggested has been lost and the power to vary has been limited. Where the variation does not affect the Indian interest in land, the Crown may vary without permission of the affected Indians. Where the variation does affect the Indian interest, the Crown may vary its obligations only if it has the informed consent of the affected of the Indians or if it can justify the variation as being in a proper exercise of its power to govern. This will be necessary when the interests or rights of others clash with the Indian rights or interests protected by the fiduciary obligation. Finally, it may be possible that positive duties to legislate so as to protect the Indian interest may also exist.

Such a point can only be proved or disproved in relation to specific facts.⁹⁶

b A Fiduciary Theory for Constitutional Review

The analysis of Dickson's opinion offered here suggests that the fiduciary obligation recognized in Guerin contains five elements: a recognized legal interest, a triggering event which gives rise to a duty, a legislative scheme which invites the supervision of the courts, a purpose, and a connecting principle. In Guerin it is an interest in the land, the aboriginal title, which is at the centre of the law. The duty to protect the Indian interest in the land is triggered by the surrender requirement. I have suggested that this is in effect a denial of the right to the Indians to regulate and alienate their land. The purpose of the duty is found in the protective role of the Crown, recognized throughout Indian/European and Indian/Canadian relations, and which is also apparent in the provisions of both the Royal Proclamation and the Indian Act. The fourth element is a legislative scheme which invites the scrutiny of the courts. That is provided by the Indian Act and its delegation of discretion to the Governor in Council. Finally, the law of fiduciaries provides a principle to connect the above elements and guide the courts in their review of the actions of the government. The theory, of course, is intended to protect the Indian land rights and is, I have suggested, now entrenched in the Constitution.

But I would go further than simply protecting land rights. I wish to suggest that Guerin can provide a minimum standard for the interpretation of s.35 rights. I would suggest that the interests recognized in the Guerin case are inevitably

limited by the facts of the case itself. So, consequently, is the law. Guerin is a pre-1982 case concerned with land issues. But I have suggested that the recognition of land rights is only one element of the full range of aboriginal rights. The special status of the aboriginal peoples as peoples, as the First Nations, is, I have argued, the essential aboriginal and treaty right. A general theory must, if it is to be useful, be relevant to the implications of this special status. And I have argued that Chief Justice Dickson's opinion might contain the germ of such a general theory.

The protection of rights in land, I suggest, is merely the result of the recognition of special status. It is an aspect of the wider hitherto unenforceable obligation of the government inherent in the Doctrine of Discovery. Land rights seem to be the premier aboriginal right only because they have been the first to come to court. Recognition of the land right, it can be argued, implies special status. The Constitution Act, 1982, s. 35 if it entrenches anything, must entrench that special status. Special status gives the aboriginal peoples of Canada a right to a measured separateness of which special protection of the interest in land is only one aspect.

i The Constitutional Fiduciary Theory

Both Chief Justice Dickson and Madame Justice Wilson imply the existence of a background fiduciary obligation in Guerin.⁹⁷ The judgement in the Federal Court of Appeal rests firmly upon an unenforceable duty.⁹⁸ It is my suggestion that s. 35 has made at least some of that background duty enforceable.

a The Origin

Chief Justice Dickson founds his fiduciary theory in the aboriginal title of the Musqueam Band. I have argued above that a broader principle underlies the doctrine of aboriginal title. I have argued that at root, the doctrine of aboriginal title rests upon the pre-contact sovereignty of the First Nations. I have suggested that Dickson's opinion even intimates this fact.

The doctrine of aboriginal title is a recognition that before colonisation, the Indian nations of North America governed themselves and their lands according to their own ideas of governance and their own ideas of property and right. The government policy of negotiating treaties of peace and friendship as well as the later land surrender treaties with the Indians as tribes rather than individuals is a further recognition of the pre-contact sovereignty of the Indian nations. And the Royal Proclamation and the Indian Act also indicate that some limited recognition was given to Indian sovereignty. The legal interest which gives rise to the broader fiduciary obligation is the pre-contact power of the Indian nations to regulate their own affairs. That is to say, their pre-contact sovereignty.

b The Triggering Event

The event which triggers Dickson's fiduciary obligation is the unilateral imposition of the surrender requirement by the Crown. It is to be noted that, since the fiduciary obligation might have unenforceable aspects, it is not necessary that the surrender requirement be justiciable or even of itself give rise to justiciable rights.

Justiciability is a separate issue. The surrender requirement is, I have argued, only one aspect of the more general disability which is effected by the Doctrine of Discovery. The Doctrine of Discovery did not only deny the right to regulate and alienate the interest in land, it also denied the Indian nations any input into, or power over, the new scheme of governance in their homeland. It was a denial of sovereign power and of any right to self-determination.

Such a rule was contrary to the British colonial law requiring that the laws of the inhabitants of occupied colonized lands be respected. That the colonisation of Canada occurred for the most part without the conquest of the Indian nations, meant that the colonial governments should have respected the pre-existing Indian rights. When the European nations decided to override the rights of the aboriginal peoples of the Americas, they did so justifying their actions through the Doctrine of Discovery. The power it gave the colonial nations came charged with a duty. That duty, it has been suggested, is an essential part of the trust obligation. The Doctrine of Discovery requires that the colonial government take up the trust obligation towards the Indians whose rights they have ignored. It is suggested that the denial of Indian sovereignty through the imposition of the Doctrine of Discovery is the origin of a special duty owed to the Indian nations.

c The Legislative Scheme which invites the Supervision of the Courts

While the Royal Proclamation and the Indian Act operate to make the land interest in Guerin justiciable, s. 35 of the Constitution Act, 1982 acts so as to make

the broader obligation justiciable. This is not to suggest that all and every aspect of pre-contact Indian sovereignty has become justiciable. It will remain necessary that any particular interest be proved to be justiciable.

d The Purpose of the Duty

I have shown above that the fiduciary obligation, if it is not properly channelled, often proves somewhat wayward.⁹⁹ The protective role of the Crown serves to prevent the Guerin obligation from allowing the courts to make political decisions. I have argued that s. 35 of the Constitution Act, 1982 entrenches a "measured separateness". It is suggested that this is the purpose of the broader fiduciary obligation. The purpose of the land right recognized by the Royal Proclamation and the Indian Act, I would argue, is to permit the First Nations to adjust to the new regime which the colonists imposed upon them. Measured separateness is what Wilkinson has called the similar right in the United States.¹⁰⁰

I have suggested that the purpose of the entrenchment of aboriginal and treaty rights in the Constitution is to permit the aboriginal peoples to develop, within Canadian society, in some measure in accord with the dictates of their own traditions and their own culture. Again, this will not make any particular interest justiciable. It merely assists the aboriginal peoples and the legislative and judicial arms of the government to determine what is and what is not a permitted interference with an established aboriginal or treaty right.

e The Connecting Principle

As in Guerin, the four elements are connected by the fiduciary principle. It operates to protect rights which are subject to variation, the control of which is not in the hands of the rights-holders themselves. The Constitutional fiduciary would limit the power of the Crown so as to permit only those variations of any aboriginal or treaty right, and perhaps of "other" rights, that can be justified in accord with a rational scheme. The rational scheme, we have seen, is to be found in the past and present practice of the Crown.

f Summary

Such then are the elements of the theory. Paraphrasing the Chief Justice one might put them together in this way. The fiduciary theory of Constitutional review of aboriginal and treaty rights, finds its origin in the denial of Indian sovereignty at the time of discovery, coupled with the fact that the Indian nations were denied any input into, or power over, the new governing regime. The fact that, under the Doctrine of Discovery, the colonial government pledged to govern with due regard to the Indian presence gives rise to the particular purpose of the obligation which is to allow the aboriginal peoples a degree of measured separateness. Finally 35 of the Constitution Act, 1982 invites court supervision of governmental action. Crown action will be judged according to a fiduciary standard. Only those variations of aboriginal or treaty rights which can be justified will pass constitutional review. What might be justifiable will depend on the legislative and factual history of the

particular right being litigated and of the aboriginal group litigating.

ii A Measured Separateness

The above, of course, says nothing of the particular interests protected. I have avoided delineating the interests protected because such issues can only be determined in relation to specific facts.¹⁰¹ That cannot be done here. It is possible nevertheless, to offer some general guidelines. I have argued that measured separateness permits the aboriginal peoples to live within Canada in some measure of accord with their own traditions and culture. Although it may not be a necessary part of measured separateness, the reserve system is perhaps the clearest illustration of the concept. The right to special schools under treaty and the Indian Act, may be another. The Indian law of the United States has recognized the concept of a measured separatism and offers a possible test for the determination of the content of s. 35. While the United States' jurisprudence is not decisive in the interpretation of the Canadian Constitution, it has been influential.¹⁰² And in Indian law matters, as we have noted previously, that influence is compounded.¹⁰³

I have suggested that the United States jurisprudence on Indian law has three components: First, the Indians are considered "domestic dependent nations" who live under the protection of the federal government. Second, Congress, and perhaps the Executive, has the absolute power to legislate on Indian matters. Included in these powers is the power to terminate Indian status over the objections of the Indian Nations themselves. And third, where the government has legislated for the Indians,

in the absence of a statement to the contrary on the face of the statute itself, a presumption operates to limit its impact on the status of the tribes. The presumption originates in the trust or fiduciary obligation by the federal government to the Indians. Its effect is determined by an interpretation of the legislation viewed in light of a presumption that the federal government intends to respect the residual sovereignty of the Indian Nations.¹⁰⁴

Wilkinson suggests that this law, together with the history of Indian/U.S. relations, is designed to allow the Indian nations to live separate lives within the United States. He views the late nineteenth century cases expressing the unrestricted power of Congress over Indians as the remnant of an assimilationist policy which has been tried and discarded. While the power remains, it is now rarely invoked. He comments:

Implicit in all the talk [at treaty time] was not only that each tribe would remain a people, but also the perception that a homeland, separate and distinct from the surrounding white culture, was a requisite element for that survival. ... The essence of [the] laws, then, as viewed by both Indian tribes and by the United States, was to limit tribes to significantly smaller domains but also to preserve substantially intact a set of societal conditions and tribal prerogatives that existed then.¹⁰⁵ (authorities omitted)

This separateness, while it does not have constitutional protection, is the guiding principle, Wilkinson suggests, which restricts the courts, the executive, and Congress. The Indians' rights to pursue their own future within the United States are, for Wilkinson, part of the essence of the United States. They are not, however, constitutionally protected.

Such separateness has not been explicitly expressed in Canadian law, but, I

suggest, it has been, and remains, an important aspect here also. I have suggested above that Wilkinson's three part model is useful in analyzing Canadian Native law. American law provides a perspective from which to view the history as well as the growing jurisprudence on aboriginal rights in this country. I have suggested that s. 35 is intended to protect a measured separateness for the Canadian First Nations. The right to live in accord with a particular set of values and rules, leads one to the conclusion that the set of rights which has been entrenched must consist of those rights which are essential to aboriginality.

Wilkinson suggests that such is the case in the United States. Wilkinson's review is mainly concerned with the jurisdiction of the Indian tribal court systems. But it does have relevance for the argument advanced here. As noted above he suggests that the United States' law has progressed from dealing with land rights, through rights to sovereign status within the United States, to developing a rule for the balancing the jurisdiction of Indian and non-Indian governments and courts systems. He states:

The identification of legitimate tribal interests is the touchstone for refining and specifying the general promises in old laws. ... The modern decisions have recognized various legitimate tribal interests that, taken together, have the potential of fulfilling the major promise made by the United States to Indian tribes - the guarantee of a measured separatism.¹⁰⁶

"Legitimate tribal interests" which have figured in recent cases include "an overriding interest in economic development", providing services to reserve residents, and the establishment and enforcement of norms and values in their communities.¹⁰⁷

These interests are subject to certain limitations. The courts have held that

the treaties and treaty substitutes were intended to protect the Indians only against "unwarranted intrusions on their personal liberty". This, Wilkinson comments, allowed the courts to restrict Indian control over non-Indians in criminal matters.¹⁰⁸ Further limitations limit off-reservation fishing rights, and perhaps water rights, to those necessary to provide a "moderate living".¹⁰⁹ In the economic sphere, only those tribal economic activities which are "tied to value created on the reservation" have been allowed to operate free of state legislation. This restriction has denied to one group of tribes, for example, the power to avoid state taxation of cigarettes which are sold to off-reservation residents.¹¹⁰ A second limitation in the economic sphere requires tribal revenue raising to be related to the provision of governmental services.¹¹¹ Wilkinson concludes:

[T]he concept of legitimate tribal interests [is] a useful device by which to bind together aspects of doctrine that are now treated disparately. The choice of legitimate interests as the benchmark of analysis is non-doctrinaire: it simply collects ideas, some of which benefit tribes and some of which do not, that are embodied in the treaties and treaty substitutes and that can efficiently and fairly focus judicial analysis.¹¹²

Canadian native law is badly in need of a concept which binds together disparate aspects of doctrine.

I do not suggest that the Canadian courts should follow the United States lead in the incidents of legitimate tribal interests. I do suggest that the rule could serve usefully in this country. I have covered the United States' law at some length simply to illustrate the strength of the concept. The aboriginal peoples of Canada as well as the Canadian courts and governments will have to determine the elements of legitimate First Nations' interests in this country. The content of measured

separateness, which is to say the range of rights protected by s. 35, could be such rights as are essential to aboriginality and which have found some measure of protection in legislation, subordinate legislation, treaties, and governmental practice. Those rights, I would suggest are inextricably bound up with the wardship.

iv The Wardship: A Final Comment

The concept of a legislative power over the First Nations, charged with a duty to protect a measured separateness is an adequate description of the wardship assumed by the Crown at the time of colonisation. Since the earliest days of colonisation, the First Nations of Canada have lived under the special protection of the Crown. We have seen that much the same might be said of many, if not all, of the aboriginal peoples of the Americas. The Spanish, the British and the United States have all held themselves to owe a special obligation to their aboriginal inhabitants. For the most part, the aboriginal peoples have had to rely on the largesse of the colonial and successor governments to enforce that obligation. Only some aspects have been entrenched into law. Nevertheless, the trust obligation, as it has been called in Canada and the United States, even where not entrenched into law, has coloured and guided governmental policy and practice. Often it has been used cynically. One author has called it the "vague doctrine of guardian-ward - which may be subject to the self-serving and patronizing discretion of a paternalistic "protector"". ¹¹³ At other times it has given great support. ¹¹⁴ Mr Justice Hall likened it to the Magna Carta. ¹¹⁵

I have argued that the trust obligation, and I have called it the wardship to emphasize the positive duties which it contains, informs the whole of the legislative and administrative scheme under which the Indians are governed in Canada. The wardship has been for the most part, only a moral or political obligation. The Crown, until 1982 at least, has chosen to make only some aspects of the wardship enforceable. For example, I have suggested that the Indian Act can be viewed as a codification of certain aspects of the wardship. It codifies, for example, the Guerin interest. In addition, it codifies, amongst other things, certain aspects of the wardship relating to education, status, governance, and economic development. Other instruments may also codify aspects of the wardship. The doctrine of aboriginal title, the Royal Proclamation, the Indian Act, the treaties, orders in council, and perhaps even governmental policy all might provide the basis of enforceable rights.

Before April 17, 1982, few, if any, of the Indian Act or other provisions would have been protected from alteration by Parliament. The positive duties in the treaties, such as the provision of schools for example, have been unenforceable unless written into legislation. In addition, wardship provisions of the Indian Act such as the obligation to provide schools are couched in permissive, not mandatory, language.¹¹⁶ Consequently, it is doubtful if, for example, a Band could have forced a reluctant government to provide or upgrade a reserve school. With the coming into force of the new Constitution, all that may have changed.

Section 35 of the Constitution Act, 1982, I have suggested, protects all those

aspects of the wardship which have found their way into law, whether through legislation, the common law, or perhaps even governmental practice. It may also render enforceable some of the positive duties contained within the trust obligation. Arguably, anything that is "essential to aboriginality" might come within the wardship and s. 35.

In the early days of colonisation, the Indian nations were denied input into the new governing system. Today that is no longer the case. However, they now lack the numbers to be able to effectively assert their special interests in Parliament and the legislatures. It can be argued then, that the trust obligation has become essential to the First Nations because of their political vulnerability to the majority of Canadians. The trust obligation serves to balance that political power at least until such constitutional arrangements as are necessary to protect the special status of the First Nations have been agreed upon and entrenched.

I have suggested above that the trust obligation requires that the government both protect and promote the aboriginal peoples. The concept of measured separateness supports that the government might have positive duties in relation to the aboriginal persons. It is clear that should it be proved that a law derogates in an unjustifiable manner from an existing aboriginal right, that that law will be declared of no force and effect in accordance with the requirements of s. 52 of the Constitution Act, 1982. I would suggest further, that where the lack of legal protection permits the destruction of aboriginality, there may also be a positive duty on the Crown to pass legislation. In the absence of that, it might fall to the courts

to find a rule in the common law allowing them to order compliance with the Constitution. I have argued elsewhere that such a rule may be found.¹¹⁷

This would be a rare occurrence. It may now be possible for bands to insist upon schools which, not only protect and promote the aboriginality of their communities, but which also are the equal of those provided to non-aboriginal communities.

v The Theory

We can now lay out the theory in its entirety. It is a theory which supports an interpretation of s. 35 of the Constitution Act, 1982 and which amounts a minimal limitation on the powers of the Crown. Section 35 entrenches the rights of aboriginal peoples as they existed as of April 17th, 1982. At that time, aboriginal rights were susceptible to both provincial and federal legislation. Many were subject to variation by regulation or even through changes in administrative policy. Many of the rights entrenched therefore, will have been entrenched as variable rights. The rights of the aboriginal peoples while they have received constitutional protection remain within the scope of the federal and perhaps provincial legislative bodies.

The interpretation of these very vague aboriginal rights requires a principled approach which is guided by a sound theory. The theory proposed here is based firmly in the unique history of the relationship between the Crown and the First Nations and the long history of fiduciary law. It is based upon a broad reading of

the decision of the now Chief Justice Dickson in Guerin.

The purpose of the entrenchment of aboriginal and treaty rights is to allow the aboriginal peoples to live within Canada in accord with their own culture and their own traditions. Section 35 is intended to protect for the aboriginal peoples, a degree of "measured separateness" within the Canadian nation. The concept of a measured separateness was entrenched into the Constitution in compliance with a long tradition of granting special status for the aboriginal peoples. It is a tradition which finds its roots in an historic duty shouldered by the Crown since the very earliest days of colonization.

The special status has its origin in the pre-contact sovereignty of the Indian nations. The denial of that sovereignty through the Doctrine of Discovery, together with the denial of the right to input into, or any control over, the new governance of their traditional lands, gave rise to a special duty owed by the Crown to the Indian Nations. The denial of civil rights to the occupants of the colonized lands required that the imperial Crown act to protect the now politically powerless original inhabitants from the excesses of the settlers and their local administrations. It required also that the Crown take up an obligation to assist the original inhabitants to adapt to the changed circumstances and make the transition from their traditional lifestyles to full participation in the new.

The special relationship which this gave rise to is now called the trust obligation. I have here also described it as a wardship so as to emphasize the fact that the duty is not only to protect Indian existence, but is also intended to promote

their adaptation. That transition is not yet complete. The measured separateness entrenched in the Constitution, is designed not only to allow the First Nations to follow the dictates of their own culture, it is also intended to protect them during the period of transition. Once the transition is complete, and the First Nations have a viable and secure place in the new Canadian nation, the duty to promote may fall away. The right to a measured separateness will persist.

The fiduciary theory therefore, will protect those rights or aspects of the wardship which have found recognition in Canadian legislation and administration. It will protect in addition any rights which are essential to the measured separateness, that is essential to aboriginality. Where legislation or administration threatens an aboriginal right, or an interest essential to aboriginality, the Constitution can be called upon to prevent its operation so as to detrimentally affect aboriginal rights. The aboriginal group litigating the issue would have to prove that the interest has received recognition or that it is essential to aboriginality.

Where either has been proved, the theory would then require the Crown to justify the encroachment it proposes. Derogation would be allowed only where a valid a justifiable purpose can be proved. The wardship would to some extent supply the standard: the Crown would have to justify failing to meet the duty to protect and promote the First Nations. They could do this perhaps in two ways. They could show that the derogation has a purpose which, while it may have some detrimental effects, has overall a beneficial one.¹¹⁸ Second, they might show that a valid national interest requires that the rights of the aboriginal group be balanced against those

of other Canadians.

This, of course, is only the bare bones of a theory. We have seen that the United States' Indian law has further checks within a similar theory. Further checks and balances would have to be worked out in relation to specific facts and particular aboriginal peoples. Conservation, for example, is a sensible limitation on the aboriginal right to hunt and fish. Nevertheless, the proposed theory, it is suggested, is a useful place from which to start. It is a theory which attempts to live up to the promise which the commentators have seen in the opinion of Chief Justice Dickson in Guerin.

I shall close the chapter, and the thesis with three examples of how the proposed duty might operate and how the courts might review the sufficiency of the governmental action.

c Some Applications of the Theory

i Child Welfare

It is only recently that Indian families have been subjected to the imposition of the provincial child welfare systems. In 1951, the Indian Act was amended to allow provincial laws of general application to apply on reserve.¹¹⁹ This made provincial child welfare laws applicable on reserves. They have had a massive effect. In 1955, for example, less than 1% of the children in care in British Columbia were Indian. By 1964 the figure had risen to more than 34%.¹²⁰ It has been estimated that in 1980 Indian children were 4.6 times more likely to be represented in the

child welfare system than non-Indian children.¹²¹ In 1983, the Penner Report concluded:

The imposition of non-Indian views of child care, through the enforcement of provincial child welfare policies on reserves, has had tragic effects on Indian family life.¹²²

In their submission to the Penner Committee, the Alberta Council of Treaty Women described the excessive apprehension of Indian children as a "process of cultural genocide".¹²³

Since the mid-1970s, the worst excesses of the problem have been dealt with. The administration of Indian child welfare has been increasingly given over to the First Nations. Many provinces have entered into agreements giving control to the First Nations¹²⁴ and some have altered their legislation so as to require the consideration of Indianness as an essential element of the best interests of the child.¹²⁵ In addition, the courts too have recognized that Indianness is an important aspect of the best interests of the child. The problem, as a problem of Indian versus non-Indian values, has, for the most part, been eliminated.¹²⁶ However, it is interesting to examine what might have happened had the fiduciary theory been brought to bear upon this problem before the adjustments had been made.

The protection of children in need of care would clearly have been within the scope of the pre-contact sovereignty of the First Nations. It was not, however, an interest which, before the late 1970s had received recognition in legislation or in any other instrument of which I am aware. Similarly, I am not aware of any governmental policy which addressed the issue. The First Nations, then would have

to prove that the problem of provincial intervention is one which threatens an interest essential to aboriginality.

Though I do not intend to do so here, that would not be a difficult task. A policy of removal of the children of a community clearly threatens its viability. In 1980 the Chief of the Spallumcheen Band, a band of some 300 members, realised that since the 1960s, 150 children had been removed from the reserve. Johnston in his book on Native Child Welfare comments:

That represented virtually an entire generation.¹²⁷

To allow such a state of affairs to continue would clearly threaten the existence of the Spallumcheen Band.

Once the Band had proved the threat to their aboriginality the loss of their children would be, the burden would pass to the Crown to justify their intervention. It is difficult to imagine how that could be done. The wardship would require the Crown to protect and promote the Band and s. 35 would require the protection of the measured separateness. The Crown would be required to undertake just what has occurred: Establish child welfare systems which recognize the importance of Indianness, or permit the establishment of on-Reserve systems. Should they fail to do so, the Courts would have had to fashion a rule including Indianness as one of the best interests of the child. It is interesting to note in passing that such a rule would operate against the Crown in both its provincial and its federal manifestations.

ii The Treaty Right to Post-Secondary Education

On May 24, 1989, the Indigenous Bar Association made a submission to the Parliamentary Standing Committee on Aboriginal Affairs arguing for the existence of a treaty right to post-secondary education.¹²⁸ They base their arguments on the text of the numbered treaties, the content of the negotiations at treaty time, and the judicial standard of treaty interpretation. They also assert that the fiduciary duty recognized in Guerin establishes a right to post-secondary education as an aboriginal right in those areas where the treaties do not cover education or where there are no treaties.

Having noted the tenor of Chief Justice Dickson's opinion in Guerin, the I.B.A. goes on to comment on the effects of colonization:

[Y]ou have a situation in which the way of life of Indians is being destroyed with the grace and approval of the fiduciary, the federal Crown. Hence the Indian populations who become dispossessed are left in a very humbled state. In an effort to alleviate the situation, the Crown introduced special measures to promote the education of Indians, to make them better able to deal with the change in lifestyle.¹²⁹

They then note that the practice of the Crown in relation to the issue, included the recognition of the importance of the post-secondary education. Crown documents went as far as to describe the post-secondary assistance program as an "[essential service] which must be provided to meet federal obligations".¹³⁰ So far the argument is effective.

Unfortunately, at that point it falls apart. The I.B.A. then merely asserts:

Arguably, given the fiduciary nature of the Federal-Indian relationship, the policy of providing post-secondary education assistance to Indians has crystallized into a specific aboriginal [and treaty] right. This is reinforced by the fact that successive Ministers of Indian Affairs have articulated that post-secondary assistance shall be provided to all those who apply. This is further supported by the mandatory nature of the program. ... If post-secondary

education was an existing aboriginal and treaty right as at April 1982, then, it may be unconstitutional for the Minister to make the changes he is proposing.¹³¹

This assertion ignores that the right recognized in Guerin, was one which functioned to protect an interest in land. And they have not made the argument that it can be broadened to protect less tangible interests, and most certainly they have not made the argument that the obligation might encompass positive duties such as an ongoing obligation to fund education.

Finally, they suggest that the consent of the First Nations will be necessary before the rate of funding might be cut.¹³² This too seems something of a leap from the opinion of the present Chief Justice in Guerin. There is no blanket requirement for the consent of the First Nations in Guerin. And Kruger makes it clear that reserve lands can be taken over the objections of the First Nations.¹³³

It is suggested that although Indigenous Bar Association is not convincing, the argument can be made. The theory presented here shows how the obligation might be broadened to include such elements of the trust obligation as education. Education is clearly an aspect of the pre-contact sovereignty of the First Nations. The duty raised by the assertion of sovereignty clearly includes the obligation to provide an education sufficient to allow full involvement in the modern society. The I.B.A. makes the argument for the importance of education to the transition of the First Nations to a place within the new society.

However, when asserting the right to continued full funding they are on shakier ground. A absolute right which would allow any First Nations member the

opportunity to obtain post-secondary education would not serve the transition from a traditional to a modern economy. The right necessary for the transition would require perhaps only such funding as would allow the First Nations to compete on a basis equal to that of members of the dominant society. At the point where the First Nations have a number of say university graduates equal to that of the dominant society, then it would seem to be possible for the Crown to justify cutting back on funding. Until that point, however, I would suggest that the First Nations could prove the need for, and the obligation of the Crown to provide, post-secondary funding to all who might apply. The right, however, would seem to be a variable one.

In support of the argument that it is a variable right, it might be noted that any right to post-secondary education existing on April 17th, 1982 would have been subject to Parliament. Furthermore, the power to regulate funding was exercised as a matter of policy through the Department of Indian Affairs. It is then, a matter very similar in scope to the aboriginal right to fish first recognized by Dickson in Jack¹³⁴ and more recently by the British Columbia Court of Appeal in Sparrow.¹³⁵ It is a regulated right. Arguably the right remains subject to justifiable variation. Consequently, the I.B.A. should attempt to prove that the numbers applying for post-secondary funding still remain below the numbers necessary for the First Nations to be able to compete effectively in the dominant economy.

The application of the theory advanced here would place the onus on the federal government to prove that the aboriginal peoples are not being condemned

to second class citizenship by the refusal to assist the aboriginal peoples, as peoples, to attain a level of education sufficient to permit full participation in the Canadian society. It would, I believe, support the call of the First Nations for continued full funding for all those who apply.

iii The Sechelt Band Self-Government Act

The Sechelt Indian Band Self-Government Act¹³⁶, has greatly changed the land law in that part of Indian country. By s.23(1), of this Act the government has passed complete ownership in the reserve lands to the Band. Fee simple title is now vested in the Band. Section 24 protects any previously existing interests, including any reversionary rights the provincial government might have if the Band were to become extinct. Other provisions refer to the operation of provincial laws on the Band's land. Many questions are raised as to the effect this might have on the Crown's fiduciary obligation and the application of provincial laws.

It is worth prefacing this discussion by noting section 3 of the Act. It reads:

3. For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from any existing aboriginal or treaty rights of the members of the Sechelt Indian Band, or any other aboriginal peoples of Canada, under s. 35 of the Constitution Act, 1982.

This section might have great significance if provincial and Sechelt interests diverge.

The fiduciary obligation, it will be remembered, arises out of aboriginal title and the surrender obligation. Essential to its existence is the discretion that the Crown has over the potential uses of surrendered reserve land.

The first comment that must be made is that the federal government might

be held to a fiduciary standard in relation to the transfer of the reserve to the Band under the Act. If there is a fiduciary obligation owed under s. 91(24) of the Constitution Act, 1867, that duty would govern the transfer of the land to the Band. We have to assume that there have been no breaches of the duty during the transfer process. If there have been, it would remain open to the Band or its members to sue the government for breach of its duty.

I am assuming also that it is possible for the government and the Sechelt Band to agree termination of the fiduciary duty, if it is a s. 35 obligation, without the necessity of a constitutional amendment. It is the position of the Band that the fiduciary obligation vis a vis the land has now been terminated.¹³⁷

The Act contains a similar provision to s. 88 of the Indian Act. Section 38 states:

Laws of general application of British Columbia apply to and in respect of members of the Band except to the extent that those laws are inconsistent with the terms of any treaty, this or any other Act of Parliament, the constitution of the Band or a law of the Band.

It is worth noting that, in as much as it is not inconsistent with the Sechelt Act, the Indian Act still applies to Sechelt lands. Therefore, the law relating to s. 88 remains in some force.

The legislative powers of the Band under s. 14(3) include the power to adopt any law of the province of British Columbia as its own law where authorized to by the Act and the Constitution. Section 15 permits the Council to exercise powers granted by the B.C. legislature. Sections 17 through 20 allow the Band to establish itself, as the Sechelt Indian Government District Council.(hereafter SIGDC) The

Act allows the SIGDC, once established, to exercise certain powers over Sechelt lands including powers over zoning, the operation of businesses, local taxation and other matters.¹³⁸ The federal government transferred those powers from the Band Council to the SIGDC 14th April 1988.¹³⁹ Powers over the disposition of land cannot be transferred to the SIGDC and must remain with the Band.

By the Sechelt Indian Government Enabling Act,¹⁴⁰ the British Columbia government recognized the SIGDC as the governing body of the District. It provides in s.3:

Where in exercise of its powers of self-government conferred by the Sechelt Indian Band Self-Government Act (Canada) the District Council enacts laws or by-laws that a municipality has under an act of the province, those laws or by-laws shall, for the purposes of this act, be deemed to have been enacted under the authority of that act of the province.

The B.C. government in 1988, through a regulatory power granted in this Act, allowed the SIGDC funding for municipal programs and suspended the taxation of non-Indian held Sechelt lands. The SIGDC, in return, agreed to provide municipal services similar to those provided elsewhere by the province.¹⁴¹

A prime purpose of the Sechelt Act was to permit the Band to bring its land under the B.C. lands legislation. This was required to raise funding for a large marina development the Band had arranged for waterfront land on the reserve. The investors wanted the security of fee simple and registration, preferably under the provincial lands registration system.

If the application of B.C. laws to the Sechelt lands were to threaten the viability of the Band in future years in a way unanticipated today, could the Band

raise the fiduciary obligation of the Crown to correct the situation? Could the Band raise the obligation so as to require the Crown to end the operation of B.C. law on the reserve? If they could do that, could they go further and require the Crown to pass legislation to prevent the land from being lost to the Band?

It is assumed that the federal government could amend or revoke the legislation if it were not violating aboriginal rights in so doing. But if the federal government refused to act, would it be possible for the Band to force the government to act? Clearly if legislation were violating an aboriginal right, s. 52 could be invoked to have the legislation declared of no force and effect. Section 3 of the Sechelt Act would permit that. But if it were the land right which were threatened, it would not be that simple. Then it would be Crown protection of land, the very duty which the Act was intended to oust, that the Band would be invoking. Since the Band has fee simple and control of the surrender process, it would appear that no fiduciary obligation would exist in the federal government.

However, the Act includes this provision:

For greater certainty, Sechelt lands are lands reserved for the Indians within the meaning of Class 24 of section 91 of the Constitution Act, 1867.¹⁴²

This might suggest that the federal government has retained some aspects of its fiduciary obligations to the Band. There is no purpose speculating under what circumstances the federal duty might be retained, but, unlikely as it would appear, it must be admitted that a possibility exists that the federal government still retains some obligation vis a vis Sechelt Indian lands.

A second question arises. If positive legislative or administrative action were

necessary to prevent further damage as a result of the operation of the Sechelt Act and provincial legislation, would it be possible to call on the fiduciary obligation and the wardship to force the government into action?

It too seems unlikely. However, there are some indicators to the contrary. The federal government has retained some control over the Band's affairs. The Band is still within s. 91(24) of the Constitution. Furthermore, they have retained power over the transfer to the SIGDC and the transfer back to the Band of any governmental powers.¹⁴³ They have also retained control over the approval of amendments to the Band Constitution.¹⁴⁴ Finally, unless declared otherwise, the Indian Act continues to apply to the Sechelt Band and its members.¹⁴⁵ In addition, the Act permits the Minister with the approval of the Governor in Council to enter into funding agreements with the Band. All this suggests that certain aspects of the wardship role of the Crown remains active between the Crown and the Sechelt Band. Therefore, it remains possible that the Band might in future, if its status as an Indian community were threatened by the continued operation of the Act, be able to raise an obligation in the federal government to act to protect the Band. Ultimately, it would appear that certain aspects of the trust obligation remain.

d Conclusion

The theory suggested here is proposed as a minimal standard for the constitutional review of aboriginal and treaty rights. It is seen as a transitional theory applicable for s. 35 rights until such time as those rights receive express

entrenchment. It is clear that a process of negotiation is the better route for delineating the rights entrenched within s. 35. Nevertheless, it is important, should the courts find themselves having to deal with litigation before the s. 35 negotiation process is completed, that they deal with the section so as to require the Canadian governments to take aboriginal and treaty rights seriously. The standard proposed here should result in the protection of a broad range of rights. It could also result in a flood of litigation. That should not be seen as a problem. If the courts do not demonstrate that they are prepared to give a broad reading to Part II of the Constitution Act, 1982, there will be no incentive for the governments of Canada to negotiate in good faith. A positive and principled statement supporting a just interpretation of existing aboriginal rights may be a necessary prerequisite to the negotiation of fair resolution of the problems precipitated by the colonisation of North America.

The aboriginal peoples of Canada stand at a crucial stage in their history. They have either reached the beginning of decolonization or are at the closing stage of colonization. The Inuit alone seem to have escaped litigation of their aboriginal rights. The Bear Island case is presently being appealed to the Supreme Court of Canada.¹⁴⁶ It deals with treaty rights. The crucial Gitksan-Wet'suwet'en case, presently at trial in British Columbia will, in all probability, take the issue of aboriginal rights, including the right to self-government to the Supreme Court of Canada.¹⁴⁷ Finally, the Metis are also at the Supreme Court arguing that they too have existing rights as a community.¹⁴⁸ It appears that it will be the courts who will

decide whether colonization or decolonization lies in the immediate future of the aboriginal peoples of Canada. It is to be hoped that they will take a creative and just approach to the interpretation of the aboriginal and treaty rights of the aboriginal peoples.

NOTES

1. While I do not develop the argument here, it is suggested that the circumstances under which the Metis Nation negotiated its rights under the Manitoba Act in 1869 and 1870, are such as to raise a fiduciary obligation. The Metis surrendered their interests in response to certain promises made to them by the federal government. Such circumstances would appear to meet all the requirements of the fiduciary obligation I have suggested here.

It has been argued that those promises were not kept, and even that they were cynically and deliberately broken. If that is true, it would appear that liability might accrue to the federal government under the theory developed here. I make no argument as to the extent to which such claims might be "existing treaty or aboriginal rights". See D.N. Sprague, Canada and the Metis, 1869-1885 (Waterloo: Wilfrid Laurier University Press, 1988). See also, Paul Luc Chartrand, "The Obligation to Set Aside and Secure Lands for the Half-Breed Population Pursuant to s. 31 of the Manitoba Act" (LLM thesis, University of Saskatchewan, 1988) [unpublished].

2. Constitution Act, 1982, R.S.C. 1985, Appendix No. 44, Schedule B. Enacted as schedule B to the Canada Act, 1982, (U.K.) 1982, c.11. In force April 17, 1982, Proclamation bringing the Constitution Act, 1982 into force, R.S.C. 1985, Appendix No. 45.
3. Kruger and Manuel v. The Queen, [1978] 1 S.C.R. 104; 75 D.L.R. (3d) 434; [1977] 4 W.W.R. 300. All cites are to S.C.R.
4. ibid. 108/9.
5. See, Re Eskimo, [1939] S.C.R. 104, [1939] 2 D.L.R. 417; Hamlet of Baker Lake v. Minister of Indian Affairs (1980), 107 D.L.R. (3d) 513, [1979] 3 C.N.L.R. 17 (F.C.T.D.)
6. Hunter v. Southam Inc., [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641. All references are to S.C.R.
7. ibid., 155.
8. R. v. Big M Drug Mart, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321. All references are to S.C.R.
9. ibid., 344.

10. Re Section 94(2) of the Motor Vehicle Act.(B.C.), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536. All references are to S.C.R.
11. ibid., 511/2. Wilson and McIntyre concurred in the decision but differed in their reasons on a separate issue.
12. Constitution Act, 1982, supra note 2, s. 37(2). This provision had originally been intended to allow the First Ministers to deal with more than just aboriginal matters. See Sanders "The Rights of the Aboriginal Peoples of Canada" infra note , 333ff. By the time the Constitution had been passed, only aboriginal matters remained to be discussed at that meeting. At that Conference in 1983, s. 37.1 was passed requiring at least two more conferences. Ultimately, three more were held in 1984, 1985 and 1987.
13. See, for example, the draft provisions circulated by the Canadian governments and by the aboriginal organizations at the 1987 Constitutional conference, "Documents from the 1987 First Ministers' Conference on Aboriginal Matters" [1987] 3 C.N.L.R. 1. For the most part these represented a commitment to negotiate to further flesh out the nature of the rights protected by ss. 25 and 35. See also: B. Schwartz, First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform, and Canadian Statecraft, (Montreal: Institute for Research on Public Policy, 1986); N.K. Zlotkin, "The 1983 and 1984 Constitutional Conferences: only the beginning" [1984] 3 C.N.L.R. 3.
14. Constitution Act, 1982, supra note 2, S. 25, as amended.
15. Slattery suggests that s. 25 is a guarantee in that it restricts the operation of the Charter. That view, however, views s. 35 as inferior to the Charter. Reading the Charter and s. 35 as prima facie equal, s. 25 operates as a guarantee and protection of the supremacy, where it exists, of s. 35. See B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983) 8 Queen's L.J. 232, 240.
16. See for example, D. Sanders, : "The Rights of the Aboriginal Peoples of Canada" (1983) 61 C.B.R. 315; K. McNeill, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982) 4 Sup. Ct. L. Rev. 255. And see K. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada" in W.S. Tarnopolsky & G.A. Beaudoin, ed. The Canadian Charter of Rights and Freedoms: A Commentary (Toronto: Carswell, 1982), 467ff.
17. Indian Act, R.S.C. 1985, c. I-5.
18. Reference re Bill C 30, An Act to amend the Education Act (Ont.), [1987] 1 S.C.R. 1148, 40 D.L.R.(4th) 18. All references are to S.C.R.
19. ibid., 1197/8.

20. Reference re Bill C 30, An Act to amend the Education Act (Ont.) (1986), 53 O.R. (2d) 513, 567/8 (Ont. C.A.).
21. R. v. Agawa (1988), 65 O.R. (2d) 505, [1988] 3 C.N.L.R. 73, 89 (C.A.). All cites are to C.N.L.R.
22. ibid., 89/90.
23. The problem with this opinion of the Ontario Court of Appeal is that it offers no principled analysis by which one might decide where the balance should lie. As noted in the Introduction, the result in Agawa, in that it is an acceptance of a mere assertion of the Crown officer, is, even if it were to be found to be the correct result, inadequate.
24. supra note 16, 316.
25. supra note 10, 508.
26. See for example, Slattery, supra note 15, 366, 373; Sanders supra note 16, 324.
27. W.F. Pentney, The Aboriginal Rights Provisions in the Constitution Act, 1982 (Saskatoon: Native Law Centre, University of Saskatchewan, 1987), 69. This is a published version of Pentney's LLM Thesis, University of Ottawa, 1986.
28. D.B. Smith, Sacred Feathers: The Reverend Peter Jones (Kahkewaquaonaby) and the Mississauga Indians (Toronto: University of Toronto Press, 1987)
29. The government assisted in establishing the Credit River Reserve in the early 1920s by ploughing the land and assisting in the building of houses. (ibid., 72) The Band were also very successful in the fishery. (ibid., 78)
30. See, Treaties and Historical Research Centre, P.R.E. Group, Indian and Northern Affairs The Historical Development of the Indian Act (Ottawa: Department of Indian Affairs and Northern Development, 1978), 17. Cited hereinafter as P.R.E. Group.
31. ibid., 15.
32. ibid., 16.
33. A. Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories Belfords, Clarke & Co., 1880 ed., (Toronto: Coles Publishing C., 1979), 28-29.
34. Copy of Treaty No. 6 between Her Majesty The Queen and the Plain and

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35. P.D. Elias, The Dakota of the Canadian Northwest: Lessons for Survival (Winnipeg: University of Manitoba Press, 1988)
 36. ibid., c. 5.
 37. ibid., 223.
 38. ibid., 83.
 39. ibid., 127.
 40. ibid., 209.
 41. ibid., 223.
 42. ibid., 224.
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 44. ibid.
 45. M. McDonald, "Indian Status: Colonialism or Sexism?" (1986) 9 Can. Com. L.J. 23, 29.
 46. Canada, Improved Program Delivery: Indians and Native Programs, Study Team Report to the task Force on Program Review (Ottawa: Ministry of Supply and Services, 1986)
 47. See for example, D. Crombie, "Transcript of Remarks to the Prairie Treaty Nations Alliance, Saskatoon, January 22nd, 1985" (Ottawa: D.I.A.N.D., 1985).
 48. S.M. Weaver, "Indian Policy in the New Conservative Government: Part II, The Nielsen Task Force in the Context of Recent Policy Initiatives" (1986) Native Studies Rev. Vol 2, No. 2, 1, 31. See also, S.M. Weaver, "Indian Policy in the New Conservative Government: Part I, The Nielsen Task Force of 1985" (1986) Native Studies Rev. vol 2, No. 1, 1.
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52. Canada, Report of the Special Parliamentary Committee on Indian Self-Government: Indian Self-Government in Canada (Ottawa: Queen's Printer, 1983) (Chair: K. Penner).
53. An Act relating to the Establishment of Indian Government, Bill C-52. This Bill proposed granting a quasi-municipal status to band councils.
54. Sechelt Band Self-Government Act, R.S.C. 1985, c. . For a discussion of this Act see, G. Allen, "Sechelt Indian Self-Government" in Conference Proceedings, First Nations Government Structures, Native Law Program, University of British Columbia, May 5th -6th, 1988, Tab 14.
55. Indian and Northern Affairs Canada, "Indian Self-Government Community Negotiations, General Information", p. 2. The resulting legislation, the government states should be seen as a "transitional phase from the existing legal framework towards a fuller exercise of Indian self-government." (*ibid.*, 3)
56. W.R. McMurtry and A. Pratt, "Indians and the Fiduciary Concept, Self-Government and the Constitution: Guerin in Perspective" [1986] 3 C.N.L.R. 19, 39-40.
57. See for example: R. v. Morgentaler, 1 S.C.R. 30, citing *inter alia*, Roe v. Wade, 410 U.S. 113 (1973); Operation Dismantle Inc. et al. v. The Queen et al., [1985] 1 S.C.R. 441, citing *inter alia*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
58. The major Native law cases which have been decided by the Supreme Court of Canada since the passing of the Constitution Act, 1982, for example, Nowegijick v. The Queen, [1983] 1 S.C.R. 29, [1983] 2 C.N.L.R. 89; Guerin et al. v. The Queen, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, 55 N.R. 161, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, [1985] 1 C.N.L.R. 120; Simon v. The Queen, [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153; R. v. Horse, [1988] 1 S.C.R. 187, [1988] 2 C.N.L.R. 112; all refer to or incorporate the United States jurisprudence. Also, all the major Canadian cases on aboriginal title refer to the United States law: see for example, St Catherines Milling and Lumber v. The Queen (1888), 14 A.C. 46, 4 Cart. B.N.A. 107, 2 C.N.L.C. 541, Calder v. A.G.B.C., [1973] S.C.R. 313, 34 D.L.R. (3d) 145; Hamlet of Baker Lake, *supra* note 5, and most recently, Sparrow, *infra* note 62.
59. See *supra* c. 2.

60. C.F. Wilkinson American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy (NewHaven & London: Yale University Press, 1987), 18.
61. Numerous authorities could be cited for this point. See for example, B. Slaterry "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32 Am J. Comp. L. 361, 376-382. The case law also recognizes this fact. See, for example, R. v. Ross, [1989] 1 C.N.L.R. 140, 151-154 (Que. S.C.).
62. Sparrow v. The Queen (1986), 9 B.C.L.R. (2d) 300, [1987] 1 C.N.L.R. 145 (B.C.C.A.).
63. For a discussion of this case, see, K. McNeill, "The Constitution Act, 1982, sections 25 and 35" [1988] 1 C.N.L.R. 1.
64. Fisheries Act, R.S.C. 1985, c. F-14; British Columbia Fishery (General) Regulations, C.R.C. 1978, c. 840, as am.
65. supra note 62, 165/166.
66. ibid., 177.
67. ibid., 178.
68. This includes ceremonial and other communal purposes.
69. supra note 62, 152.
70. U.S. v. Mitchell, 463 U.S. 206, 103 Sup.Ct. 2961, 77 L.Ed. 2d 580 (1983). See at 2972: "[T]he statutes and regulations ... define the contours of the United States' fiduciary responsibilities." And see supra, c. 2.c.iv.
71. Section 25 protects "aboriginal, treaty or other rights" from the effects of the Charter. And see, K. McNeill, "The Constitution Act, 1982, sections 25 and 35" [1988] 1 C.N.L.R. 1. McNeill, as well as many other authors, seem to include the Royal Proclamation within the s. 35 rights. See, for example, B. Slaterry "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32 Am J. Comp. L. 361.
72. supra note 58.
73. see, for example, Slaterry, supra note 15, and any of the works cited at note 16.
74. ibid.

75. It would appear that any legislative alteration of the duty would be effective only in as much as it had the informed support of any First Nation affected.
76. Kruger et al. v. The Queen (1985), 17 D.L.R. (4th) 591, [1985] 3 C.N.L.R. 15, 32 L.C.R. 65 (F.C.C.A.). All cites are to D.L.R.
77. ibid., Heald, 607, Urie, 648.
78. Leave to appeal to the Supreme Court of Canada was denied, 31st July 1985.
79. ibid., L.C.R. 120. He noted also the that the secretary of Indian Affairs in Ottawa was also a "strong advocate".
80. ibid.
81. Indian Act, R.S.C. 1985, c. I-5, s. 35 requires the consent of the Governor in Council before reserve lands are susceptible to expropriation.
82. Urie held that the sum had been adequate.(At 116-126) Stone justified the lower payment on the grounds that a fiduciary is permitted to justify acceptance of what might appear to be a lesser amount than proper if he can show that he did so out of a "combination of prudence and common sense".(At L.C.R. 130, citing Buttle et al. v. Saunders et al., [1950] 2 All E.R. 193.
83. ibid., 95.
84. Apssassin et al. v. Canada, [1988] 1 C.N.L.R. 73 (F.C.T.D.).
85. ibid., 139. The Court went on to find the claim to be statute barred.
86. ibid., 92.
87. infra note 97, 500.
88. She comments: "With the exception of any special obligations which might be created by treaty."(ibid., 92)
89. ibid., 104.
90. A similar scheme to that adopted by the Court of Appeal in Sparrow, was rejected in Jack v. The Queen, [1980] 1 S.C.R. 294, [1979] 5 W.W.R. 364, 2 C.N.L.R. 25. See the dissent of Dickson J., as he then was.
91. ibid., 92.

92. ibid., 93.
93. The treaty right to education is presently before the courts. The Sandy Bay Indian Band of Manitoba is arguing that the school on reserve is below the standard necessary to meet their treaty right. Should they win, non-treaty bands as well as bands whose treaties do not include the right to education could also litigate in respect to the Indian Act provisions.(ss. 114ff) The non-treaty bands might be held to have an "aboriginal or other" right to a similar education as do the treat bands receive. In such a way, the Indian Act might very well prove to be legally enforceable. Other provisions might also now be justiciable. For example, it might be that the by-law disallowance power in s. 82(2) might also be limited to where its use can be justified.
94. ibid., 92.
95. ibid.
96. See the discussion of the Sechelt Band's self-government regime below, c. 5, part c.iii.
97. Guerin et al. v. The Queen, [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, [1985] 1 C.N.L.R. 120 (S.C.C.). Cites are to W.W.R. Dickson, 494-495; Wilson, 517-518. Both confine themselves to a discussion of the particular interest at issue.
98. Guerin et al. v. The Queen, [1983] 2 F.C. 656, 143 D.L.R. (3d) 416, 45 N.R. 181, [1983] 2 W.W.R. 686, 13 E.T.R. 245, [1983] C.N.L.R. 20 (F.C.A.).
99. The decision in Bromley v. G.L.C., [1982] 1 All E.R. 129 (H.L.) discussed supra c. 4, part a.iii.b, for example.
100. supra note 60, 14-19.
101. See Kruger and Manuel, supra note 4 and the accompanying text.
102. See for example: R. v. Morgentaler, 1 S.C.R. 30, citing inter alia, Roe v. Wade, 410 U.S. 113 (1973); Operation Dismantle Inc. et al. v. The Queen et al., [1985] 1 S.C.R. 441, citing inter alia, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
103. supra note 58 and the accompanying text.
104. See supra c. 2.
105. supra note 60, 18.

106. ibid., 107.
107. ibid., 107-108.
108. ibid., 108.
109. ibid. The phrase is from Washington v. Washington State Commercial Fishing Vessel Association, 443 U.S. 658, 686 (1979).
110. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (180). The Court held that the Tribes were luring outsiders to the reservation and in so doing attempting to market their tax exemption.
111. supra note 60, .110.
112. ibid., 110-111.
113. M.J. Kaplan, "Issues in Land Claims: Indian Title" in I. Sutton ed., supra note 2, 71 at 72. See also N.C. Carter, "Race and Power Politics as Aspects of Federal Guardianship over Indians: Land Related Cases" (1976) 4 Am. Ind. L. Rev. 197; National Lawyers Guild, Rethinking Indian Law (New York: Committee on Native American Struggles, 1982).
114. The principles of treaty interpretation would be an example of this. See Jones v. Meehan, 175 U.S. 371, 20 Sup.Ct. 1, 49 L.Ed. 1089 (1905) in the United States; and R. v. Nowegejick, [1983] 1 S.C.R. 29, [1983] 2 C.N.L.R. 89, and R. v. Simon, [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153, in Canada.
115. Calder v. A.G.B.C., [1973] S.C.R. 313, 34 D.L.R. (3d) 145, 203 (S.C.C.)
116. See for example, Indian Act, R.S.C. 1985, c. I-5, s. 114:
 (1) The Governor in Council may authorize the Minister ... to enter into agreements on behalf of Her Majesty for the education in accordance of this Act of Indian children, ... (2) The Minister may, in accordance with this Act, establish, operate and maintain schools for Indian children.
117. Phil Lancaster, "The Structural Injunction as a Remedy for Violations of Indian Constitutional Rights" Research Paper for the "Canadian Bar Association Committee on Aboriginal Rights, June 1988, Publication forthcoming.
118. The conservation of fish stocks in the Sparrow case is an example of this.
119. Indian Act, S.C. 1951, c. 29, s. 87, now R.S.C. 1985, c. I-5, s. 88.

120. P. Johnston, Native Children and the Child Welfare System (Ottawa: The Canadian Council on Social Development & James Lorimer & Co., 1983), 23. The statistics for the whole country are not available.
121. ibid., 57.
122. supra note 52, 31.
123. Cited in Penner Report, ibid., 32.
124. See for example, Canada/Manitoba/Indian Child Welfare Agreement, [1982] 2 C.N.L.R. 1.
125. See, for example, Child and Family Services Act, S.O. 1984, c. 55, ss. 1(f) (recognizing the importance of aboriginality generally), 53(5) (upon intervention), 54(4)(d) (access after intervention), 130(3) (in relation to adoption).
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127. supra note 120, 107.
128. Indigenous Bar Association, "Submission to the Standing Committee on Aboriginal Affairs regarding the Post-Secondary Education Assistance Program" [1989] 3 C.N.L.R. 16. Presented to the Standing Committee, May 24th, 1989. Cites are to C.N.L.R.
129. ibid., 21.
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131. ibid.
132. ibid., 23.
133. supra note 76.
134. supra note 90.
135. supra note 62.

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137. G. Allen, lawyer for the Sechelt Band, at the First Nations Land Ownership Conference, Native Law Self-Government Project, Faculty of Law, University of British Columbia, Vancouver, September 29/30, 1988.
138. For details see the Sechelt Band Constitution, Canada Gazette, Part I, 12th September 1987, 3248ff; amended 21st November 1987, 4416ff, 9th July 1988, 2707ff.
139. SOR/88-236.
140. Sechelt Indian Government Enabling Act, S.B.C. 1987, c. 16, in force July 24th, 1987, B.C. Reg. 252/87.
141. ibid., ss. 4,5.
142. supra note 136, s. 31.
143. ibid., ss. 21(2), 21(4), 21(6).
144. ibid., s. 12.
145. ibid., ss. 35, 36.
146. Ontario (A.G.) v. Bear Island Foundation v. Ontario (1989), 70 O.R. (2d) 574, [1989] 2 C.N.L.R. 73 (C.A.), leave to appeal to S.C.C. granted Oct. 19th, 1989, 103 N.R. 240.
147. Delgamuukwu v. The Queen in Right of British Columbia and The Attorney General of Canada, statement of claim filed in the Supreme Court of British Columbia, October 23rd, 1984. Trial in process. See, L. Mandell, "Gitksan-Wet'suwet'en Land Title Action" [1988] 1 C.N.L.R. 14; "The Address of the Gitksan and Wet'suwet'en Hereditary Chiefs to Chief Justice McEachern of the Supreme Court of British Columbia" [1988] 1 C.N.L.R. 17.
148. Dumont et al. v. Canada (A.G.) and Manitoba (A.G.) (1988) 52 Man. R. (2d) 291, [1988] 3 C.N.L.R. 39 (C.A.), reversed S.C.C. file No. 21063, March 2nd, 1990. This decision, on a preliminary point as to whether the plaintiffs had standing, allows the case to be tried at the Manitoba Court of Queen's Bench. The main issue will be whether the legislation governing the distribution of land to the Metis under the Manitoba Act was properly passed and whether it has extinguished the Metis claims to land under the Manitoba Act.

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